CONSTITUTIONAL LAW



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CHAPTER OVERVIEW

1: Historical perspective of the Constitution

1.1: The Constitution of the United States

1.2: The Federalist Papers

1.3: Marbury v. Madison

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1.1: The Constitution of the United States



We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fi ll such Vacancies. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]* for six Years; and each Senator shall have one Vote. Immediately after they shall be assembled in Consequence of the fi rst Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the fi rst Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fi ll such Vacancies.]*. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen. The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President prot empore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States. The Senate shall have the sole Power

to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. The Congress shall assemble at least once in every Year, and such Meeting shall be [on the first Monday in December,]* unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member. Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fi fth of those Present, be entered on the Journal. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively, If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournament prevent its Return, in which Case it shall not be a Law. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fi x the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offi ces and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; To defi ne and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and

support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings; -And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. No Bill of Attainder or ex post facto Law shall be passed. [No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.]* No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another. No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Offi ce during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Offi ce of Trust or Profit under the United States, shall be appointed an Elector. [The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certifi cates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the fi ve highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the

President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.]*The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Offi ce of President; neither shall any person be eligible to that Offi ce who shall not have attained to the Age of thirty fi ve Years, and been fourteen Years a Resident within the United States. [In Case of the Removal of the President from Offi ce, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Offi ce, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Offi cer shall then act as President, and such Offi cer shall act accordingly, until the Disability be removed, or a President shall be elected.]* The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:- “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Offi cer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offi ces, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Offi cers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Offi cers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. The President shall have Power to fi ll up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Offi cers of the United States.

SECTION. 4. The President, Vice President and all civil Offi cers of the United States, shall be removed from Offi ce on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offi ces during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Offi ce.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – [between a State and Citizens of another State;-]* between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof;- and foreign States, Citizens or Subjects.]* In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial

shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. A Person charged in any State with Treason, Felony, or other Crime, who shall fl ee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fl ed, be delivered up, to be removed to the State having Jurisdiction of the Crime. [No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.]*

SECTION. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratifi ed by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratifi cation may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the fi rst and fourth Clauses in the Ninth Section of the fi rst Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Offi cers, both of the United States and of the several States, shall be bound by Oath or Affi rmation, to support this Constitution; but no religious Test shall ever be required as a Qualifi cation to any Offi ce or public Trust under the United States

Article VII.

The Ratification of the Conventions of nine States, shall be suffi cient for the Establishment of this Constitution between the States so ratifying the Same. Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in

the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names, Go. Washington–Presidt: and deputy from Virginia

NEW HAMPSHIRE John Langdon Nicholas Gilman

MASSACHUSETTS Nathaniel Gorham Rufus King

CONNECTICUT Wm. Saml. Johnson Roger Sherman

NEW YORK Alexander Hamilton

NEW JERSEY Wil: Livingston David Brearley Wm. Paterson Jona: Dayton

PENNSYLVANIA B Franklin Thomas Miffl in Robt Morris Geo. Clymer Thos. FitzSimons Jared Ingersoll James Wilson Gouv Morris

DELAWARE Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom

MARYLAND James McHenry Dan of St. Thos. Jenifer Danl Carroll

VIRGINIA John BlairJames Madison Jr.

NORTH CAROLINA Wm. Blount Richd. Dobbs Spaight Hu Williamson

SOUTH CAROLINA J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler

GEORGIA William Few Abr Baldwin Attest William Jackson Secretary

In Convention Monday September 17th, 1787. Present
The States of

New Hampshire, Massachusetts, Connecticut, Mr. Ham- ilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,
That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion
of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legisla- ture, for their Assent and Ratification; and that each Con- vention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the Presi- dent, and the Time and Place for commencing Proceedings under this Constitution.

That after such Publication the Electors should be ap- pointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the unanimous Order of the Convention

Go. Washington-Presidt: W. JACKSON Secretary.

* Language in brackets has been changed by amendment.

THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS RATIFIED BY THE STATES

Preamble to the Bill of Rights

Congress of the United States
begun and held at the City of New-York, on Wednesday the fourth of March,
one thousand seven hundred and eighty nine

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America,
in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments
to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

(Note: The first 10 amendments to the Constitution were ratified December 15, 1791, and form what is known as the “Bill of Rights.”)

Amendment I.

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

Amendment II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV.

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

Amendment V.

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

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit- nesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re- examined in any Court of the United States, than according to the rules of the common law.

AmendmentVIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X.

The powers not delegated to the United States by the Con- stitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENTS 11-27

AmendmentXI.

Passed by Congress March 4, 1794. Ratified February 7, 1795.

(Note: A portion of Article III, Section 2 of the Constitution was modified by the 11th Amendment.)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or pros- ecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AmendmentXII.

Passed by Congress December 9, 1803. Ratified June 15, 1804.

(Note: A portion of Article II, Section 1 of the Constitution was changed by the 12th Amendment.)

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom,
at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted

for as Vice-President, and they shall make distinct lists of
all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed
to the seat of the government of the United States, directed to the President of the Senate;-the President of the Senate shall, in the presence of the Senate and House of Represen- tatives, open all the certificates and the votes shall then be counted;-The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choos- ing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representa- tives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.-]* The person having the greatest number of votes as Vice-President, shall be the Vice-Presi- dent, if such number be a majority of the whole number

of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to

a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

*Superseded by Section 3 of the 20th Amendment.

CONSTITUTION OF THE UNITED STATES

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AmendmentXIII.

Passed by Congress January 31, 1865. Ratified December 6, 1865.

(Note: A portion of Article IV, Section 2 of the Constitution was changed by the 13th Amendment.)

SECTION 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.

AmendmentXIV.

Passed by Congress June 13, 1866. Ratified July 9, 1868.

(Note: Article I, Section 2 of the Constitution was modified by Section 2 of the 14th Amendment.)

SECTION 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

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

SECTION 3.

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

SECTION 4.

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

SECTION 5.

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

*Changed by Section 1 of the 26th Amendment.

CONSTITUTION OF THE UNITED STATES

Amendment XV.

Passed by Congress February 26, 1869. Ratified February 3, 1870.

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2.

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

AmendmentXVI.

Passed by Congress July 2, 1909. Ratified February 3, 1913.

(Note: Article I, Section 9 of the Constitution was modified by the 16th Amendment.)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportion- ment among the several States, and without regard to any census or enumeration.

AmendmentXVII.

Passed by Congress May 13, 1912. Ratified April 8, 1913.

(Note: Article I, Section 3 of the Constitution was modified by the 17th Amendment.)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for elec- tors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII.

Passed by Congress December 18, 1917. Ratified January 16, 1919. Repealed by the 21st Amendment, December 5, 1933.

SECTION 1.

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legisla- tures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AmendmentXIX.

Passed by Congress June 4, 1919. Ratified August 18, 1920.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appro- priate legislation.

CONSTITUTION OF THE UNITED STATES

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AmendmentXX.

Passed by Congress March 2, 1932. Ratified January 23, 1933.

(Note: Article I, Section 4 of the Constitution was modified by Section 2 of this Amendment. In addition, a portion of the 12th Amendment was superseded by Section 3.)

SECTION 1.

The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Sena- tors and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their succes- sors shall then begin.

SECTION 2.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice Presi- dent elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representa- tives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5.

Sections 1 and 2 shall take effect on the 15th day of Octo- ber following the ratification of this article.

SECTION 6.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the leg- islatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI.

Passed by Congress February 20, 1933. Ratified December 5, 1933.

SECTION 1.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conven- tions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

CONSTITUTION OF THE UNITED STATES

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AmendmentXXII.

Passed by Congress March 21, 1947. Ratified February 27, 1951.

SECTION 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Con- gress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the leg- islatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII.

Passed by Congress June 16, 1960. Ratified March 29, 1961.

SECTION 1.

The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of

the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV.

Passed by Congress August 27, 1962. Ratified January 23, 1964.

SECTION 1.

The right of citizens of the United States to vote in any pri- mary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

SECTION 2.

The Congress shall have power to enforce this article by appropriate legislation.

CONSTITUTION OF THE UNITED STATES

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Amendment XXV.

Passed by Congress July 6, 1965. Ratified February 10, 1967.

(Note: Article II, Section 1 of the Constitution was modified by the 25th Amendment.)

SECTION 1.

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2.

Whenever there is a vacancy in the office of the Vice Presi- dent, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability ex- ists, he shall resume the powers and duties of his office un- less the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the Presi- dent shall resume the powers and duties of his office.

Amendment XXVI.

Passed by Congress March 23, 1971. Ratified July 1, 1971.

(Note: Amendment 14, Section 2 of the Constitution was modified by Section 1 of the 26th Amendment.)

SECTION 1.

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII.

Originally proposed Sept. 25, 1789. Ratified May 7, 1992.

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an elec- tion of representatives shall have intervened.

The NCC is an independent, non-partisan, nonprofit organization that was established in 1988 under the Constitution Heritage Act. The Center's mission is to increase awareness and understanding of the Constitution, the Constitution's history and its relevance to people's daily lives.

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1.2: The Federalist Papers

FEDERALIST No. 1. General Introduction

For the Independent Journal. Saturday, October 27, 1787

HAMILTON

To the People of the State of New York:

AFTER an unequivocal experience of the inefficacy of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This idea will add the inducements of philanthropy to those of patriotism, to heighten the solicitude which all considerate and good men must feel for the event. Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions and prejudices little favorable to the discovery of truth.

Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments; and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.

It is not, however, my design to dwell upon observations of this nature. I am well aware that it would be disingenuous to resolve indiscriminately the opposition of any set of men (merely because their situations might subject them to suspicion) into interested or ambitious views. Candor will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, or may hereafter make its appearance, will spring from sources, blameless at least, if not respectable—the honest errors of minds led astray by preconceived jealousies and fears. So numerous indeed and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy. And a further reason for caution, in this respect, might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists. Ambition, avarice, personal animosity, party opposition, and many other motives not more laudable than these, are apt to operate as well upon those who support as those who oppose the right side of a question. Were there not even these inducements to moderation, nothing could be more ill-judged than that intolerant spirit which has, at all times, characterized political parties. For in politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.

And yet, however just these sentiments will be allowed to be, we have already sufficient indications that it will happen in this as in all former cases of great national discussion. A torrent of angry and malignant passions will be let loose. To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and the bitterness of their invectives. An enlightened zeal for the energy and efficiency of government will be stigmatized as the offspring of a temper fond of despotic power and hostile

to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretense and artifice, the stale bait for popularity at the expense of the public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of love, and that the noble enthusiasm of liberty is apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth. You will, no doubt, at the same time, have collected from the general scope of them, that they proceed from a source not unfriendly to the new Constitution. Yes, my countrymen, I own to you that, after having given it an attentive consideration, I am clearly of opinion it is your interest to adopt it. I am convinced that this is the safest course for your liberty, your dignity, and your happiness. I affect not reserves which I do not feel. I will not amuse you with an appearance of deliberation when I have decided. I frankly acknowledge to you my convictions, and I will freely lay before you the reasons on which they are founded. The consciousness of good intentions disdains ambiguity. I shall not, however, multiply professions on this head. My motives must remain in the depository of my own breast. My arguments will be open to all, and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

I propose, in a series of papers, to discuss the following interesting particulars:

THE UTILITY OF THE UNION TO YOUR POLITICAL PROSPERITY THE INSUFFICIENCY OF THE PRESENT CONFEDERATION TO PRESERVE THAT UNION THE NECESSITY OF A GOVERNMENT AT LEAST EQUALLY ENERGETIC WITH THE ONE PROPOSED, TO THE ATTAINMENT OF THIS OBJECT THE CONFORMITY OF THE PROPOSED CONSTITUTION TO THE TRUE PRINCIPLES OF REPUBLICAN GOVERNMENT ITS ANALOGY TO YOUR OWN STATE CONSTITUTION and lastly, THE ADDITIONAL SECURITY WHICH ITS ADOPTION WILL AFFORD TO THE PRESERVATION OF THAT SPECIES OF GOVERNMENT, TO LIBERTY, AND TO PROPERTY.

In the progress of this discussion I shall endeavor to give a satisfactory answer to all the objections which shall have made their appearance, that may seem to have any claim to your attention.

It may perhaps be thought superfluous to offer arguments to prove the utility of the UNION, a point, no doubt, deeply engraved on the hearts of the great body of the people in every State, and one, which it may be imagined, has no adversaries. But the fact is, that we already hear it whispered in the private circles of those who oppose the new Constitution, that the thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies of distinct portions of the whole.(1) This doctrine will, in all probability, be gradually propagated, till it has votaries enough to countenance an open avowal of it. For nothing can be more evident, to those who are able to take an enlarged view of the subject, than the alternative of an adoption of the new Constitution or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils, and the probable dangers, to which every State will be exposed from its dissolution. This shall accordingly constitute the subject of my next address.

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1. The same idea, tracing the arguments to their consequences, is held out in several of the late publications against the new Constitution.

FEDERALIST No. 2. Concerning Dangers from Foreign Force and Influence

For the Independent Journal. Wednesday, October 31, 17

JAY

To the People of the State of New York:

WHEN the people of America reflect that they are now called upon to decide a question, which, in its consequences, must prove one of the most important that ever engaged their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, will be evident.

Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers. It is well worthy of consideration therefore, whether it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government, or that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.

It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object. But politicians now appear, who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought to seek it in a division of the States into distinct confederacies or sovereignties. However extraordinary this new doctrine may appear, it nevertheless has its advocates; and certain characters who were much opposed to it formerly, are at present of the number. Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, wide-spreading country was the portion of our western sons of liberty. Providence has in a particular manner blessed it with a variety of soils and productions, and watered it with innumerable streams, for the delight and accommodation of its inhabitants. A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids, and the mutual transportation and exchange of their various commodities.

With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.

Similar sentiments have hitherto prevailed among all orders and denominations of men among us. To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection. As a nation we have made peace and war; as a nation we have vanquished our common enemies; as a nation we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign states.

A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it. They formed it almost as soon as they had a political existence; nay, at a time when their habitations were in flames, when many of their citizens were bleeding, and when the progress of hostility and desolation left little room for those calm and mature inquiries and reflections which must ever precede the formation of a wise and well-balanced government for a free people. It is not to be wondered at, that a government instituted in times so inauspicious, should on experiment be found greatly deficient and inadequate to the purpose it was intended to answer.

This intelligent people perceived and regretted these defects. Still continuing no less attached to union than enamored of liberty, they observed the danger which immediately threatened the former and more remotely the latter; and being persuaded that ample security for both could only be found in a national government more wisely framed, they as with one voice, convened the late convention at Philadelphia, to take that important subject under consideration.

This convention composed of men who possessed the confidence of the people, and many of whom had become highly distinguished by their patriotism, virtue and wisdom, in times which tried the minds and hearts of men, undertook the arduous task. In the mild season of peace, with minds unoccupied by other subjects, they passed many months in cool, uninterrupted, and daily

consultation; and finally, without having been awed by power, or influenced by any passions except love for their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.

Admit, for so is the fact, that this plan is only RECOMMENDED, not imposed, yet let it be remembered that it is neither recommended to BLIND approbation, nor to BLIND reprobation; but to that sedate and candid consideration which the magnitude and importance of the subject demand, and which it certainly ought to receive. But this (as was remarked in the foregoing number of this paper) is more to be wished than expected, that it may be so considered and examined. Experience on a former occasion teaches us not to be too sanguine in such hopes. It is not yet forgotten that well-grounded apprehensions of imminent danger induced the people of America to form the memorable Congress of 1774. That body recommended certain measures to their constituents, and the event proved their wisdom; yet it is fresh in our memories how soon the press began to teem with pamphlets and weekly papers against those very measures. Not only many of the officers of government, who obeyed the dictates of personal interest, but others, from a mistaken estimate of consequences, or the undue influence of former attachments, or whose ambition aimed at objects which did not correspond with the public good, were indefatigable in their efforts to persuade the people to reject the advice of that patriotic Congress. Many, indeed, were deceived and deluded, but the great majority of the people reasoned and decided judiciously; and happy they are in reflecting that they did so.

They considered that the Congress was composed of many wise and experienced men. That, being convened from different parts of the country, they brought with them and communicated to each other a variety of useful information. That, in the course of the time they passed together in inquiring into and discussing the true interests of their country, they must have acquired very accurate knowledge on that head. That they were individually interested in the public liberty and prosperity, and therefore that it was not less their inclination than their duty to recommend only such measures as, after the most mature deliberation, they really thought prudent and advisable.

These and similar considerations then induced the people to rely greatly on the judgment and integrity of the Congress; and they took their advice, notwithstanding the various arts and endeavors used to deter them from it. But if the people at large had reason to confide in the men of that Congress, few of whom had been fully tried or generally known, still greater reason have they now to respect the judgment and advice of the convention, for it is well known that some of the most distinguished members of that Congress, who have been since tried and justly approved for patriotism and abilities, and who have grown old in acquiring political information, were also members of this convention, and carried into it their accumulated knowledge and experience.

It is worthy of remark that not only the first, but every succeeding Congress, as well as the late convention, have invariably joined with the people in thinking that the prosperity of America depended on its Union. To preserve and perpetuate it was the great object of the people in forming that convention, and it is also the great object of the plan which the convention has advised them to adopt. With what propriety, therefore, or for what good purposes, are attempts at this particular period made by some men to depreciate the importance of the Union? Or why is it suggested that three or four confederacies would be better than one? I am persuaded in my own mind that the people have always thought right on this subject, and that their universal and uniform attachment to the cause of the Union rests on great and weighty reasons, which I shall endeavor to develop and explain in some ensuing papers. They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention, seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy. That certainly would be the case, and I sincerely wish that it may be as clearly foreseen by every good citizen, that whenever the dissolution of the Union arrives, America will have reason to exclaim, in the words of the poet: “FAREWELL! A LONG FAREWELL TO ALL MY GREATNESS.”

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FEDERALIST No. 3. The Same Subject Continued (Concerning Dangers From Foreign Force and Influence)

For the Independent Journal. Saturday, November 3, 1787

JAY

To the People of the State of New York:

IT IS not a new observation that the people of any country (if, like the Americans, intelligent and wellinformed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests. That consideration naturally tends to create great respect for the high opinion which the people of America have so long and uniformly entertained of the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes.

The more attentively I consider and investigate the reasons which appear to have given birth to this opinion, the more I become convinced that they are cogent and conclusive.

Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their SAFETY seems to be the first. The SAFETY of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively.

At present I mean only to consider it as it respects security for the preservation of peace and tranquillity, as well as against dangers from FOREIGN ARMS AND INFLUENCE, as from dangers of the LIKE KIND arising from domestic causes. As the former of these comes first in order, it is proper it should be the first discussed. Let us therefore proceed to examine whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords them the best security that can be devised against HOSTILITIES from abroad.

The number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether REAL or PRETENDED, which PROVOKE or INVITE them. If this remark be just, it becomes useful to inquire whether so many JUST causes of war are likely to be given by UNITED AMERICA as by DISUNITED America; for if it should turn out that United America will probably give the fewest, then it will follow that in this respect the Union tends most to preserve the people in a state of peace with other nations.

The JUST causes of war, for the most part, arise either from violation of treaties or from direct violence. America has already formed treaties with no less than six foreign nations, and all of them, except Prussia, are maritime, and therefore able to annoy and injure us. She has also extensive commerce with Portugal, Spain, and Britain, and, with respect to the two latter, has, in addition, the circumstance of neighborhood to attend to.

It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.

Because when once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it; for, although town or country, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government,—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States. Hence, it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more SAFE with respect to us.

Because, under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner,—whereas, adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments, as from the different local laws and interests which may affect and influence them. The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended.

Because the prospect of present loss or advantage may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations, not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. The case of the treaty of peace with Britain adds great weight to this reasoning.

Because, even if the governing party in a State should be disposed to resist such temptations, yet as such temptations may, and commonly do, result from circumstances peculiar to the State, and may affect a great number of the inhabitants, the governing party may not always be able, if willing, to prevent the injustice meditated, or to punish the aggressors. But the national government, not being affected by those local circumstances, will neither be induced to commit the wrong themselves, nor want power or inclination to prevent or punish its commission by others.

So far, therefore, as either designed or accidental violations of treaties and the laws of nations afford JUST causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the SAFETY of the people.

As to those just causes of war which proceed from direct and unlawful violence, it appears equally clear to me that one good national government affords vastly more security against dangers of that sort than can be derived from any other quarter.

Because such violences are more frequently caused by the passions and interests of a part than of the whole; of one or two States than of the Union. Not a single Indian war has yet been occasioned by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.

The neighborhood of Spanish and British territories, bordering on some States and not on others, naturally confines the causes of quarrel more immediately to the borderers. The bordering States, if any, will be those who, under the impulse of sudden irritation, and a quick sense of apparent interest or injury, will be most likely, by direct violence, to excite war with these nations; and nothing can so effectually obviate that danger as a national government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested.

But not only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate and settle them amicably. They will be more temperate and cool, and in that respect, as well as in others, will be more in capacity to act advisedly than the offending State. The pride of states, as well as of men, naturally disposes them to justify all their actions, and opposes their acknowledging, correcting, or repairing their errors and offenses. The national government, in such cases, will not be affected by this pride, but will proceed with moderation and candor to consider and decide on the means most proper to extricate them from the difficulties which threaten them.

Besides, it is well known that acknowledgments, explanations, and compensations are often accepted as satisfactory from a strong united nation, which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power.

In the year 1685, the state of Genoa having offended Louis XIV., endeavored to appease him. He demanded that they should send their Doge, or chief magistrate, accompanied by four of their senators, to FRANCE, to ask his pardon and receive his terms. They were obliged to submit to it for the sake of peace. Would he on any occasion either have demanded or have received the like humiliation from Spain, or Britain, or any other POWERFUL nation?

FEDERALIST No. 4. The Same Subject Continued (Concerning Dangers From Foreign Force and Influence)

For the Independent Journal. Wednesday, November 7, 1787

JAY

To the People of the State of New York:

MY LAST paper assigned several reasons why the safety of the people would be best secured by union against the danger it may be exposed to by JUST causes of war given to other nations; and those reasons show that such causes would not only be more rarely given, but would also be more easily accommodated, by a national government than either by the State governments or the proposed little confederacies.

But the safety of the people of America against dangers from FOREIGN force depends not only on their forbearing to give JUST causes of war to other nations, but also on their placing and continuing themselves in such a situation as not to INVITE hostility or insult; for it need not be observed that there are PRETENDED as well as just causes of war.

It is too true, however disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting anything by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people. But, independent of these inducements to war, which are more prevalent in absolute monarchies, but which well deserve our attention, there are others which affect nations as often as kings; and some of them will on examination be found to grow out of our relative situation and circumstances.

With France and with Britain we are rivals in the fisheries, and can supply their markets cheaper than they can themselves, notwithstanding any efforts to prevent it by bounties on their own or duties on foreign fish.

With them and with most other European nations we are rivals in navigation and the carrying trade; and we shall deceive ourselves if we suppose that any of them will rejoice to see it flourish; for, as our carrying trade cannot increase without in some degree diminishing theirs, it is more their interest, and will be more their policy, to restrain than to promote it.

In the trade to China and India, we interfere with more than one nation, inasmuch as it enables us to partake in advantages which they had in a manner monopolized, and as we thereby supply ourselves with commodities which we used to purchase from them.

The extension of our own commerce in our own vessels cannot give pleasure to any nations who possess territories on or near this continent, because the cheapness and excellence of our productions, added to the circumstance of vicinity, and the enterprise and address of our merchants and navigators, will give us a greater share in the advantages which those territories afford, than consists with the wishes or policy of their respective sovereigns.

Spain thinks it convenient to shut the Mississippi against us on the one side, and Britain excludes us from the Saint Lawrence on the other; nor will either of them permit the other waters which are between them and us to become the means of mutual intercourse and traffic.

From these and such like considerations, which might, if consistent with prudence, be more amplified and detailed, it is easy to see that jealousies and uneasinesses may gradually slide into the minds and cabinets of other nations, and that we are not to expect that they should regard our advancement in union, in power and consequence by land and by sea, with an eye of indifference and composure.

The people of America are aware that inducements to war may arise out of these circumstances, as well as from others not so obvious at present, and that whenever such inducements may find fit time and opportunity for operation, pretenses to color and justify them will not be wanting. Wisely, therefore, do they consider union and a good national government as necessary to put and keep them in SUCH A SITUATION as, instead of INVITING war, will tend to repress and discourage it. That situation consists in the best possible state of defense, and necessarily depends on the government, the arms, and the resources of the country.

As the safety of the whole is the interest of the whole, and cannot be provided for without government, either one or more or many, let us inquire whether one good government is not, relative to the object in question, more competent than any other given number whatever.

One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each. In the formation of treaties, it will regard the interest of the whole, and the particular interests of the parts as connected with that of the whole. It can apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system. It can place the militia under one plan of discipline, and, by putting their officers in a proper line of subordination to the Chief Magistrate, will, as it were, consolidate them into one corps, and thereby render them more efficient than if divided into thirteen or into three or four distinct independent companies.

What would the militia of Britain be if the English militia obeyed the government of England, if the Scotch militia obeyed the government of Scotland, and if the Welsh militia obeyed the government of Wales? Suppose an invasion; would those three governments (if they agreed at all) be able, with all their respective forces, to operate against the enemy so effectually as the single government of Great Britain would?

We have heard much of the fleets of Britain, and the time may come, if we are wise, when the fleets of America may engage attention. But if one national government, had not so regulated the navigation of Britain as to make it a nursery for seamen—if one national government had not called forth all the national means and materials for forming fleets, their prowess and their thunder would never have been celebrated. Let England have its navigation and fleet—let Scotland have its navigation and fleet—let Wales have its navigation and fleet—let Ireland have its navigation and fleet—let those four of the constituent parts of the British empire be be under four independent governments, and it is easy to perceive how soon they would each dwindle into comparative insignificance.

Apply these facts to our own case. Leave America divided into thirteen or, if you please, into three or four independent governments—what armies could they raise and pay—what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by its specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquillity and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Although such conduct would not be wise, it would, nevertheless, be natural. The history of the states of Greece, and of other countries, abounds with such instances, and it is not improbable that what has so often happened would, under similar circumstances, happen again.

But admit that they might be willing to help the invaded State or confederacy. How, and when, and in what proportion shall aids of men and money be afforded? Who shall command the allied armies, and from which of them shall he receive his orders? Who shall settle the terms of peace, and in case of disputes what umpire shall decide between them and compel acquiescence? Various difficulties and inconveniences would be inseparable from such a situation; whereas one government, watching over the general and common interests, and combining and directing the powers and resources of the whole, would be free from all these embarrassments, and conduce far more to the safety of the people.

But whatever may be our situation, whether firmly united under one national government, or split into a number of confederacies, certain it is, that foreign nations will know and view it exactly as it is; and they will act toward us accordingly. If they see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment. If, on the other hand, they find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor, pitiful figure will America make in their eyes! How liable would she become not only to their contempt but to their outrage, and how soon would dear-bought experience proclaim that when a people or family so divide, it never fails to be against themselves.

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FEDERALIST No. 5. The Same Subject Continued (Concerning Dangers From Foreign Force and Influence)

For the Independent Journal. Saturday, November 10, 1787

JAY

To the People of the State of New York:

QUEEN ANNE, in her letter of the 1st July, 1706, to the Scotch Parliament, makes some observations on the importance of the UNION then forming between England and Scotland, which merit our attention. I shall present the public with one or two extracts from it: “An entire and perfect union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms. It must increase your strength, riches, and trade; and by this union the whole island, being joined in affection and free from all apprehensions of different interest, will be ENABLED TO RESIST ALL ITS ENEMIES.” “We most earnestly recommend to you calmness and unanimity in this great and weighty affair, that the union may be brought to a happy conclusion, being the only EFFECTUAL way to secure our present and future happiness, and disappoint the designs of our and your enemies, who will doubtless, on this occasion, USE THEIR UTMOST ENDEAVORS TO PREVENT OR DELAY THIS UNION.”

It was remarked in the preceding paper, that weakness and divisions at home would invite dangers from abroad; and that nothing would tend more to secure us from them than union, strength, and good government within ourselves. This subject is copious and cannot easily be exhausted.

The history of Great Britain is the one with which we are in general the best acquainted, and it gives us many useful lessons. We may profit by their experience without paying the price which it cost them. Although it seems obvious to common sense that the people of such an island should be but one nation, yet we find that they were for ages divided into three, and that those three were almost constantly embroiled in quarrels and wars with one another. Notwithstanding their true interest with respect to the continental nations was really the same, yet by the arts and policy and practices of those nations, their mutual jealousies were

perpetually kept inflamed, and for a long series of years they were far more inconvenient and troublesome than they were useful and assisting to each other.

Should the people of America divide themselves into three or four nations, would not the same thing happen? Would not similar jealousies arise, and be in like manner cherished? Instead of their being “joined in affection” and free from all apprehension of different “interests,” envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence, like most other BORDERING nations, they would always be either involved in disputes and war, or live in the constant apprehension of them.

The most sanguine advocates for three or four confederacies cannot reasonably suppose that they would long remain exactly on an equal footing in point of strength, even if it was possible to form them so at first; but, admitting that to be practicable, yet what human contrivance can secure the continuance of such equality? Independent of those local circumstances which tend to beget and increase power in one part and to impede its progress in another, we must advert to the effects of that superior policy and good management which would probably distinguish the government of one above the rest, and by which their relative equality in strength and consideration would be destroyed. For it cannot be presumed that the same degree of sound policy, prudence, and foresight would uniformly be observed by each of these confederacies for a long succession of years.

Whenever, and from whatever causes, it might happen, and happen it would, that any one of these nations or confederacies should rise on the scale of political importance much above the degree of her neighbors, that moment would those neighbors behold her with envy and with fear. Both those passions would lead them to countenance, if not to promote, whatever might promise to diminish her importance; and would also restrain them from measures calculated to advance or even to secure her prosperity. Much time would not be necessary to enable her to discern these unfriendly dispositions. She would soon begin, not only to lose confidence in her neighbors, but also to feel a disposition equally unfavorable to them. Distrust naturally creates distrust, and by nothing is good-will and kind conduct more speedily changed than by invidious jealousies and uncandid imputations, whether expressed or implied.

The North is generally the region of strength, and many local circumstances render it probable that the most Northern of the proposed confederacies would, at a period not very distant, be unquestionably more formidable than any of the others. No sooner would this become evident than the NORTHERN HIVE would excite the same ideas and sensations in the more southern parts of America which it formerly did in the southern parts of Europe. Nor does it appear to be a rash conjecture that its young swarms might often be tempted to gather honey in the more blooming fields and milder air of their luxurious and more delicate neighbors.

They who well consider the history of similar divisions and confederacies will find abundant reason to apprehend that those in contemplation would in no other sense be neighbors than as they would be borderers; that they would neither love nor trust one another, but on the contrary would be a prey to discord, jealousy, and mutual injuries; in short, that they would place us exactly in the situations in which some nations doubtless wish to see us, viz., FORMIDABLE ONLY TO EACH OTHER.

From these considerations it appears that those gentlemen are greatly mistaken who suppose that alliances offensive and defensive might be formed between these confederacies, and would produce that combination and union of wills of arms and of resources, which would be necessary to put and keep them in a formidable state of defense against foreign enemies.

When did the independent states, into which Britain and Spain were formerly divided, combine in such alliance, or unite their forces against a foreign enemy? The proposed confederacies will be DISTINCT NATIONS. Each of them would have its commerce with foreigners to regulate by distinct treaties; and as their productions and commodities are different and proper for different markets, so would those treaties be essentially different. Different commercial concerns must create different interests, and of course different degrees of political attachment to and connection with different foreign nations. Hence it might and probably would happen that the foreign nation with whom the SOUTHERN confederacy might be at war would be the one with whom the NORTHERN confederacy would be the most desirous of preserving peace and friendship. An alliance so contrary to their immediate interest would not therefore be easy to form, nor, if formed, would it be observed and fulfilled with perfect good faith.

Nay, it is far more probable that in America, as in Europe, neighboring nations, acting under the impulse of opposite interests and unfriendly passions, would frequently be found taking different sides. Considering our distance from Europe, it would be more natural for these confederacies to apprehend danger from one another than from distant nations, and therefore that each of them

should be more desirous to guard against the others by the aid of foreign alliances, than to guard against foreign dangers by alliances between themselves. And here let us not forget how much more easy it is to receive foreign fleets into our ports, and foreign armies into our country, than it is to persuade or compel them to depart. How many conquests did the Romans and others make in the characters of allies, and what innovations did they under the same character introduce into the governments of those whom they pretended to protect.

Let candid men judge, then, whether the division of America into any given number of independent sovereignties would tend to secure us against the hostilities and improper interference of foreign nations.

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FEDERALIST No. 6. Concerning Dangers from Dissensions Between the States

For the Independent Journal. Wednesday, November 14, 1787

HAMILTON

To the People of the State of New York:

THE three last numbers of this paper have been dedicated to an enumeration of the dangers to which we should be exposed, in a state of disunion, from the arms and arts of foreign nations. I shall now proceed to delineate dangers of a different and, perhaps, still more alarming kind—those which will in all probability flow from dissensions between the States themselves, and from domestic factions and convulsions. These have been already in some instances slightly anticipated; but they deserve a more particular and more full investigation.

A man must be far gone in Utopian speculations who can seriously doubt that, if these States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests as an argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious. To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.

The causes of hostility among nations are innumerable. There are some which have a general and almost constant operation upon the collective bodies of society. Of this description are the love of power or the desire of pre-eminence and dominion—the jealousy of power, or the desire of equality and safety. There are others which have a more circumscribed though an equally operative influence within their spheres. Such are the rivalships and competitions of commerce between commercial nations. And there are others, not less numerous than either of the former, which take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading individuals in the communities of which they are members. Men of this class, whether the favorites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquillity to personal advantage or personal gratification.

The celebrated Pericles, in compliance with the resentment of a prostitute,(1) at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the SAMMIANS. The same man, stimulated by private pique against the MEGARENSIANS,(2) another nation of Greece, or to avoid a prosecution with which he was threatened as an accomplice of a supposed theft of the statuary Phidias,(3) or to get rid of the accusations prepared to be brought against him for dissipating the funds of the state in the purchase of popularity,(4) or from a combination of all these causes, was the primitive author of that famous and fatal war, distinguished in the Grecian annals by the name of the PELOPONNESIAN war; which, after various vicissitudes, intermissions, and renewals, terminated in the ruin of the Athenian commonwealth.

The ambitious cardinal, who was prime minister to Henry VIII., permitting his vanity to aspire to the triple crown,(5) entertained hopes of succeeding in the acquisition of that splendid prize by the influence of the Emperor Charles V. To secure the favor and interest of this enterprising and powerful monarch, he precipitated England into a war with France, contrary to the plainest dictates of policy, and at the hazard of the safety and independence, as well of the kingdom over which he presided by his counsels, as of Europe in general. For if there ever was a sovereign who bid fair to realize the project of universal monarchy, it was the Emperor Charles V., of whose intrigues Wolsey was at once the instrument and the dupe.

The influence which the bigotry of one female,(6) the petulance of another,(7) and the cabals of a third,(8) had in the contemporary policy, ferments, and pacifications, of a considerable part of Europe, are topics that have been too often descanted upon not to be generally known.

To multiply examples of the agency of personal considerations in the production of great national events, either foreign or domestic, according to their direction, would be an unnecessary waste of time. Those who have but a superficial acquaintance with the sources from which they are to be drawn, will themselves recollect a variety of instances; and those who have a tolerable knowledge of human nature will not stand in need of such lights to form their opinion either of the reality or extent of that agency. Perhaps, however, a reference, tending to illustrate the general principle, may with propriety be made to a case which has lately happened among ourselves. If Shays had not been a DESPERATE DEBTOR, it is much to be doubted whether Massachusetts would have been plunged into a civil war.

But notwithstanding the concurring testimony of experience, in this particular, there are still to be found visionary or designing men, who stand ready to advocate the paradox of perpetual peace between the States, though dismembered and alienated from each other. The genius of republics (say they) is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humors which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.

Is it not (we may ask these projectors in politics) the true interest of all nations to cultivate the same benevolent and philosophic spirit? If this be their true interest, have they in fact pursued it? Has it not, on the contrary, invariably been found that momentary passions, and immediate interest, have a more active and imperious control over human conduct than general or remote considerations of policy, utility or justice? Have republics in practice been less addicted to war than monarchies? Are not the former administered by MEN as well as the latter? Are there not aversions, predilections, rivalships, and desires of unjust acquisitions, that affect nations as well as kings? Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence, and are, of course, liable to be tinctured by the passions and views of those individuals? Has commerce hitherto done anything more than change the objects of war? Is not the love of wealth as domineering and enterprising a passion as that of power or glory? Have there not been as many wars founded upon commercial motives since that has become the prevailing system of nations, as were before occasioned by the cupidity of territory or dominion? Has not the spirit of commerce, in many instances, administered new incentives to the appetite, both for the one and for the other? Let experience, the least fallible guide of human opinions, be appealed to for an answer to these inquiries.

Sparta, Athens, Rome, and Carthage were all republics; two of them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighboring monarchies of the same times. Sparta was little better than a wellregulated camp; and Rome was never sated of carnage and conquest.

Carthage, though a commercial republic, was the aggressor in the very war that ended in her destruction. Hannibal had carried her arms into the heart of Italy and to the gates of Rome, before Scipio, in turn, gave him an overthrow in the territories of Carthage, and made a conquest of the commonwealth.

Venice, in later times, figured more than once in wars of ambition, till, becoming an object to the other Italian states, Pope Julius II. found means to accomplish that formidable league,(9) which gave a deadly blow to the power and pride of this haughty republic.

The provinces of Holland, till they were overwhelmed in debts and taxes, took a leading and conspicuous part in the wars of Europe. They had furious contests with England for the dominion of the sea, and were among the most persevering and most implacable of the opponents of Louis XIV.

In the government of Britain the representatives of the people compose one branch of the national legislature. Commerce has been for ages the predominant pursuit of that country. Few nations, nevertheless, have been more frequently engaged in war; and the wars in which that kingdom has been engaged have, in numerous instances, proceeded from the people.

There have been, if I may so express it, almost as many popular as royal wars. The cries of the nation and the importunities of their representatives have, upon various occasions, dragged their monarchs into war, or continued them in it, contrary to their inclinations, and sometimes contrary to the real interests of the State. In that memorable struggle for superiority between the rival

houses of AUSTRIA and BOURBON, which so long kept Europe in a flame, it is well known that the antipathies of the English against the French, seconding the ambition, or rather the avarice, of a favorite leader,(10) protracted the war beyond the limits marked out by sound policy, and for a considerable time in opposition to the views of the court.

The wars of these two last-mentioned nations have in a great measure grown out of commercial considerations,—the desire of supplanting and the fear of being supplanted, either in particular branches of traffic or in the general advantages of trade and navigation, and sometimes even the more culpable desire of sharing in the commerce of other nations without their consent.

The last war but between Britain and Spain sprang from the attempts of the British merchants to prosecute an illicit trade with the Spanish main. These unjustifiable practices on their part produced severity on the part of the Spaniards toward the subjects of Great Britain which were not more justifiable, because they exceeded the bounds of a just retaliation and were chargeable with inhumanity and cruelty. Many of the English who were taken on the Spanish coast were sent to dig in the mines of Potosi; and by the usual progress of a spirit of resentment, the innocent were, after a while, confounded with the guilty in indiscriminate punishment. The complaints of the merchants kindled a violent flame throughout the nation, which soon after broke out in the House of Commons, and was communicated from that body to the ministry. Letters of reprisal were granted, and a war ensued, which in its consequences overthrew all the alliances that but twenty years before had been formed with sanguine expectations of the most beneficial fruits.

From this summary of what has taken place in other countries, whose situations have borne the nearest resemblance to our own, what reason can we have to confide in those reveries which would seduce us into an expectation of peace and cordiality between the members of the present confederacy, in a state of separation? Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, weaknesses and evils incident to society in every shape? Is it not time to awake from the deceitful dream of a golden age, and to adopt as a practical maxim for the direction of our political conduct that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect wisdom and perfect virtue?

Let the point of extreme depression to which our national dignity and credit have sunk, let the inconveniences felt everywhere from a lax and ill administration of government, let the revolt of a part of the State of North Carolina, the late menacing disturbances in Pennsylvania, and the actual insurrections and rebellions in Massachusetts, declare—!

So far is the general sense of mankind from corresponding with the tenets of those who endeavor to lull asleep our apprehensions of discord and hostility between the States, in the event of disunion, that it has from long observation of the progress of society become a sort of axiom in politics, that vicinity or nearness of situation, constitutes nations natural enemies. An intelligent writer expresses himself on this subject to this effect: “NEIGHBORING NATIONS (says he) are naturally enemies of each other unless their common weakness forces them to league in a CONFEDERATE REPUBLIC, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors.”(11) This passage, at the same time, points out the EVIL and suggests the REMEDY.

PUBLIUS

1. Aspasia, vide “Plutarch’s Life of Pericles.”

2. Ibid.

3. Ibid.

4. Ibid. Phidias was supposed to have stolen some public gold, with the connivance of Pericles, for the embellishment of the statue of Minerva.

5. Worn by the popes.

6. Madame de Maintenon.

7. Duchess of Marlborough.

8. Madame de Pompadour.

9. The League of Cambray, comprehending the Emperor, the King of France, the King of Aragon, and most of the Italian princes and states.

10. The Duke of Marlborough.

11. Vide “Principes des Negociations” par l’Abbé de Mably.

FEDERALIST No. 7. The Same Subject Continued (Concerning Dangers from Dissensions Between the States)

For the Independent Journal. Thursday, November 15, 1787

HAMILTON

To the People of the State of New York:

IT IS sometimes asked, with an air of seeming triumph, what inducements could the States have, if disunited, to make war upon each other? It would be a full answer to this question to say—precisely the same inducements which have, at different times, deluged in blood all the nations in the world. But, unfortunately for us, the question admits of a more particular answer. There are causes of differences within our immediate contemplation, of the tendency of which, even under the restraints of a federal constitution, we have had sufficient experience to enable us to form a judgment of what might be expected if those restraints were removed.

Territorial disputes have at all times been found one of the most fertile sources of hostility among nations. Perhaps the greatest proportion of wars that have desolated the earth have sprung from this origin. This cause would exist among us in full force. We have a vast tract of unsettled territory within the boundaries of the United States. There still are discordant and undecided claims between several of them, and the dissolution of the Union would lay a foundation for similar claims between them all. It is well known that they have heretofore had serious and animated discussion concerning the rights to the lands which were ungranted at the time of the Revolution, and which usually went under the name of crown lands. The States within the limits of whose colonial governments they were comprised have claimed them as their property, the others have contended that the rights of the crown in this article devolved upon the Union; especially as to all that part of the Western territory which, either by actual possession, or through the submission of the Indian proprietors, was subjected to the jurisdiction of the king of Great Britain, till it was relinquished in the treaty of peace. This, it has been said, was at all events an acquisition to the Confederacy by compact with a foreign power. It has been the prudent policy of Congress to appease this controversy, by prevailing upon the States to make cessions to the United States for the benefit of the whole. This has been so far accomplished as, under a continuation of the Union, to afford a decided prospect of an amicable termination of the dispute. A dismemberment of the Confederacy, however, would revive this dispute, and would create others on the same subject. At present, a large part of the vacant Western territory is, by cession at least, if not by any anterior right, the common property of the Union. If that were at an end, the States which made the cession, on a principle of federal compromise, would be apt when the motive of the grant had ceased, to reclaim the lands as a reversion. The other States would no doubt insist on a proportion, by right of representation. Their argument would be, that a grant, once made, could not be revoked; and that the justice of participating in territory acquired or secured by the joint efforts of the Confederacy, remained undiminished. If, contrary to probability, it should be admitted by all the States, that each had a right to a share of this common stock, there would still be a difficulty to be surmounted, as to a proper rule of apportionment. Different principles would be set up by different States for this purpose; and as they would affect the opposite interests of the parties, they might not easily be susceptible of a pacific adjustment.

In the wide field of Western territory, therefore, we perceive an ample theatre for hostile pretensions, without any umpire or common judge to interpose between the contending parties. To reason from the past to the future, we shall have good ground to apprehend, that the sword would sometimes be appealed to as the arbiter of their differences. The circumstances of the dispute between Connecticut and Pennsylvania, respecting the land at Wyoming, admonish us not to be sanguine in expecting an easy accommodation of such differences. The articles of confederation obliged the parties to submit the matter to the decision of a federal court. The submission was made, and the court decided in favor of Pennsylvania. But Connecticut gave strong indications of dissatisfaction with that determination; nor did she appear to be entirely resigned to it, till, by negotiation and management, something like an equivalent was found for the loss she supposed herself to have sustained. Nothing here said is intended to convey the slightest censure on the conduct of that State. She no doubt sincerely believed herself to have been injured by the decision; and States, like individuals, acquiesce with great reluctance in determinations to their disadvantage.

Those who had an opportunity of seeing the inside of the transactions which attended the progress of the controversy between this State and the district of Vermont, can vouch the opposition we experienced, as well from States not interested as from those which were interested in the claim; and can attest the danger to which the peace of the Confederacy might have been exposed, had this State attempted to assert its rights by force. Two motives preponderated in that opposition: one, a jealousy entertained of our future power; and the other, the interest of certain individuals of influence in the neighboring States, who had obtained grants of lands under the actual government of that district. Even the States which brought forward claims, in contradiction to ours, seemed more solicitous to dismember this State, than to establish their own pretensions. These were New Hampshire, Massachusetts, and Connecticut. New Jersey and Rhode Island, upon all occasions, discovered a warm zeal for the independence of Vermont; and Maryland, till alarmed by the appearance of a connection between Canada and that State, entered deeply into the same views. These being small States, saw with an unfriendly eye the perspective of our growing greatness. In a review of these transactions we may trace some of the causes which would be likely to embroil the States with each other, if it should be their unpropitious destiny to become disunited.

The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country, would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance. WE SHOULD BE READY TO DENOMINATE INJURIES THOSE THINGS WHICH WERE IN REALITY THE JUSTIFIABLE ACTS OF INDEPENDENT SOVEREIGNTIES CONSULTING A DISTINCT INTEREST. The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable that this unbridled spirit would pay much respect to those regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.

The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut, and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive? Should we be able to preserve it against the incumbent weight of Connecticut on the one side, and the co-operating pressure of New Jersey on the other? These are questions that temerity alone will answer in the affirmative.

The public debt of the Union would be a further cause of collision between the separate States or confederacies. The apportionment, in the first instance, and the progressive extinguishment afterward, would be alike productive of ill-humor and animosity. How would it be possible to agree upon a rule of apportionment satisfactory to all? There is scarcely any that can be proposed which is entirely free from real objections. These, as usual, would be exaggerated by the adverse interest of the parties. There are even dissimilar views among the States as to the general principle of discharging the public debt. Some of them, either less impressed with the importance of national credit, or because their citizens have little, if any, immediate interest in the question, feel an indifference, if not a repugnance, to the payment of the domestic debt at any rate. These would be inclined to magnify the difficulties of a distribution. Others of them, a numerous body of whose citizens are creditors to the public beyond proportion of the State in the total amount of the national debt, would be strenuous for some equitable and effective provision. The procrastinations of the former would excite the resentments of the latter. The settlement of a rule would, in the meantime, be postponed by real differences of opinion and affected delays. The citizens of the States interested would clamour; foreign powers would urge for the satisfaction of their just demands, and the peace of the States would be hazarded to the double contingency of external invasion and internal contention.

Suppose the difficulties of agreeing upon a rule surmounted, and the apportionment made. Still there is great room to suppose that the rule agreed upon would, upon experiment, be found to bear harder upon some States than upon others. Those which were sufferers by it would naturally seek for a mitigation of the burden. The others would as naturally be disinclined to a revision, which was likely to end in an increase of their own incumbrances. Their refusal would be too plausible a pretext to the complaining States to withhold their contributions, not to be embraced with avidity; and the non-compliance of these States with their engagements would be a ground of bitter discussion and altercation. If even the rule adopted should in practice justify the equality of its principle, still delinquencies in payments on the part of some of the States would result from a diversity of other causes—the real deficiency of resources; the mismanagement of their finances; accidental disorders in the management of the government; and, in addition to the rest, the reluctance with which men commonly part with money for purposes that have outlived the exigencies which produced them, and interfere with the supply of immediate wants. Delinquencies, from whatever causes, would be productive of complaints, recriminations, and quarrels. There is, perhaps, nothing more likely to disturb the tranquillity of nations than their being bound to mutual contributions for any common object that does not yield an equal and coincident benefit. For it is an observation, as true as it is trite, that there is nothing men differ so readily about as the payment of money.

Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility. We are not authorized to expect that a more liberal or more equitable spirit would preside over the legislations of the individual States hereafter, if unrestrained by any additional checks, than we have heretofore seen in too many instances disgracing their several codes. We have observed the disposition to retaliation excited in Connecticut in consequence of the enormities perpetrated by the Legislature of Rhode Island; and we reasonably infer that, in similar cases, under other circumstances, a war, not of PARCHMENT, but of the sword, would chastise such atrocious breaches of moral obligation and social justice.

The probability of incompatible alliances between the different States or confederacies and different foreign nations, and the effects of this situation upon the peace of the whole, have been sufficiently unfolded in some preceding papers. From the view they have exhibited of this part of the subject, this conclusion is to be drawn, that America, if not connected at all, or only by the feeble tie of a simple league, offensive and defensive, would, by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts into which she was divided, would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all. Divide et impera(1) must be the motto of every nation that either hates or fears us.(2)

PUBLIUS

1. Divide and command.

2. In order that the whole subject of these papers may as soon as possible be laid before the public, it is proposed to publish them four times a week—on Tuesday in the New York Packet and on Thursday in the Daily Advertiser.

FEDERALIST No. 8. The Consequences of Hostilities Between the States

From the New York Packet. Tuesday, November 20, 1787.

HAMILTON

To the People of the State of New York:

ASSUMING it therefore as an established truth that the several States, in case of disunion, or such combinations of them as might happen to be formed out of the wreck of the general Confederacy, would be subject to those vicissitudes of peace and war, of friendship and enmity, with each other, which have fallen to the lot of all neighboring nations not united under one government, let us enter into a concise detail of some of the consequences that would attend such a situation.

War between the States, in the first period of their separate existence, would be accompanied with much greater distresses than it commonly is in those countries where regular military establishments have long obtained. The disciplined armies always kept on foot on the continent of Europe, though they bear a malignant aspect to liberty and economy, have, notwithstanding, been productive of the signal advantage of rendering sudden conquests impracticable, and of preventing that rapid desolation which used to mark the progress of war prior to their introduction. The art of fortification has contributed to the same ends. The nations of

Europe are encircled with chains of fortified places, which mutually obstruct invasion. Campaigns are wasted in reducing two or three frontier garrisons, to gain admittance into an enemy's country. Similar impediments occur at every step, to exhaust the strength and delay the progress of an invader. Formerly, an invading army would penetrate into the heart of a neighboring country almost as soon as intelligence of its approach could be received; but now a comparatively small force of disciplined troops, acting on the defensive, with the aid of posts, is able to impede, and finally to frustrate, the enterprises of one much more considerable. The history of war, in that quarter of the globe, is no longer a history of nations subdued and empires overturned, but of towns taken and retaken; of battles that decide nothing; of retreats more beneficial than victories; of much effort and little acquisition.

In this country the scene would be altogether reversed. The jealousy of military establishments would postpone them as long as possible. The want of fortifications, leaving the frontiers of one state open to another, would facilitate inroads. The populous States would, with little difficulty, overrun their less populous neighbors. Conquests would be as easy to be made as difficult to be retained. War, therefore, would be desultory and predatory. PLUNDER and devastation ever march in the train of irregulars. The calamities of individuals would make the principal figure in the events which would characterize our military exploits.

This picture is not too highly wrought; though, I confess, it would not long remain a just one. Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

The institutions chiefly alluded to are STANDING ARMIES and the correspondent appendages of military establishments. Standing armies, it is said, are not provided against in the new Constitution; and it is therefore inferred that they may exist under it. (1) Their existence, however, from the very terms of the proposition, is, at most, problematical and uncertain. But standing armies, it may be replied, must inevitably result from a dissolution of the Confederacy. Frequent war and constant apprehension, which require a state of as constant preparation, will infallibly produce them. The weaker States or confederacies would first have recourse to them, to put themselves upon an equality with their more potent neighbors. They would endeavor to supply the inferiority of population and resources by a more regular and effective system of defense, by disciplined troops, and by fortifications. They would, at the same time, be necessitated to strengthen the executive arm of government, in doing which their constitutions would acquire a progressive direction toward monarchy. It is of the nature of war to increase the executive at the expense of the legislative authority.

The expedients which have been mentioned would soon give the States or confederacies that made use of them a superiority over their neighbors. Small states, or states of less natural strength, under vigorous governments, and with the assistance of disciplined armies, have often triumphed over large states, or states of greater natural strength, which have been destitute of these advantages. Neither the pride nor the safety of the more important States or confederacies would permit them long to submit to this mortifying and adventitious superiority. They would quickly resort to means similar to those by which it had been effected, to reinstate themselves in their lost pre-eminence. Thus, we should, in a little time, see established in every part of this country the same engines of despotism which have been the scourge of the Old World. This, at least, would be the natural course of things; and our reasonings will be the more likely to be just, in proportion as they are accommodated to this standard.

These are not vague inferences drawn from supposed or speculative defects in a Constitution, the whole power of which is lodged in the hands of a people, or their representatives and delegates, but they are solid conclusions, drawn from the natural and necessary progress of human affairs.

It may, perhaps, be asked, by way of objection to this, why did not standing armies spring up out of the contentions which so often distracted the ancient republics of Greece? Different answers, equally satisfactory, may be given to this question. The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers, which was the true condition of the people of those republics. The means of revenue, which have been so greatly multiplied by the increase of gold and silver and of the arts of industry, and the science of finance, which is the offspring of modern times, concurring with the habits of nations, have produced an entire revolution in the system of war, and have rendered disciplined armies, distinct from the body of the citizens, the inseparable companions of frequent hostility.

There is a wide difference, also, between military establishments in a country seldom exposed by its situation to internal invasions, and in one which is often subject to them, and always apprehensive of them. The rulers of the former can have no good pretext, if they are even so inclined, to keep on foot armies so numerous as must of necessity be maintained in the latter. These armies being, in the first case, rarely, if at all, called into activity for interior defense, the people are in no danger of being broken to military subordination. The laws are not accustomed to relaxations, in favor of military exigencies; the civil state remains in full vigor, neither corrupted, nor confounded with the principles or propensities of the other state. The smallness of the army renders the natural strength of the community an overmatch for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be exerted to the prejudice of their rights.

The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.

In a country in the predicament last described, the contrary of all this happens. The perpetual menacings of danger oblige the government to be always prepared to repel it; its armies must be numerous enough for instant defense. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants of territories, often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them masters, is neither remote nor difficult; but it is very difficult to prevail upon a people under such impressions, to make a bold or effectual resistance to usurpations supported by the military power.

The kingdom of Great Britain falls within the first description. An insular situation, and a powerful marine, guarding it in a great measure against the possibility of foreign invasion, supersede the necessity of a numerous army within the kingdom. A sufficient force to make head against a sudden descent, till the militia could have time to rally and embody, is all that has been deemed requisite. No motive of national policy has demanded, nor would public opinion have tolerated, a larger number of troops upon its domestic establishment. There has been, for a long time past, little room for the operation of the other causes, which have been enumerated as the consequences of internal war. This peculiar felicity of situation has, in a great degree, contributed to preserve the liberty which that country to this day enjoys, in spite of the prevalent venality and corruption. If, on the contrary, Britain had been situated on the continent, and had been compelled, as she would have been, by that situation, to make her military establishments at home coextensive with those of the other great powers of Europe, she, like them, would in all probability be, at this day, a victim to the absolute power of a single man. It is possible, though not easy, that the people of that island may be enslaved from other causes; but it cannot be by the prowess of an army so inconsiderable as that which has been usually kept up within the kingdom.

If we are wise enough to preserve the Union we may for ages enjoy an advantage similar to that of an insulated situation. Europe is at a great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot, in this position, be necessary to our security. But if we should be disunited, and the integral parts should either remain separated, or, which is most probable, should be thrown together into two or three confederacies, we should be, in a short course of time, in the predicament of the continental powers of Europe—our liberties would be a prey to the means of defending ourselves against the ambition and jealousy of each other.

This is an idea not superficial or futile, but solid and weighty. It deserves the most serious and mature consideration of every prudent and honest man of whatever party. If such men will make a firm and solemn pause, and meditate dispassionately on the importance of this interesting idea; if they will contemplate it in all its attitudes, and trace it to all its consequences, they will not hesitate to part with trivial objections to a Constitution, the rejection of which would in all probability put a final period to the Union. The airy phantoms that flit before the distempered imaginations of some of its adversaries would quickly give place to the more substantial forms of dangers, real, certain, and formidable.

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1. This objection will be fully examined in its proper place, and it will be shown that the only natural precaution which could have been taken on this subject has been taken; and a much better one than is to be found in any constitution that has been heretofore framed in America, most of which contain no guard at all on this subject.

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FEDERALIST No. 9. The Union as a Safeguard Against Domestic Faction and Insurrection

For the Independent Journal. Wednesday, November 21, 1787

HAMILTON

To the People of the State of New York:

A FIRM Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection. It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as short-lived contrast to the furious storms that are to succeed. If now and then intervals of felicity open to view, we behold them with a mixture of regret, arising from the reflection that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliancy, they at the same time admonish us to lament that the vices of government should pervert the direction and tarnish the lustre of those bright talents and exalted endowments for which the favored soils that produced them have been so justly celebrated.

From the disorders that disfigure the annals of those republics the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. They have decried all free government as inconsistent with the order of society, and have indulged themselves in malicious exultation over its friends and partisans. Happily for mankind, stupendous fabrics reared on the basis of liberty, which have flourished for ages, have, in a few glorious instances, refuted their gloomy sophisms. And, I trust, America will be the broad and solid foundation of other edifices, not less magnificent, which will be equally permanent monuments of their errors.

But it is not to be denied that the portraits they have sketched of republican government were too just copies of the originals from which they were taken. If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided. To this catalogue of circumstances that tend to the amelioration of popular systems of civil government, I shall venture, however novel it may appear to some, to add one more, on a principle which has been made the foundation of an objection to the new Constitution; I mean the ENLARGEMENT of the ORBIT within which such systems are to revolve, either in respect to the dimensions of a single State or to the consolidation of several smaller States into one great Confederacy. The latter is that which immediately concerns the object under consideration. It will, however, be of use to examine the principle in its application to a single State, which shall be attended to in another place.

The utility of a Confederacy, as well to suppress faction and to guard the internal tranquillity of States, as to increase their external force and security, is in reality not a new idea. It has been practiced upon in different countries and ages, and has received the sanction of the most approved writers on the subject of politics. The opponents of the plan proposed have, with great assiduity, cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government. But they seem not to have been apprised of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the principle to which they subscribe with such ready acquiescence.

When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions far short of the limits of almost every one of these States. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina, nor Georgia can by any means be compared with the models from which he reasoned and to which the terms of his description apply. If we therefore take his ideas on this point as the criterion of truth, we shall be driven to the alternative either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt. Some of the writers who have come

forward on the other side of the question seem to have been aware of the dilemma; and have even been bold enough to hint at the division of the larger States as a desirable thing. Such an infatuated policy, such a desperate expedient, might, by the multiplication of petty offices, answer the views of men who possess not qualifications to extend their influence beyond the narrow circles of personal intrigue, but it could never promote the greatness or happiness of the people of America.

Referring the examination of the principle itself to another place, as has been already mentioned, it will be sufficient to remark here that, in the sense of the author who has been most emphatically quoted upon the occasion, it would only dictate a reduction of the SIZE of the more considerable MEMBERS of the Union, but would not militate against their being all comprehended in one confederate government. And this is the true question, in the discussion of which we are at present interested.

So far are the suggestions of Montesquieu from standing in opposition to a general Union of the States, that he explicitly treats of a confederate republic as the expedient for extending the sphere of popular government, and reconciling the advantages of monarchy with those of republicanism.

“It is very probable,” (says he(1)) “that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.”

“This form of government is a convention by which several smaller STATES agree to become members of a larger ONE, which they intend to form. It is a kind of assemblage of societies that constitute a new one, capable of increasing, by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.”

“A republic of this kind, able to withstand an external force, may support itself without any internal corruptions. The form of this society prevents all manner of inconveniences.”

“If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped and overpower him before he could be settled in his usurpation.”

“Should a popular insurrection happen in one of the confederate states the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.”

“As this government is composed of small republics, it enjoys the internal happiness of each; and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.”

I have thought it proper to quote at length these interesting passages, because they contain a luminous abridgment of the principal arguments in favor of the Union, and must effectually remove the false impressions which a misapplication of other parts of the work was calculated to make. They have, at the same time, an intimate connection with the more immediate design of this paper; which is, to illustrate the tendency of the Union to repress domestic faction and insurrection.

A distinction, more subtle than accurate, has been raised between a CONFEDERACY and a CONSOLIDATION of the States. The essential characteristic of the first is said to be, the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. It has indeed happened, that governments of this kind have generally operated in the manner which the distinction taken notice of, supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject. And it will be clearly shown in the course of this investigation that as far as the principle contended for has prevailed, it has been the cause of incurable disorder and imbecility in the government.

The definition of a CONFEDERATE REPUBLIC seems simply to be “an assemblage of societies,” or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an

association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

In the Lycian confederacy, which consisted of twenty-three CITIES or republics, the largest were entitled to THREE votes in the COMMON COUNCIL, those of the middle class to TWO, and the smallest to ONE. The COMMON COUNCIL had the appointment of all the judges and magistrates of the respective CITIES. This was certainly the most, delicate species of interference in their internal administration; for if there be any thing that seems exclusively appropriated to the local jurisdictions, it is the appointment of their own officers. Yet Montesquieu, speaking of this association, says: “Were I to give a model of an excellent Confederate Republic, it would be that of Lycia.” Thus we perceive that the distinctions insisted upon were not within the contemplation of this enlightened civilian; and we shall be led to conclude, that they are the novel refinements of an erroneous theory.

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1. “Spirit of Laws,” vol. i., book ix., chap. i.

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FEDERALIST No. 10. The Same Subject Continued (The Union as a Safeguard Against Domestic Faction and Insurrection)

From the Daily Advertiser. Thursday, November 22, 1787.

MADISON

To the People of the State of New York:

AMONG the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the

other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and

pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic,—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

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FEDERALIST No. 11. The Utility of the Union in Respect to Commercial Relations and a Navy

For the Independent Journal. Saturday, November 24, 1787

HAMILTON

To the People of the State of New York:

THE importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject. This applies as well to our intercourse with foreign countries as with each other.

There are appearances to authorize a supposition that the adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. They seem to be apprehensive of our too great interference in that carrying trade, which is the support of their navigation and the foundation of their naval strength. Those of them which have colonies in America look forward to what this country is capable of becoming, with painful solicitude. They foresee the dangers that may threaten their American dominions from the neighborhood of States, which have all the dispositions, and would possess all the means, requisite to the creation of a powerful marine. Impressions of this kind will naturally indicate the policy of fostering divisions among us, and of depriving us, as far as possible, of an ACTIVE COMMERCE in our own bottoms. This would answer the threefold purpose of preventing our interference in their navigation, of monopolizing the profits of

our trade, and of clipping the wings by which we might soar to a dangerous greatness. Did not prudence forbid the detail, it would not be difficult to trace, by facts, the workings of this policy to the cabinets of ministers.

If we continue united, we may counteract a policy so unfriendly to our prosperity in a variety of ways. By prohibitory regulations, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets. This assertion will not appear chimerical to those who are able to appreciate the importance of the markets of three millions of people—increasing in rapid progression, for the most part exclusively addicted to agriculture, and likely from local circumstances to remain so—to any manufacturing nation; and the immense difference there would be to the trade and navigation of such a nation, between a direct communication in its own ships, and an indirect conveyance of its products and returns, to and from America, in the ships of another country. Suppose, for instance, we had a government in America, capable of excluding Great Britain (with whom we have at present no treaty of commerce) from all our ports; what would be the probable operation of this step upon her politics? Would it not enable us to negotiate, with the fairest prospect of success, for commercial privileges of the most valuable and extensive kind, in the dominions of that kingdom? When these questions have been asked, upon other occasions, they have received a plausible, but not a solid or satisfactory answer. It has been said that prohibitions on our part would produce no change in the system of Britain, because she could prosecute her trade with us through the medium of the Dutch, who would be her immediate customers and paymasters for those articles which were wanted for the supply of our markets. But would not her navigation be materially injured by the loss of the important advantage of being her own carrier in that trade? Would not the principal part of its profits be intercepted by the Dutch, as a compensation for their agency and risk? Would not the mere circumstance of freight occasion a considerable deduction? Would not so circuitous an intercourse facilitate the competitions of other nations, by enhancing the price of British commodities in our markets, and by transferring to other hands the management of this interesting branch of the British commerce?

A mature consideration of the objects suggested by these questions will justify a belief that the real disadvantages to Britain from such a state of things, conspiring with the pre-possessions of a great part of the nation in favor of the American trade, and with the importunities of the West India islands, would produce a relaxation in her present system, and would let us into the enjoyment of privileges in the markets of those islands elsewhere, from which our trade would derive the most substantial benefits. Such a point gained from the British government, and which could not be expected without an equivalent in exemptions and immunities in our markets, would be likely to have a correspondent effect on the conduct of other nations, who would not be inclined to see themselves altogether supplanted in our trade.

A further resource for influencing the conduct of European nations toward us, in this respect, would arise from the establishment of a federal navy. There can be no doubt that the continuance of the Union under an efficient government would put it in our power, at a period not very distant, to create a navy which, if it could not vie with those of the great maritime powers, would at least be of respectable weight if thrown into the scale of either of two contending parties. This would be more peculiarly the case in relation to operations in the West Indies. A few ships of the line, sent opportunely to the reinforcement of either side, would often be sufficient to decide the fate of a campaign, on the event of which interests of the greatest magnitude were suspended. Our position is, in this respect, a most commanding one. And if to this consideration we add that of the usefulness of supplies from this country, in the prosecution of military operations in the West Indies, it will readily be perceived that a situation so favorable would enable us to bargain with great advantage for commercial privileges. A price would be set not only upon our friendship, but upon our neutrality. By a steady adherence to the Union we may hope, erelong, to become the arbiter of Europe in America, and to be able to incline the balance of European competitions in this part of the world as our interest may dictate.

But in the reverse of this eligible situation, we shall discover that the rivalships of the parts would make them checks upon each other, and would frustrate all the tempting advantages which nature has kindly placed within our reach. In a state so insignificant our commerce would be a prey to the wanton intermeddlings of all nations at war with each other; who, having nothing to fear from us, would with little scruple or remorse, supply their wants by depredations on our property as often as it fell in their way. The rights of neutrality will only be respected when they are defended by an adequate power. A nation, despicable by its weakness, forfeits even the privilege of being neutral.

Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth. This situation would even take away the motive to such combinations, by inducing an impracticability of success. An active commerce, an extensive navigation, and a flourishing marine

would then be the offspring of moral and physical necessity. We might defy the little arts of the little politicians to control or vary the irresistible and unchangeable course of nature.

But in a state of disunion, these combinations might exist and might operate with success. It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; and as they have a common interest in being our carriers, and still more in preventing our becoming theirs, they would in all probability combine to embarrass our navigation in such a manner as would in effect destroy it, and confine us to a PASSIVE COMMERCE. We should then be compelled to content ourselves with the first price of our commodities, and to see the profits of our trade snatched from us to enrich our enemies and persecutors. That unequaled spirit of enterprise, which signalizes the genius of the American merchants and navigators, and which is in itself an inexhaustible mine of national wealth, would be stifled and lost, and poverty and disgrace would overspread a country which, with wisdom, might make herself the admiration and envy of the world.

There are rights of great moment to the trade of America which are rights of the Union—I allude to the fisheries, to the navigation of the Western lakes, and to that of the Mississippi. The dissolution of the Confederacy would give room for delicate questions concerning the future existence of these rights; which the interest of more powerful partners would hardly fail to solve to our disadvantage. The disposition of Spain with regard to the Mississippi needs no comment. France and Britain are concerned with us in the fisheries, and view them as of the utmost moment to their navigation. They, of course, would hardly remain long indifferent to that decided mastery, of which experience has shown us to be possessed in this valuable branch of traffic, and by which we are able to undersell those nations in their own markets. What more natural than that they should be disposed to exclude from the lists such dangerous competitors?

This branch of trade ought not to be considered as a partial benefit. All the navigating States may, in different degrees, advantageously participate in it, and under circumstances of a greater extension of mercantile capital, would not be unlikely to do it. As a nursery of seamen, it now is, or when time shall have more nearly assimilated the principles of navigation in the several States, will become, a universal resource. To the establishment of a navy, it must be indispensable.

To this great national object, a NAVY, union will contribute in various ways. Every institution will grow and flourish in proportion to the quantity and extent of the means concentred towards its formation and support. A navy of the United States, as it would embrace the resources of all, is an object far less remote than a navy of any single State or partial confederacy, which would only embrace the resources of a single part. It happens, indeed, that different portions of confederated America possess each some peculiar advantage for this essential establishment. The more southern States furnish in greater abundance certain kinds of naval stores—tar, pitch, and turpentine. Their wood for the construction of ships is also of a more solid and lasting texture. The difference in the duration of the ships of which the navy might be composed, if chiefly constructed of Southern wood, would be of signal importance, either in the view of naval strength or of national economy. Some of the Southern and of the Middle States yield a greater plenty of iron, and of better quality. Seamen must chiefly be drawn from the Northern hive. The necessity of naval protection to external or maritime commerce does not require a particular elucidation, no more than the conduciveness of that species of commerce to the prosperity of a navy.

An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation contributes to the activity of foreign commerce. It can be conducted upon much better terms with a large number of materials of a given value than with a small number of materials of the same value; arising from the competitions of trade and from the fluctuations of markets. Particular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament, and on this account the operations of the merchant would be less liable to any considerable obstruction or stagnation. The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.

It may perhaps be replied to this, that whether the States are united or disunited, there would still be an intimate intercourse between them which would answer the same ends; this intercourse would be fettered, interrupted, and narrowed by a multiplicity of

causes, which in the course of these papers have been amply detailed. A unity of commercial, as well as political, interests, can only result from a unity of government.

There are other points of view in which this subject might be placed, of a striking and animating kind. But they would lead us too far into the regions of futurity, and would involve topics not proper for a newspaper discussion. I shall briefly observe, that our situation invites and our interests prompt us to aim at an ascendant in the system of American affairs. The world may politically, as well as geographically, be divided into four parts, each having a distinct set of interests. Unhappily for the other three, Europe, by her arms and by her negotiations, by force and by fraud, has, in different degrees, extended her dominion over them all. Africa, Asia, and America, have successively felt her domination. The superiority she has long maintained has tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit. Men admired as profound philosophers have, in direct terms, attributed to her inhabitants a physical superiority, and have gravely asserted that all animals, and with them the human species, degenerate in America—that even dogs cease to bark after having breathed awhile in our atmosphere.(1) Facts have too long supported these arrogant pretensions of the Europeans. It belongs to us to vindicate the honor of the human race, and to teach that assuming brother, moderation. Union will enable us to do it. Disunion will will add another victim to his triumphs. Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!

PUBLIUS “Recherches philosophiques sur les Americains.”

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FEDERALIST No. 12. The Utility of the Union In Respect to Revenue

From the New York Packet. Tuesday, November 27, 1787.

HAMILTON

To the People of the State of New York:

THE effects of Union upon the commercial prosperity of the States have been sufficiently delineated. Its tendency to promote the interests of revenue will be the subject of our present inquiry.

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer,—all orders of men, look forward with eager expectation and growing alacrity to this pleasing reward of their toils. The often-agitated question between agriculture and commerce has, from indubitable experience, received a decision which has silenced the rivalship that once subsisted between them, and has proved, to the satisfaction of their friends, that their interests are intimately blended and interwoven. It has been found in various countries that, in proportion as commerce has flourished, land has risen in value. And how could it have happened otherwise? Could that which procures a freer vent for the products of the earth, which furnishes new incitements to the cultivation of land, which is the most powerful instrument in increasing the quantity of money in a state—could that, in fine, which is the faithful handmaid of labor and industry, in every shape, fail to augment that article, which is the prolific parent of far the greatest part of the objects upon which they are exerted? It is astonishing that so simple a truth should ever have had an adversary; and it is one, among a multitude of proofs, how apt a spirit of ill-informed jealousy, or of too great abstraction and refinement, is to lead men astray from the plainest truths of reason and conviction.

The ability of a country to pay taxes must always be proportioned, in a great degree, to the quantity of money in circulation, and to the celerity with which it circulates. Commerce, contributing to both these objects, must of necessity render the payment of taxes easier, and facilitate the requisite supplies to the treasury. The hereditary dominions of the Emperor of Germany contain a great extent of fertile, cultivated, and populous territory, a large proportion of which is situated in mild and luxuriant climates. In some parts of this territory are to be found the best gold and silver mines in Europe. And yet, from the want of the fostering influence of commerce, that monarch can boast but slender revenues. He has several times been compelled to owe obligations to the pecuniary

succors of other nations for the preservation of his essential interests, and is unable, upon the strength of his own resources, to sustain a long or continued war.

But it is not in this aspect of the subject alone that Union will be seen to conduce to the purpose of revenue. There are other points of view, in which its influence will appear more immediate and decisive. It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation. Tax laws have in vain been multiplied; new methods to enforce the collection have in vain been tried; the public expectation has been uniformly disappointed, and the treasuries of the States have remained empty. The popular system of administration inherent in the nature of popular government, coinciding with the real scarcity of money incident to a languid and mutilated state of trade, has hitherto defeated every experiment for extensive collections, and has at length taught the different legislatures the folly of attempting them.

No person acquainted with what happens in other countries will be surprised at this circumstance. In so opulent a nation as that of Britain, where direct taxes from superior wealth must be much more tolerable, and, from the vigor of the government, much more practicable, than in America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises. Duties on imported articles form a large branch of this latter description.

In America, it is evident that we must a long time depend for the means of revenue chiefly on such duties. In most parts of it, excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and peremptory spirit of excise laws. The pockets of the farmers, on the other hand, will reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.

If these remarks have any foundation, that state of things which will best enable us to improve and extend so valuable a resource must be best adapted to our political welfare. And it cannot admit of a serious doubt, that this state of things must rest on the basis of a general Union. As far as this would be conducive to the interests of commerce, so far it must tend to the extension of the revenue to be drawn from that source. As far as it would contribute to rendering regulations for the collection of the duties more simple and efficacious, so far it must serve to answer the purposes of making the same rate of duties more productive, and of putting it into the power of the government to increase the rate without prejudice to trade.

The relative situation of these States; the number of rivers with which they are intersected, and of bays that wash there shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse;—all these are circumstances that would conspire to render an illicit trade between them a matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other. The separate States or confederacies would be necessitated by mutual jealousy to avoid the temptations to that kind of trade by the lowness of their duties. The temper of our governments, for a long time to come, would not permit those rigorous precautions by which the European nations guard the avenues into their respective countries, as well by land as by water; and which, even there, are found insufficient obstacles to the adventurous stratagems of avarice.

In France, there is an army of patrols (as they are called) constantly employed to secure their fiscal regulations against the inroads of the dealers in contraband trade. Mr. Neckar computes the number of these patrols at upwards of twenty thousand. This shows the immense difficulty in preventing that species of traffic, where there is an inland communication, and places in a strong light the disadvantages with which the collection of duties in this country would be encumbered, if by disunion the States should be placed in a situation, with respect to each other, resembling that of France with respect to her neighbors. The arbitrary and vexatious powers with which the patrols are necessarily armed, would be intolerable in a free country.

If, on the contrary, there be but one government pervading all the States, there will be, as to the principal part of our commerce, but ONE SIDE to guard—the ATLANTIC COAST. Vessels arriving directly from foreign countries, laden with valuable cargoes, would rarely choose to hazard themselves to the complicated and critical perils which would attend attempts to unlade prior to their coming into port. They would have to dread both the dangers of the coast, and of detection, as well after as before their arrival at the places of their final destination. An ordinary degree of vigilance would be competent to the prevention of any material infractions upon the rights of the revenue. A few armed vessels, judiciously stationed at the entrances of our ports, might at a small expense be made useful sentinels of the laws. And the government having the same interest to provide against violations everywhere, the co-operation of its measures in each State would have a powerful tendency to render them effectual. Here also we

should preserve by Union, an advantage which nature holds out to us, and which would be relinquished by separation. The United States lie at a great distance from Europe, and at a considerable distance from all other places with which they would have extensive connections of foreign trade. The passage from them to us, in a few hours, or in a single night, as between the coasts of France and Britain, and of other neighboring nations, would be impracticable. This is a prodigious security against a direct contraband with foreign countries; but a circuitous contraband to one State, through the medium of another, would be both easy and safe. The difference between a direct importation from abroad, and an indirect importation through the channel of a neighboring State, in small parcels, according to time and opportunity, with the additional facilities of inland communication, must be palpable to every man of discernment.

It is therefore evident, that one national government would be able, at much less expense, to extend the duties on imports, beyond comparison, further than would be practicable to the States separately, or to any partial confederacies. Hitherto, I believe, it may safely be asserted, that these duties have not upon an average exceeded in any State three per cent. In France they are estimated to be about fifteen per cent., and in Britain they exceed this proportion.(1) There seems to be nothing to hinder their being increased in this country to at least treble their present amount. The single article of ardent spirits, under federal regulation, might be made to furnish a considerable revenue. Upon a ratio to the importation into this State, the whole quantity imported into the United States may be estimated at four millions of gallons; which, at a shilling per gallon, would produce two hundred thousand pounds. That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society. There is, perhaps, nothing so much a subject of national extravagance as these spirits.

What will be the consequence, if we are not able to avail ourselves of the resource in question in its full extent? A nation cannot long exist without revenues. Destitute of this essential support, it must resign its independence, and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land. It has been already intimated that excises, in their true signification, are too little in unison with the feelings of the people, to admit of great use being made of that mode of taxation; nor, indeed, in the States where almost the sole employment is agriculture, are the objects proper for excise sufficiently numerous to permit very ample collections in that way. Personal estate (as has been before remarked), from the difficulty in tracing it, cannot be subjected to large contributions, by any other means than by taxes on consumption. In populous cities, it may be enough the subject of conjecture, to occasion the oppression of individuals, without much aggregate benefit to the State; but beyond these circles, it must, in a great measure, escape the eye and the hand of the tax-gatherer. As the necessities of the State, nevertheless, must be satisfied in some mode or other, the defect of other resources must throw the principal weight of public burdens on the possessors of land. And as, on the other hand, the wants of the government can never obtain an adequate supply, unless all the sources of revenue are open to its demands, the finances of the community, under such embarrassments, cannot be put into a situation consistent with its respectability or its security. Thus we shall not even have the consolations of a full treasury, to atone for the oppression of that valuable class of the citizens who are employed in the cultivation of the soil. But public and private distress will keep pace with each other in gloomy concert; and unite in deploring the infatuation of those counsels which led to disunion.

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1. If my memory be right they amount to twenty per cent.

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FEDERALIST No. 13. Advantage of the Union in Respect to Economy in Government

For the Independent Journal. Wednesday, November 28, 1787

HAMILTON

To the People of the State of New York:

As CONNECTED with the subject of revenue, we may with propriety consider that of economy. The money saved from one object may be usefully applied to another, and there will be so much the less to be drawn from the pockets of the people. If the States are united under one government, there will be but one national civil list to support; if they are divided into several confederacies, there will be as many different national civil lists to be provided for—and each of them, as to the principal departments, coextensive with

that which would be necessary for a government of the whole. The entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates. The ideas of men who speculate upon the dismemberment of the empire seem generally turned toward three confederacies—one consisting of the four Northern, another of the four Middle, and a third of the five Southern States. There is little probability that there would be a greater number. According to this distribution, each confederacy would comprise an extent of territory larger than that of the kingdom of Great Britain. No well-informed man will suppose that the affairs of such a confederacy can be properly regulated by a government less comprehensive in its organs or institutions than that which has been proposed by the convention. When the dimensions of a State attain to a certain magnitude, it requires the same energy of government and the same forms of administration which are requisite in one of much greater extent. This idea admits not of precise demonstration, because there is no rule by which we can measure the momentum of civil power necessary to the government of any given number of individuals; but when we consider that the island of Britain, nearly commensurate with each of the supposed confederacies, contains about eight millions of people, and when we reflect upon the degree of authority required to direct the passions of so large a society to the public good, we shall see no reason to doubt that the like portion of power would be sufficient to perform the same task in a society far more numerous. Civil power, properly organized and exerted, is capable of diffusing its force to a very great extent; and can, in a manner, reproduce itself in every part of a great empire by a judicious arrangement of subordinate institutions.

The supposition that each confederacy into which the States would be likely to be divided would require a government not less comprehensive than the one proposed, will be strengthened by another supposition, more probable than that which presents us with three confederacies as the alternative to a general Union. If we attend carefully to geographical and commercial considerations, in conjunction with the habits and prejudices of the different States, we shall be led to conclude that in case of disunion they will most naturally league themselves under two governments. The four Eastern States, from all the causes that form the links of national sympathy and connection, may with certainty be expected to unite. New York, situated as she is, would never be unwise enough to oppose a feeble and unsupported flank to the weight of that confederacy. There are other obvious reasons that would facilitate her accession to it. New Jersey is too small a State to think of being a frontier, in opposition to this still more powerful combination; nor do there appear to be any obstacles to her admission into it. Even Pennsylvania would have strong inducements to join the Northern league. An active foreign commerce, on the basis of her own navigation, is her true policy, and coincides with the opinions and dispositions of her citizens. The more Southern States, from various circumstances, may not think themselves much interested in the encouragement of navigation. They may prefer a system which would give unlimited scope to all nations to be the carriers as well as the purchasers of their commodities. Pennsylvania may not choose to confound her interests in a connection so adverse to her policy. As she must at all events be a frontier, she may deem it most consistent with her safety to have her exposed side turned towards the weaker power of the Southern, rather than towards the stronger power of the Northern, Confederacy. This would give her the fairest chance to avoid being the Flanders of America. Whatever may be the determination of Pennsylvania, if the Northern Confederacy includes New Jersey, there is no likelihood of more than one confederacy to the south of that State.

Nothing can be more evident than that the thirteen States will be able to support a national government better than one half, or one third, or any number less than the whole. This reflection must have great weight in obviating that objection to the proposed plan, which is founded on the principle of expense; an objection, however, which, when we come to take a nearer view of it, will appear in every light to stand on mistaken ground.

If, in addition to the consideration of a plurality of civil lists, we take into view the number of persons who must necessarily be employed to guard the inland communication between the different confederacies against illicit trade, and who in time will infallibly spring up out of the necessities of revenue; and if we also take into view the military establishments which it has been shown would unavoidably result from the jealousies and conflicts of the several nations into which the States would be divided, we shall clearly discover that a separation would be not less injurious to the economy, than to the tranquillity, commerce, revenue, and liberty of every part.

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FEDERALIST No. 14. Objections to the Proposed Constitution From Extent of Territory Answered

From the New York Packet. Friday, November 30, 1787.

MADISON

To the People of the State of New York:

WE HAVE seen the necessity of the Union, as our bulwark against foreign danger, as the conservator of peace among ourselves, as the guardian of our commerce and other common interests, as the only substitute for those military establishments which have subverted the liberties of the Old World, and as the proper antidote for the diseases of faction, which have proved fatal to other popular governments, and of which alarming symptoms have been betrayed by our own. All that remains, within this branch of our inquiries, is to take notice of an objection that may be drawn from the great extent of country which the Union embraces. A few observations on this subject will be the more proper, as it is perceived that the adversaries of the new Constitution are availing themselves of the prevailing prejudice with regard to the practicable sphere of republican administration, in order to supply, by imaginary difficulties, the want of those solid objections which they endeavor in vain to find.

The error which limits republican government to a narrow district has been unfolded and refuted in preceding papers. I remark here only that it seems to owe its rise and prevalence chiefly to the confounding of a republic with a democracy, applying to the former reasonings drawn from the nature of the latter. The true distinction between these forms was also adverted to on a former occasion. It is, that in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents. A democracy, consequently, will be confined to a small spot. A republic may be extended over a large region.

To this accidental source of the error may be added the artifice of some celebrated authors, whose writings have had a great share in forming the modern standard of political opinions. Being subjects either of an absolute or limited monarchy, they have endeavored to heighten the advantages, or palliate the evils of those forms, by placing in comparison the vices and defects of the republican, and by citing as specimens of the latter the turbulent democracies of ancient Greece and modern Italy. Under the confusion of names, it has been an easy task to transfer to a republic observations applicable to a democracy only; and among others, the observation that it can never be established but among a small number of people, living within a small compass of territory.

Such a fallacy may have been the less perceived, as most of the popular governments of antiquity were of the democratic species; and even in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular, and founded, at the same time, wholly on that principle. If Europe has the merit of discovering this great mechanical power in government, by the simple agency of which the will of the largest political body may be concentred, and its force directed to any object which the public good requires, America can claim the merit of making the discovery the basis of unmixed and extensive republics. It is only to be lamented that any of her citizens should wish to deprive her of the additional merit of displaying its full efficacy in the establishment of the comprehensive system now under her consideration.

As the natural limit of a democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater number than can join in those functions; so the natural limit of a republic is that distance from the centre which will barely allow the representatives to meet as often as may be necessary for the administration of public affairs. Can it be said that the limits of the United States exceed this distance? It will not be said by those who recollect that the Atlantic coast is the longest side of the Union, that during the term of thirteen years, the representatives of the States have been almost continually assembled, and that the members from the most distant States are not chargeable with greater intermissions of attendance than those from the States in the neighborhood of Congress.

That we may form a juster estimate with regard to this interesting subject, let us resort to the actual dimensions of the Union. The limits, as fixed by the treaty of peace, are: on the east the Atlantic, on the south the latitude of thirty-one degrees, on the west the Mississippi, and on the north an irregular line running in some instances beyond the forty-fifth degree, in others falling as low as the forty-second. The southern shore of Lake Erie lies below that latitude. Computing the distance between the thirty-first and forty-fifth degrees, it amounts to nine hundred and seventy-three common miles; computing it from thirty-one to forty-two degrees, to seven hundred and sixty-four miles and a half. Taking the mean for the distance, the amount will be eight hundred and sixty-eight miles and three-fourths. The mean distance from the Atlantic to the Mississippi does not probably exceed seven hundred and fifty miles. On a comparison of this extent with that of several countries in Europe, the practicability of rendering our system commensurate to it appears to be demonstrable. It is not a great deal larger than Germany, where a diet representing the whole empire is continually assembled; or than Poland before the late dismemberment, where another national diet was the depositary of the supreme power. Passing by France and Spain, we find that in Great Britain, inferior as it may be in size, the representatives of the northern extremity of the island have as far to travel to the national council as will be required of those of the most remote parts of the Union.

Favorable as this view of the subject may be, some observations remain which will place it in a light still more satisfactory.

In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other subjects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the convention to abolish the governments of the particular States, its adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction.

A second observation to be made is that the immediate object of the federal Constitution is to secure the union of the thirteen primitive States, which we know to be practicable; and to add to them such other States as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable. The arrangements that may be necessary for those angles and fractions of our territory which lie on our northwestern frontier, must be left to those whom further discoveries and experience will render more equal to the task.

Let it be remarked, in the third place, that the intercourse throughout the Union will be facilitated by new improvements. Roads will everywhere be shortened, and kept in better order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.

A fourth and still more important consideration is, that as almost every State will, on one side or other, be a frontier, and will thus find, in regard to its safety, an inducement to make some sacrifices for the sake of the general protection; so the States which lie at the greatest distance from the heart of the Union, and which, of course, may partake least of the ordinary circulation of its benefits, will be at the same time immediately contiguous to foreign nations, and will consequently stand, on particular occasions, in greatest need of its strength and resources. It may be inconvenient for Georgia, or the States forming our western or northeastern borders, to send their representatives to the seat of government; but they would find it more so to struggle alone against an invading enemy, or even to support alone the whole expense of those precautions which may be dictated by the neighborhood of continual danger. If they should derive less benefit, therefore, from the Union in some respects than the less distant States, they will derive greater benefit from it in other respects, and thus the proper equilibrium will be maintained throughout.

I submit to you, my fellow-citizens, these considerations, in full confidence that the good sense which has so often marked your decisions will allow them their due weight and effect; and that you will never suffer difficulties, however formidable in appearance, or however fashionable the error on which they may be founded, to drive you into the gloomy and perilous scene into which the advocates for disunion would conduct you. Hearken not to the unnatural voice which tells you that the people of America, knit together as they are by so many cords of affection, can no longer live together as members of the same family; can no longer continue the mutual guardians of their mutual happiness; can no longer be fellow citizens of one great, respectable, and flourishing empire. Hearken not to the voice which petulantly tells you that the form of government recommended for your adoption is a novelty in the political world; that it has never yet had a place in the theories of the wildest projectors; that it rashly attempts what it is impossible to accomplish. No, my countrymen, shut your ears against this unhallowed language. Shut your hearts against the poison which it conveys; the kindred blood which flows in the veins of American citizens, the mingled blood which they have shed in defense of their sacred rights, consecrate their Union, and excite horror at the idea of their becoming aliens, rivals, enemies. And if novelties are to be shunned, believe me, the most alarming of all novelties, the most wild of all projects, the most rash of all attempts, is that of rendering us in pieces, in order to preserve our liberties and promote our happiness. But why is the experiment of an extended republic to be rejected, merely because it may comprise what is new? Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favor of private rights and public happiness. Had no important step been taken by the leaders of the Revolution for which a precedent could not be discovered, no government established of which an exact model did not present itself, the people of the United States might, at this moment have been

numbered among the melancholy victims of misguided councils, must at best have been laboring under the weight of some of those forms which have crushed the liberties of the rest of mankind. Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate. If their works betray imperfections, we wonder at the fewness of them. If they erred most in the structure of the Union, this was the work most difficult to be executed; this is the work which has been new modelled by the act of your convention, and it is that act on which you are now to deliberate and to decide.

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FEDERALIST No. 15. The Insufficiency of the Present Confederation to Preserve the Union

For the Independent Journal. Saturday, December 1, 1787

HAMILTON

To the People of the State of New York.

IN THE course of the preceding papers, I have endeavored, my fellow citizens, to place before you, in a clear and convincing light, the importance of Union to your political safety and happiness. I have unfolded to you a complication of dangers to which you would be exposed, should you permit that sacred knot which binds the people of America together be severed or dissolved by ambition or by avarice, by jealousy or by misrepresentation. In the sequel of the inquiry through which I propose to accompany you, the truths intended to be inculcated will receive further confirmation from facts and arguments hitherto unnoticed. If the road over which you will still have to pass should in some places appear to you tedious or irksome, you will recollect that you are in quest of information on a subject the most momentous which can engage the attention of a free people, that the field through which you have to travel is in itself spacious, and that the difficulties of the journey have been unnecessarily increased by the mazes with which sophistry has beset the way. It will be my aim to remove the obstacles from your progress in as compendious a manner as it can be done, without sacrificing utility to despatch.

In pursuance of the plan which I have laid down for the discussion of the subject, the point next in order to be examined is the “insufficiency of the present Confederation to the preservation of the Union.” It may perhaps be asked what need there is of reasoning or proof to illustrate a position which is not either controverted or doubted, to which the understandings and feelings of all classes of men assent, and which in substance is admitted by the opponents as well as by the friends of the new Constitution. It must in truth be acknowledged that, however these may differ in other respects, they in general appear to harmonize in this sentiment, at least, that there are material imperfections in our national system, and that something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion are no longer objects of speculation. They have forced themselves upon the sensibility of the people at large, and have at length extorted from those, whose mistaken policy has had the principal share in precipitating the extremity at which we are arrived, a reluctant confession of the reality of those defects in the scheme of our federal government, which have been long pointed out and regretted by the intelligent friends of the Union.

We may indeed with propriety be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride or degrade the character of an independent nation which we do not experience. Are there engagements to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in the possession of a foreign power which, by express stipulations, ought long since to have been surrendered? These are still retained, to the prejudice of our interests, not less than of our rights. Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.(1) Are we even in a condition to remonstrate with dignity? The just imputations on our own faith, in respect to the same treaty, ought first to be removed. Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it. Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our government even forbids them to treat with us. Our ambassadors abroad are the mere

pageants of mimic sovereignty. Is a violent and unnatural decrease in the value of land a symptom of national distress? The price of improved land in most parts of the country is much lower than can be accounted for by the quantity of waste land at market, and can only be fully explained by that want of private and public confidence, which are so alarmingly prevalent among all ranks, and which have a direct tendency to depreciate property of every kind. Is private credit the friend and patron of industry? That most useful kind which relates to borrowing and lending is reduced within the narrowest limits, and this still more from an opinion of insecurity than from the scarcity of money. To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes?

This is the melancholy situation to which we have been brought by those very maxims and councils which would now deter us from adopting the proposed Constitution; and which, not content with having conducted us to the brink of a precipice, seem resolved to plunge us into the abyss that awaits us below. Here, my countrymen, impelled by every motive that ought to influence an enlightened people, let us make a firm stand for our safety, our tranquillity, our dignity, our reputation. Let us at last break the fatal charm which has too long seduced us from the paths of felicity and prosperity.

It is true, as has been before observed that facts, too stubborn to be resisted, have produced a species of general assent to the abstract proposition that there exist material defects in our national system; but the usefulness of the concession, on the part of the old adversaries of federal measures, is destroyed by a strenuous opposition to a remedy, upon the only principles that can give it a chance of success. While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an imperium in imperio. This renders a full display of the principal defects of the Confederation necessary, in order to show that the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of appointment, the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind, that after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution, for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword to the mild influence of the magistracy.

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion.

If the particular States in this country are disposed to stand in a similar relation to each other, and to drop the project of a general DISCRETIONARY SUPERINTENDENCE, the scheme would indeed be pernicious, and would entail upon us all the mischiefs

which have been enumerated under the first head; but it would have the merit of being, at least, consistent and practicable Abandoning all views towards a confederate government, this would bring us to a simple alliance offensive and defensive; and would place us in a situation to be alternate friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.

But if we are unwilling to be placed in this perilous situation; if we still will adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens,—the only proper objects of government.

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity, be employed against bodies politic, or communities, or States. It is evident that there is no process of a court by which the observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities, that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

There was a time when we were told that breaches, by the States, of the regulations of the federal authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.

In addition to all this, there is, in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens, that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common centre. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us how little reason there is to expect, that the persons intrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready, with perfect good-humor, and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature.

If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims; the momentary conveniences or inconveniences that would attend its adoption. All this will be done; and in a spirit of interested and suspicious scrutiny, without that knowledge of national circumstances and reasons of state, which is essential to a right judgment, and with that strong predilection in favor of local objects, which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is

constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part. Those who have been conversant in the proceedings of popular assemblies; who have seen how difficult it often is, where there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive how impossible it must be to induce a number of such assemblies, deliberating at a distance from each other, at different times, and under different impressions, long to co-operate in the same views and pursuits.

In our case, the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has, at length, arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration, till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified produced at first only unequal and disproportionate degrees of compliance with the requisitions of the Union. The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying, or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden? These were suggestions which human selfishness could not withstand, and which even speculative men, who looked forward to remote consequences, could not, without hesitation, combat. Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.

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1. “I mean for the Union.”

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FEDERALIST No. 16. The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)

From the New York Packet. Tuesday, December 4, 1787.

HAMILTON

To the People of the State of New York:

THE tendency of the principle of legislation for States, or communities, in their political capacities, as it has been exemplified by the experiment we have made of it, is equally attested by the events which have befallen all other governments of the confederate kind, of which we have any account, in exact proportion to its prevalence in those systems. The confirmations of this fact will be worthy of a distinct and particular examination. I shall content myself with barely observing here, that of all the confederacies of antiquity, which history has handed down to us, the Lycian and Achaean leagues, as far as there remain vestiges of them, appear to have been most free from the fetters of that mistaken principle, and were accordingly those which have best deserved, and have most liberally received, the applauding suffrages of political writers.

This exceptionable principle may, as truly as emphatically, be styled the parent of anarchy: It has been seen that delinquencies in the members of the Union are its natural and necessary offspring; and that whenever they happen, the only constitutional remedy is force, and the immediate effect of the use of it, civil war.

It remains to inquire how far so odious an engine of government, in its application to us, would even be capable of answering its end. If there should not be a large army constantly at the disposal of the national government it would either not be able to employ force at all, or, when this could be done, it would amount to a war between parts of the Confederacy concerning the infractions of a league, in which the strongest combination would be most likely to prevail, whether it consisted of those who supported or of those who resisted the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member, and if there were more than one who had neglected their duty, similarity of situation would induce them to unite for common defense. Independent of this motive of sympathy, if a large and influential State should happen to be the aggressing member, it would commonly have weight enough with its neighbors to win over some of them as associates to its cause. Specious arguments of danger to the common liberty could easily be contrived; plausible excuses for the deficiencies of the party could,

without difficulty, be invented to alarm the apprehensions, inflame the passions, and conciliate the good-will, even of those States which were not chargeable with any violation or omission of duty. This would be the more likely to take place, as the delinquencies of the larger members might be expected sometimes to proceed from an ambitious premeditation in their rulers, with a view to getting rid of all external control upon their designs of personal aggrandizement; the better to effect which it is presumable they would tamper beforehand with leading individuals in the adjacent States. If associates could not be found at home, recourse would be had to the aid of foreign powers, who would seldom be disinclined to encouraging the dissensions of a Confederacy, from the firm union of which they had so much to fear. When the sword is once drawn, the passions of men observe no bounds of moderation. The suggestions of wounded pride, the instigations of irritated resentment, would be apt to carry the States against which the arms of the Union were exerted, to any extremes necessary to avenge the affront or to avoid the disgrace of submission. The first war of this kind would probably terminate in a dissolution of the Union.

This may be considered as the violent death of the Confederacy. Its more natural death is what we now seem to be on the point of experiencing, if the federal system be not speedily renovated in a more substantial form. It is not probable, considering the genius of this country, that the complying States would often be inclined to support the authority of the Union by engaging in a war against the non-complying States. They would always be more ready to pursue the milder course of putting themselves upon an equal footing with the delinquent members by an imitation of their example. And the guilt of all would thus become the security of all. Our past experience has exhibited the operation of this spirit in its full light. There would, in fact, be an insuperable difficulty in ascertaining when force could with propriety be employed. In the article of pecuniary contribution, which would be the most usual source of delinquency, it would often be impossible to decide whether it had proceeded from disinclination or inability. The pretense of the latter would always be at hand. And the case must be very flagrant in which its fallacy could be detected with sufficient certainty to justify the harsh expedient of compulsion. It is easy to see that this problem alone, as often as it should occur, would open a wide field for the exercise of factious views, of partiality, and of oppression, in the majority that happened to prevail in the national council.

It seems to require no pains to prove that the States ought not to prefer a national Constitution which could only be kept in motion by the instrumentality of a large army continually on foot to execute the ordinary requisitions or decrees of the government. And yet this is the plain alternative involved by those who wish to deny it the power of extending its operations to individuals. Such a scheme, if practicable at all, would instantly degenerate into a military despotism; but it will be found in every light impracticable. The resources of the Union would not be equal to the maintenance of an army considerable enough to confine the larger States within the limits of their duty; nor would the means ever be furnished of forming such an army in the first instance. Whoever considers the populousness and strength of several of these States singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is little less romantic than the monster-taming spirit which is attributed to the fabulous heroes and demi-gods of antiquity.

Even in those confederacies which have been composed of members smaller than many of our counties, the principle of legislation for sovereign States, supported by military coercion, has never been found effectual. It has rarely been attempted to be employed, but against the weaker members; and in most instances attempts to coerce the refractory and disobedient have been the signals of bloody wars, in which one half of the confederacy has displayed its banners against the other half.

The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each State, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have aright to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the government of the particular States.

To this reasoning it may perhaps be objected, that if any State should be disaffected to the authority of the Union, it could at any time obstruct the execution of its laws, and bring the matter to the same issue of force, with the necessity of which the opposite

scheme is reproached.

The plausibility of this objection will vanish the moment we advert to the essential difference between a mere NON-COMPLIANCE and a DIRECT and ACTIVE RESISTANCE. If the interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only NOT TO ACT, or TO ACT EVASIVELY, and the measure is defeated. This neglect of duty may be disguised under affected but unsubstantial provisions, so as not to appear, and of course not to excite any alarm in the people for the safety of the Constitution. The State leaders may even make a merit of their surreptitious invasions of it on the ground of some temporary convenience, exemption, or advantage.

But if the execution of the laws of the national government should not require the intervention of the State legislatures, if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions nor evasions would answer the end. They would be obliged to act, and in such a manner as would leave no doubt that they had encroached on the national rights. An experiment of this nature would always be hazardous in the face of a constitution in any degree competent to its own defense, and of a people enlightened enough to distinguish between a legal exercise and an illegal usurpation of authority. The success of it would require not merely a factious majority in the legislature, but the concurrence of the courts of justice and of the body of the people. If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void. If the people were not tainted with the spirit of their State representatives, they, as the natural guardians of the Constitution, would throw their weight into the national scale and give it a decided preponderancy in the contest. Attempts of this kind would not often be made with levity or rashness, because they could seldom be made without danger to the authors, unless in cases of a tyrannical exercise of the federal authority.

If opposition to the national government should arise from the disorderly conduct of refractory or seditious individuals, it could be overcome by the same means which are daily employed against the same evil under the State governments. The magistracy, being equally the ministers of the law of the land, from whatever source it might emanate, would doubtless be as ready to guard the national as the local regulations from the inroads of private licentiousness. As to those partial commotions and insurrections, which sometimes disquiet society, from the intrigues of an inconsiderable faction, or from sudden or occasional illhumors that do not infect the great body of the community the general government could command more extensive resources for the suppression of disturbances of that kind than would be in the power of any single member. And as to those mortal feuds which, in certain conjunctures, spread a conflagration through a whole nation, or through a very large proportion of it, proceeding either from weighty causes of discontent given by the government or from the contagion of some violent popular paroxysm, they do not fall within any ordinary rules of calculation. When they happen, they commonly amount to revolutions and dismemberments of empire. No form of government can always either avoid or control them. It is in vain to hope to guard against events too mighty for human foresight or precaution, and it would be idle to object to a government because it could not perform impossibilities.

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FEDERALIST No. 17. The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)

For the Independent Journal. Wednesday, December 5, 1787

HAMILTON

To the People of the State of New York:

AN OBJECTION, of a nature different from that which has been stated and answered, in my last address, may perhaps be likewise urged against the principle of legislation for the individual citizens of America. It may be said that it would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of

agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.

But let it be admitted, for argument's sake, that mere wantonness and lust of domination would be sufficient to beget that disposition; still it may be safely affirmed, that the sense of the constituent body of the national representatives, or, in other words, the people of the several States, would control the indulgence of so extravagant an appetite. It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State governments if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty.

The superiority of influence in favor of the particular governments would result partly from the diffusive construction of the national government, but chiefly from the nature of the objects to which the attention of the State administrations would be directed.

It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

This strong propensity of the human heart would find powerful auxiliaries in the objects of State regulation.

The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations, and which will form so many rivulets of influence, running through every part of the society, cannot be particularized, without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.

There is one transcendant advantage belonging to the province of the State governments, which alone suffices to place the matter in a clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes, more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

The operations of the national government, on the other hand, falling less immediately under the observation of the mass of the citizens, the benefits derived from it will chiefly be perceived and attended to by speculative men. Relating to more general interests, they will be less apt to come home to the feelings of the people; and, in proportion, less likely to inspire an habitual sense of obligation, and an active sentiment of attachment.

The reasoning on this head has been abundantly exemplified by the experience of all federal constitutions with which we are acquainted, and of all others which have borne the least analogy to them.

Though the ancient feudal systems were not, strictly speaking, confederacies, yet they partook of the nature of that species of association. There was a common head, chieftain, or sovereign, whose authority extended over the whole nation; and a number of subordinate vassals, or feudatories, who had large portions of land allotted to them, and numerous trains of INFERIOR vassals or retainers, who occupied and cultivated that land upon the tenure of fealty or obedience, to the persons of whom they held it. Each principal vassal was a kind of sovereign, within his particular demesnes. The consequences of this situation were a continual opposition to authority of the sovereign, and frequent wars between the great barons or chief feudatories themselves. The power of

the head of the nation was commonly too weak, either to preserve the public peace, or to protect the people against the oppressions of their immediate lords. This period of European affairs is emphatically styled by historians, the times of feudal anarchy.

When the sovereign happened to be a man of vigorous and warlike temper and of superior abilities, he would acquire a personal weight and influence, which answered, for the time, the purpose of a more regular authority. But in general, the power of the barons triumphed over that of the prince; and in many instances his dominion was entirely thrown off, and the great fiefs were erected into independent principalities or States. In those instances in which the monarch finally prevailed over his vassals, his success was chiefly owing to the tyranny of those vassals over their dependents. The barons, or nobles, equally the enemies of the sovereign and the oppressors of the common people, were dreaded and detested by both; till mutual danger and mutual interest effected a union between them fatal to the power of the aristocracy. Had the nobles, by a conduct of clemency and justice, preserved the fidelity and devotion of their retainers and followers, the contests between them and the prince must almost always have ended in their favor, and in the abridgment or subversion of the royal authority.

This is not an assertion founded merely in speculation or conjecture. Among other illustrations of its truth which might be cited, Scotland will furnish a cogent example. The spirit of clanship which was, at an early day, introduced into that kingdom, uniting the nobles and their dependants by ties equivalent to those of kindred, rendered the aristocracy a constant overmatch for the power of the monarch, till the incorporation with England subdued its fierce and ungovernable spirit, and reduced it within those rules of subordination which a more rational and more energetic system of civil polity had previously established in the latter kingdom.

The separate governments in a confederacy may aptly be compared with the feudal baronies; with this advantage in their favor, that from the reasons already explained, they will generally possess the confidence and good-will of the people, and with so important a support, will be able effectually to oppose all encroachments of the national government. It will be well if they are not able to counteract its legitimate and necessary authority. The points of similitude consist in the rivalship of power, applicable to both, and in the CONCENTRATION of large portions of the strength of the community into particular DEPOSITORIES, in one case at the disposal of individuals, in the other case at the disposal of political bodies.

A concise review of the events that have attended confederate governments will further illustrate this important doctrine; an inattention to which has been the great source of our political mistakes, and has given our jealousy a direction to the wrong side. This review shall form the subject of some ensuing papers.

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FEDERALIST No. 18. The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)

For the New York Packet. Friday, December 7, 1787

MADISON, with HAMILTON

To the People of the State of New York:

AMONG the confederacies of antiquity, the most considerable was that of the Grecian republics, associated under the Amphictyonic council. From the best accounts transmitted of this celebrated institution, it bore a very instructive analogy to the present Confederation of the American States.

The members retained the character of independent and sovereign states, and had equal votes in the federal council. This council had a general authority to propose and resolve whatever it judged necessary for the common welfare of Greece; to declare and carry on war; to decide, in the last resort, all controversies between the members; to fine the aggressing party; to employ the whole force of the confederacy against the disobedient; to admit new members. The Amphictyons were the guardians of religion, and of the immense riches belonging to the temple of Delphos, where they had the right of jurisdiction in controversies between the inhabitants and those who came to consult the oracle. As a further provision for the efficacy of the federal powers, they took an oath mutually to defend and protect the united cities, to punish the violators of this oath, and to inflict vengeance on sacrilegious despoilers of the temple.

In theory, and upon paper, this apparatus of powers seems amply sufficient for all general purposes. In several material instances, they exceed the powers enumerated in the articles of confederation. The Amphictyons had in their hands the superstition of the

times, one of the principal engines by which government was then maintained; they had a declared authority to use coercion against refractory cities, and were bound by oath to exert this authority on the necessary occasions.

Very different, nevertheless, was the experiment from the theory. The powers, like those of the present Congress, were administered by deputies appointed wholly by the cities in their political capacities; and exercised over them in the same capacities. Hence the weakness, the disorders, and finally the destruction of the confederacy. The more powerful members, instead of being kept in awe and subordination, tyrannized successively over all the rest. Athens, as we learn from Demosthenes, was the arbiter of Greece seventy-three years. The Lacedaemonians next governed it twenty-nine years; at a subsequent period, after the battle of Leuctra, the Thebans had their turn of domination.

It happened but too often, according to Plutarch, that the deputies of the strongest cities awed and corrupted those of the weaker; and that judgment went in favor of the most powerful party.

Even in the midst of defensive and dangerous wars with Persia and Macedon, the members never acted in concert, and were, more or fewer of them, eternally the dupes or the hirelings of the common enemy. The intervals of foreign war were filled up by domestic vicissitudes convulsions, and carnage.

After the conclusion of the war with Xerxes, it appears that the Lacedaemonians required that a number of the cities should be turned out of the confederacy for the unfaithful part they had acted. The Athenians, finding that the Lacedaemonians would lose fewer partisans by such a measure than themselves, and would become masters of the public deliberations, vigorously opposed and defeated the attempt. This piece of history proves at once the inefficiency of the union, the ambition and jealousy of its most powerful members, and the dependent and degraded condition of the rest. The smaller members, though entitled by the theory of their system to revolve in equal pride and majesty around the common center, had become, in fact, satellites of the orbs of primary magnitude.

Had the Greeks, says the Abbe Milot, been as wise as they were courageous, they would have been admonished by experience of the necessity of a closer union, and would have availed themselves of the peace which followed their success against the Persian arms, to establish such a reformation. Instead of this obvious policy, Athens and Sparta, inflated with the victories and the glory they had acquired, became first rivals and then enemies; and did each other infinitely more mischief than they had suffered from Xerxes. Their mutual jealousies, fears, hatreds, and injuries ended in the celebrated Peloponnesian war; which itself ended in the ruin and slavery of the Athenians who had begun it.

As a weak government, when not at war, is ever agitated by internal dissentions, so these never fail to bring on fresh calamities from abroad. The Phocians having ploughed up some consecrated ground belonging to the temple of Apollo, the Amphictyonic council, according to the superstition of the age, imposed a fine on the sacrilegious offenders. The Phocians, being abetted by Athens and Sparta, refused to submit to the decree. The Thebans, with others of the cities, undertook to maintain the authority of the Amphictyons, and to avenge the violated god. The latter, being the weaker party, invited the assistance of Philip of Macedon, who had secretly fostered the contest. Philip gladly seized the opportunity of executing the designs he had long planned against the liberties of Greece. By his intrigues and bribes he won over to his interests the popular leaders of several cities; by their influence and votes, gained admission into the Amphictyonic council; and by his arts and his arms, made himself master of the confederacy.

Such were the consequences of the fallacious principle on which this interesting establishment was founded. Had Greece, says a judicious observer on her fate, been united by a stricter confederation, and persevered in her union, she would never have worn the chains of Macedon; and might have proved a barrier to the vast projects of Rome.

The Achaean league, as it is called, was another society of Grecian republics, which supplies us with valuable instruction.

The Union here was far more intimate, and its organization much wiser, than in the preceding instance. It will accordingly appear, that though not exempt from a similar catastrophe, it by no means equally deserved it.

The cities composing this league retained their municipal jurisdiction, appointed their own officers, and enjoyed a perfect equality. The senate, in which they were represented, had the sole and exclusive right of peace and war; of sending and receiving ambassadors; of entering into treaties and alliances; of appointing a chief magistrate or praetor, as he was called, who commanded their armies, and who, with the advice and consent of ten of the senators, not only administered the government in the recess of the senate, but had a great share in its deliberations, when assembled. According to the primitive constitution, there were two praetors associated in the administration; but on trial a single one was preferred.

It appears that the cities had all the same laws and customs, the same weights and measures, and the same money. But how far this effect proceeded from the authority of the federal council is left in uncertainty. It is said only that the cities were in a manner compelled to receive the same laws and usages. When Lacedaemon was brought into the league by Philopoemen, it was attended with an abolition of the institutions and laws of Lycurgus, and an adoption of those of the Achaeans. The Amphictyonic confederacy, of which she had been a member, left her in the full exercise of her government and her legislation. This circumstance alone proves a very material difference in the genius of the two systems.

It is much to be regretted that such imperfect monuments remain of this curious political fabric. Could its interior structure and regular operation be ascertained, it is probable that more light would be thrown by it on the science of federal government, than by any of the like experiments with which we are acquainted.

One important fact seems to be witnessed by all the historians who take notice of Achaean affairs. It is, that as well after the renovation of the league by Aratus, as before its dissolution by the arts of Macedon, there was infinitely more of moderation and justice in the administration of its government, and less of violence and sedition in the people, than were to be found in any of the cities exercising SINGLY all the prerogatives of sovereignty. The Abbe Mably, in his observations on Greece, says that the popular government, which was so tempestuous elsewhere, caused no disorders in the members of the Achaean republic, BECAUSE IT WAS THERE TEMPERED BY THE GENERAL AUTHORITY AND LAWS OF THE CONFEDERACY.

We are not to conclude too hastily, however, that faction did not, in a certain degree, agitate the particular cities; much less that a due subordination and harmony reigned in the general system. The contrary is sufficiently displayed in the vicissitudes and fate of the republic.

Whilst the Amphictyonic confederacy remained, that of the Achaeans, which comprehended the less important cities only, made little figure on the theatre of Greece. When the former became a victim to Macedon, the latter was spared by the policy of Philip and Alexander. Under the successors of these princes, however, a different policy prevailed. The arts of division were practiced among the Achaeans. Each city was seduced into a separate interest; the union was dissolved. Some of the cities fell under the tyranny of Macedonian garrisons; others under that of usurpers springing out of their own confusions. Shame and oppression erelong awaken their love of liberty. A few cities reunited. Their example was followed by others, as opportunities were found of cutting off their tyrants. The league soon embraced almost the whole Peloponnesus. Macedon saw its progress; but was hindered by internal dissensions from stopping it. All Greece caught the enthusiasm and seemed ready to unite in one confederacy, when the jealousy and envy in Sparta and Athens, of the rising glory of the Achaeans, threw a fatal damp on the enterprise. The dread of the Macedonian power induced the league to court the alliance of the Kings of Egypt and Syria, who, as successors of Alexander, were rivals of the king of Macedon. This policy was defeated by Cleomenes, king of Sparta, who was led by his ambition to make an unprovoked attack on his neighbors, the Achaeans, and who, as an enemy to Macedon, had interest enough with the Egyptian and Syrian princes to effect a breach of their engagements with the league.

The Achaeans were now reduced to the dilemma of submitting to Cleomenes, or of supplicating the aid of Macedon, its former oppressor. The latter expedient was adopted. The contests of the Greeks always afforded a pleasing opportunity to that powerful neighbor of intermeddling in their affairs. A Macedonian army quickly appeared. Cleomenes was vanquished. The Achaeans soon experienced, as often happens, that a victorious and powerful ally is but another name for a master. All that their most abject compliances could obtain from him was a toleration of the exercise of their laws. Philip, who was now on the throne of Macedon, soon provoked by his tyrannies, fresh combinations among the Greeks. The Achaeans, though weakened by internal dissensions and by the revolt of Messene, one of its members, being joined by the AEtolians and Athenians, erected the standard of opposition. Finding themselves, though thus supported, unequal to the undertaking, they once more had recourse to the dangerous expedient of introducing the succor of foreign arms. The Romans, to whom the invitation was made, eagerly embraced it. Philip was conquered; Macedon subdued. A new crisis ensued to the league. Dissensions broke out among it members. These the Romans fostered. Callicrates and other popular leaders became mercenary instruments for inveigling their countrymen. The more effectually to nourish discord and disorder the Romans had, to the astonishment of those who confided in their sincerity, already proclaimed universal liberty(1) throughout Greece. With the same insidious views, they now seduced the members from the league, by representing to their pride the violation it committed on their sovereignty. By these arts this union, the last hope of Greece, the last hope of ancient liberty, was torn into pieces; and such imbecility and distraction introduced, that the arms of Rome found little difficulty in completing the ruin which their arts had commenced. The Achaeans were cut to pieces, and Achaia loaded with chains, under which it is groaning at this hour.

I have thought it not superfluous to give the outlines of this important portion of history; both because it teaches more than one lesson, and because, as a supplement to the outlines of the Achaean constitution, it emphatically illustrates the tendency of federal bodies rather to anarchy among the members, than to tyranny in the head.

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1. This was but another name more specious for the independence of the members on the federal head.

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FEDERALIST No. 19. The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)

For the Independent Journal. Saturday, December 8, 1787

MADISON, with HAMILTON

To the People of the State of New York:

THE examples of ancient confederacies, cited in my last paper, have not exhausted the source of experimental instruction on this subject. There are existing institutions, founded on a similar principle, which merit particular consideration. The first which presents itself is the Germanic body.

In the early ages of Christianity, Germany was occupied by seven distinct nations, who had no common chief. The Franks, one of the number, having conquered the Gauls, established the kingdom which has taken its name from them. In the ninth century Charlemagne, its warlike monarch, carried his victorious arms in every direction; and Germany became a part of his vast dominions. On the dismemberment, which took place under his sons, this part was erected into a separate and independent empire. Charlemagne and his immediate descendants possessed the reality, as well as the ensigns and dignity of imperial power. But the principal vassals, whose fiefs had become hereditary, and who composed the national diets which Charlemagne had not abolished, gradually threw off the yoke and advanced to sovereign jurisdiction and independence. The force of imperial sovereignty was insufficient to restrain such powerful dependants; or to preserve the unity and tranquillity of the empire. The most furious private wars, accompanied with every species of calamity, were carried on between the different princes and states. The imperial authority, unable to maintain the public order, declined by degrees till it was almost extinct in the anarchy, which agitated the long interval between the death of the last emperor of the Suabian, and the accession of the first emperor of the Austrian lines. In the eleventh century the emperors enjoyed full sovereignty: In the fifteenth they had little more than the symbols and decorations of power.

Out of this feudal system, which has itself many of the important features of a confederacy, has grown the federal system which constitutes the Germanic empire. Its powers are vested in a diet representing the component members of the confederacy; in the emperor, who is the executive magistrate, with a negative on the decrees of the diet; and in the imperial chamber and the aulic council, two judiciary tribunals having supreme jurisdiction in controversies which concern the empire, or which happen among its members.

The diet possesses the general power of legislating for the empire; of making war and peace; contracting alliances; assessing quotas of troops and money; constructing fortresses; regulating coin; admitting new members; and subjecting disobedient members to the ban of the empire, by which the party is degraded from his sovereign rights and his possessions forfeited. The members of the confederacy are expressly restricted from entering into compacts prejudicial to the empire; from imposing tolls and duties on their mutual intercourse, without the consent of the emperor and diet; from altering the value of money; from doing injustice to one another; or from affording assistance or retreat to disturbers of the public peace. And the ban is denounced against such as shall violate any of these restrictions. The members of the diet, as such, are subject in all cases to be judged by the emperor and diet, and in their private capacities by the aulic council and imperial chamber.

The prerogatives of the emperor are numerous. The most important of them are: his exclusive right to make propositions to the diet; to negative its resolutions; to name ambassadors; to confer dignities and titles; to fill vacant electorates; to found universities; to grant privileges not injurious to the states of the empire; to receive and apply the public revenues; and generally to watch over the public safety. In certain cases, the electors form a council to him. In quality of emperor, he possesses no territory within the empire, nor receives any revenue for his support. But his revenue and dominions, in other qualities, constitute him one of the most powerful princes in Europe.

From such a parade of constitutional powers, in the representatives and head of this confederacy, the natural supposition would be, that it must form an exception to the general character which belongs to its kindred systems. Nothing would be further from the reality. The fundamental principle on which it rests, that the empire is a community of sovereigns, that the diet is a representation of sovereigns and that the laws are addressed to sovereigns, renders the empire a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels.

The history of Germany is a history of wars between the emperor and the princes and states; of wars among the princes and states themselves; of the licentiousness of the strong, and the oppression of the weak; of foreign intrusions, and foreign intrigues; of requisitions of men and money disregarded, or partially complied with; of attempts to enforce them, altogether abortive, or attended with slaughter and desolation, involving the innocent with the guilty; of general imbecility, confusion, and misery.

In the sixteenth century, the emperor, with one part of the empire on his side, was seen engaged against the other princes and states. In one of the conflicts, the emperor himself was put to flight, and very near being made prisoner by the elector of Saxony. The late king of Prussia was more than once pitted against his imperial sovereign; and commonly proved an overmatch for him. Controversies and wars among the members themselves have been so common, that the German annals are crowded with the bloody pages which describe them. Previous to the peace of Westphalia, Germany was desolated by a war of thirty years, in which the emperor, with one half of the empire, was on one side, and Sweden, with the other half, on the opposite side. Peace was at length negotiated, and dictated by foreign powers; and the articles of it, to which foreign powers are parties, made a fundamental part of the Germanic constitution.

If the nation happens, on any emergency, to be more united by the necessity of self-defense, its situation is still deplorable. Military preparations must be preceded by so many tedious discussions, arising from the jealousies, pride, separate views, and clashing pretensions of sovereign bodies, that before the diet can settle the arrangements, the enemy are in the field; and before the federal troops are ready to take it, are retiring into winter quarters.

The small body of national troops, which has been judged necessary in time of peace, is defectively kept up, badly paid, infected with local prejudices, and supported by irregular and disproportionate contributions to the treasury.

The impossibility of maintaining order and dispensing justice among these sovereign subjects, produced the experiment of dividing the empire into nine or ten circles or districts; of giving them an interior organization, and of charging them with the military execution of the laws against delinquent and contumacious members. This experiment has only served to demonstrate more fully the radical vice of the constitution. Each circle is the miniature picture of the deformities of this political monster. They either fail to execute their commissions, or they do it with all the devastation and carnage of civil war. Sometimes whole circles are defaulters; and then they increase the mischief which they were instituted to remedy.

We may form some judgment of this scheme of military coercion from a sample given by Thuanus. In Donawerth, a free and imperial city of the circle of Suabia, the Abbe de St. Croix enjoyed certain immunities which had been reserved to him. In the exercise of these, on some public occasions, outrages were committed on him by the people of the city. The consequence was that the city was put under the ban of the empire, and the Duke of Bavaria, though director of another circle, obtained an appointment to enforce it. He soon appeared before the city with a corps of ten thousand troops, and finding it a fit occasion, as he had secretly intended from the beginning, to revive an antiquated claim, on the pretext that his ancestors had suffered the place to be dismembered from his territory,(1) he took possession of it in his own name, disarmed, and punished the inhabitants, and reannexed the city to his domains.

It may be asked, perhaps, what has so long kept this disjointed machine from falling entirely to pieces? The answer is obvious: The weakness of most of the members, who are unwilling to expose themselves to the mercy of foreign powers; the weakness of most of the principal members, compared with the formidable powers all around them; the vast weight and influence which the emperor derives from his separate and hereditary dominions; and the interest he feels in preserving a system with which his family pride is connected, and which constitutes him the first prince in Europe;—these causes support a feeble and precarious Union; whilst the repellant quality, incident to the nature of sovereignty, and which time continually strengthens, prevents any reform whatever, founded on a proper consolidation. Nor is it to be imagined, if this obstacle could be surmounted, that the neighboring powers would suffer a revolution to take place which would give to the empire the force and preeminence to which it is entitled. Foreign nations have long considered themselves as interested in the changes made by events in this constitution; and have, on various occasions, betrayed their policy of perpetuating its anarchy and weakness.

If more direct examples were wanting, Poland, as a government over local sovereigns, might not improperly be taken notice of. Nor could any proof more striking be given of the calamities flowing from such institutions. Equally unfit for self-government and self-defense, it has long been at the mercy of its powerful neighbors; who have lately had the mercy to disburden it of one third of its people and territories.

The connection among the Swiss cantons scarcely amounts to a confederacy; though it is sometimes cited as an instance of the stability of such institutions.

They have no common treasury; no common troops even in war; no common coin; no common judicatory; nor any other common mark of sovereignty.

They are kept together by the peculiarity of their topographical position; by their individual weakness and insignificancy; by the fear of powerful neighbors, to one of which they were formerly subject; by the few sources of contention among a people of such simple and homogeneous manners; by their joint interest in their dependent possessions; by the mutual aid they stand in need of, for suppressing insurrections and rebellions, an aid expressly stipulated and often required and afforded; and by the necessity of some regular and permanent provision for accommodating disputes among the cantons. The provision is, that the parties at variance shall each choose four judges out of the neutral cantons, who, in case of disagreement, choose an umpire. This tribunal, under an oath of impartiality, pronounces definitive sentence, which all the cantons are bound to enforce. The competency of this regulation may be estimated by a clause in their treaty of 1683, with Victor Amadeus of Savoy; in which he obliges himself to interpose as mediator in disputes between the cantons, and to employ force, if necessary, against the contumacious party.

So far as the peculiarity of their case will admit of comparison with that of the United States, it serves to confirm the principle intended to be established. Whatever efficacy the union may have had in ordinary cases, it appears that the moment a cause of difference sprang up, capable of trying its strength, it failed. The controversies on the subject of religion, which in three instances have kindled violent and bloody contests, may be said, in fact, to have severed the league. The Protestant and Catholic cantons have since had their separate diets, where all the most important concerns are adjusted, and which have left the general diet little other business than to take care of the common bailages.

That separation had another consequence, which merits attention. It produced opposite alliances with foreign powers: of Berne, at the head of the Protestant association, with the United Provinces; and of Luzerne, at the head of the Catholic association, with France.

PUBLIUS

1. Pfeffel, “Nouvel Abrég. Chronol. de l’Hist., etc., d’Allemagne,” says the pretext was to indemnify himself for the expense of the expedition.

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FEDERALIST No. 20. The Same Subject Continued (The Insufficiency of the Present Confederation to Preserve the Union)

From the New York Packet. Tuesday, December 11, 1787.

MADISON, with HAMILTON

To the People of the State of New York:

THE United Netherlands are a confederacy of republics, or rather of aristocracies of a very remarkable texture, yet confirming all the lessons derived from those which we have already reviewed.

The union is composed of seven coequal and sovereign states, and each state or province is a composition of equal and independent cities. In all important cases, not only the provinces but the cities must be unanimous.

The sovereignty of the Union is represented by the States-General, consisting usually of about fifty deputies appointed by the provinces. They hold their seats, some for life, some for six, three, and one years; from two provinces they continue in appointment during pleasure.

The States-General have authority to enter into treaties and alliances; to make war and peace; to raise armies and equip fleets; to ascertain quotas and demand contributions. In all these cases, however, unanimity and the sanction of their constituents are

requisite. They have authority to appoint and receive ambassadors; to execute treaties and alliances already formed; to provide for the collection of duties on imports and exports; to regulate the mint, with a saving to the provincial rights; to govern as sovereigns the dependent territories. The provinces are restrained, unless with the general consent, from entering into foreign treaties; from establishing imposts injurious to others, or charging their neighbors with higher duties than their own subjects. A council of state, a chamber of accounts, with five colleges of admiralty, aid and fortify the federal administration.

The executive magistrate of the union is the stadtholder, who is now an hereditary prince. His principal weight and influence in the republic are derived from this independent title; from his great patrimonial estates; from his family connections with some of the chief potentates of Europe; and, more than all, perhaps, from his being stadtholder in the several provinces, as well as for the union; in which provincial quality he has the appointment of town magistrates under certain regulations, executes provincial decrees, presides when he pleases in the provincial tribunals, and has throughout the power of pardon.

As stadtholder of the union, he has, however, considerable prerogatives.

In his political capacity he has authority to settle disputes between the provinces, when other methods fail; to assist at the deliberations of the States-General, and at their particular conferences; to give audiences to foreign ambassadors, and to keep agents for his particular affairs at foreign courts.

In his military capacity he commands the federal troops, provides for garrisons, and in general regulates military affairs; disposes of all appointments, from colonels to ensigns, and of the governments and posts of fortified towns.

In his marine capacity he is admiral-general, and superintends and directs every thing relative to naval forces and other naval affairs; presides in the admiralties in person or by proxy; appoints lieutenant-admirals and other officers; and establishes councils of war, whose sentences are not executed till he approves them.

His revenue, exclusive of his private income, amounts to three hundred thousand florins. The standing army which he commands consists of about forty thousand men.

Such is the nature of the celebrated Belgic confederacy, as delineated on parchment. What are the characters which practice has stamped upon it? Imbecility in the government; discord among the provinces; foreign influence and indignities; a precarious existence in peace, and peculiar calamities from war.

It was long ago remarked by Grotius, that nothing but the hatred of his countrymen to the house of Austria kept them from being ruined by the vices of their constitution.

The union of Utrecht, says another respectable writer, reposes an authority in the States-General, seemingly sufficient to secure harmony, but the jealousy in each province renders the practice very different from the theory.

The same instrument, says another, obliges each province to levy certain contributions; but this article never could, and probably never will, be executed; because the inland provinces, who have little commerce, cannot pay an equal quota.

In matters of contribution, it is the practice to waive the articles of the constitution. The danger of delay obliges the consenting provinces to furnish their quotas, without waiting for the others; and then to obtain reimbursement from the others, by deputations, which are frequent, or otherwise, as they can. The great wealth and influence of the province of Holland enable her to effect both these purposes.

It has more than once happened, that the deficiencies had to be ultimately collected at the point of the bayonet; a thing practicable, though dreadful, in a confederacy where one of the members exceeds in force all the rest, and where several of them are too small to meditate resistance; but utterly impracticable in one composed of members, several of which are equal to each other in strength and resources, and equal singly to a vigorous and persevering defense.

Foreign ministers, says Sir William Temple, who was himself a foreign minister, elude matters taken ad referendum, by tampering with the provinces and cities. In 1726, the treaty of Hanover was delayed by these means a whole year. Instances of a like nature are numerous and notorious.

In critical emergencies, the States-General are often compelled to overleap their constitutional bounds. In 1688, they concluded a treaty of themselves at the risk of their heads. The treaty of Westphalia, in 1648, by which their independence was formerly and finally recognized, was concluded without the consent of Zealand. Even as recently as the last treaty of peace with Great Britain, the constitutional principle of unanimity was departed from. A weak constitution must necessarily terminate in dissolution, for want

of proper powers, or the usurpation of powers requisite for the public safety. Whether the usurpation, when once begun, will stop at the salutary point, or go forward to the dangerous extreme, must depend on the contingencies of the moment. Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities.

Notwithstanding the calamities produced by the stadtholdership, it has been supposed that without his influence in the individual provinces, the causes of anarchy manifest in the confederacy would long ago have dissolved it. “Under such a government,” says the Abbe Mably, “the Union could never have subsisted, if the provinces had not a spring within themselves, capable of quickening their tardiness, and compelling them to the same way of thinking. This spring is the stadtholder.” It is remarked by Sir William Temple, “that in the intermissions of the stadtholdership, Holland, by her riches and her authority, which drew the others into a sort of dependence, supplied the place.”

These are not the only circumstances which have controlled the tendency to anarchy and dissolution. The surrounding powers impose an absolute necessity of union to a certain degree, at the same time that they nourish by their intrigues the constitutional vices which keep the republic in some degree always at their mercy.

The true patriots have long bewailed the fatal tendency of these vices, and have made no less than four regular experiments by EXTRAORDINARY ASSEMBLIES, convened for the special purpose, to apply a remedy. As many times has their laudable zeal found it impossible to UNITE THE PUBLIC COUNCILS in reforming the known, the acknowledged, the fatal evils of the existing constitution. Let us pause, my fellow-citizens, for one moment, over this melancholy and monitory lesson of history; and with the tear that drops for the calamities brought on mankind by their adverse opinions and selfish passions, let our gratitude mingle an ejaculation to Heaven, for the propitious concord which has distinguished the consultations for our political happiness.

A design was also conceived of establishing a general tax to be administered by the federal authority. This also had its adversaries and failed.

This unhappy people seem to be now suffering from popular convulsions, from dissensions among the states, and from the actual invasion of foreign arms, the crisis of their destiny. All nations have their eyes fixed on the awful spectacle. The first wish prompted by humanity is, that this severe trial may issue in such a revolution of their government as will establish their union, and render it the parent of tranquillity, freedom and happiness: The next, that the asylum under which, we trust, the enjoyment of these blessings will speedily be secured in this country, may receive and console them for the catastrophe of their own.

I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting VIOLENCE in place of LAW, or the destructive COERCION of the SWORD in place of the mild and salutary COERCION of the MAGISTRACY.

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FEDERALIST No. 21. Other Defects of the Present Confederation

For the Independent Journal. Wednesday, December 12, 1787

HAMILTON

To the People of the State of New York:

HAVING in the three last numbers taken a summary review of the principal circumstances and events which have depicted the genius and fate of other confederate governments, I shall now proceed in the enumeration of the most important of those defects which have hitherto disappointed our hopes from the system established among ourselves. To form a safe and satisfactory judgment of the proper remedy, it is absolutely necessary that we should be well acquainted with the extent and malignity of the disease.

The next most palpable defect of the subsisting Confederation, is the total want of a SANCTION to its laws. The United States, as now composed, have no powers to exact obedience, or punish disobedience to their resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. There is no express delegation of authority to them to use force against delinquent members; and if such a right should be ascribed to the federal head, as resulting from the nature of the

social compact between the States, it must be by inference and construction, in the face of that part of the second article, by which it is declared, “that each State shall retain every power, jurisdiction, and right, not EXPRESSLY delegated to the United States in Congress assembled.” There is, doubtless, a striking absurdity in supposing that a right of this kind does not exist, but we are reduced to the dilemma either of embracing that supposition, preposterous as it may seem, or of contravening or explaining away a provision, which has been of late a repeated theme of the eulogies of those who oppose the new Constitution; and the want of which, in that plan, has been the subject of much plausible animadversion, and severe criticism. If we are unwilling to impair the force of this applauded provision, we shall be obliged to conclude, that the United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws. It will appear, from the specimens which have been cited, that the American Confederacy, in this particular, stands discriminated from every other institution of a similar kind, and exhibits a new and unexampled phenomenon in the political world.

The want of a mutual guaranty of the State governments is another capital imperfection in the federal plan. There is nothing of this kind declared in the articles that compose it; and to imply a tacit guaranty from considerations of utility, would be a still more flagrant departure from the clause which has been mentioned, than to imply a tacit power of coercion from the like considerations. The want of a guaranty, though it might in its consequences endanger the Union, does not so immediately attack its existence as the want of a constitutional sanction to its laws.

Without a guaranty the assistance to be derived from the Union in repelling those domestic dangers which may sometimes threaten the existence of the State constitutions, must be renounced. Usurpation may rear its crest in each State, and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret. A successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the Union to the friends and supporters of the government. The tempestuous situation from which Massachusetts has scarcely emerged, evinces that dangers of this kind are not merely speculative. Who can determine what might have been the issue of her late convulsions, if the malcontents had been headed by a Caesar or by a Cromwell? Who can predict what effect a despotism, established in Massachusetts, would have upon the liberties of New Hampshire or Rhode Island, of Connecticut or New York?

The inordinate pride of State importance has suggested to some minds an objection to the principle of a guaranty in the federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the State constitution by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence. Towards the preventions of calamities of this kind, too many checks cannot be provided. The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the State. The natural cure for an ill-administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much levelled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.

The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation. Its repugnancy to an adequate supply of the national exigencies has been already pointed out, and has sufficiently appeared from the trial which has been made of it. I speak of it now solely with a view to equality among the States. Those who have been accustomed to contemplate the circumstances which produce and constitute national wealth, must be satisfied that there is no common standard or barometer by which the degrees of it can be ascertained. Neither the value of lands, nor the numbers of the people, which have been successively proposed as the rule of State contributions, has any pretension to being a just representative. If we compare the wealth of the United Netherlands with that of Russia or Germany, or even of France, and if we at the same time compare the total value of the lands and the aggregate population of that contracted district with the total value of the lands and the aggregate population of the immense regions of either of the three last-mentioned countries, we shall at once discover that there is no comparison between the proportion of either of these two objects and that of the relative wealth of those nations. If the like parallel were to be run between several of the American States, it would furnish a like result. Let Virginia be contrasted with North Carolina, Pennsylvania with Connecticut, or Maryland with New Jersey, and we shall be convinced that the respective abilities of those States, in relation to revenue, bear little or no analogy to their comparative stock in lands or to their comparative

population. The position may be equally illustrated by a similar process between the counties of the same State. No man who is acquainted with the State of New York will doubt that the active wealth of King's County bears a much greater proportion to that of Montgomery than it would appear to be if we should take either the total value of the lands or the total number of the people as a criterion!

The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry, these circumstances and many more, too complex, minute, or adventitious to admit of a particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries. The consequence clearly is that there can be no common measure of national wealth, and, of course, no general or stationary rule by which the ability of a state to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of a confederacy by any such rule, cannot fail to be productive of glaring inequality and extreme oppression.

This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised. The suffering States would not long consent to remain associated upon a principle which distributes the public burdens with so unequal a hand, and which was calculated to impoverish and oppress the citizens of some States, while those of others would scarcely be conscious of the small proportion of the weight they were required to sustain. This, however, is an evil inseparable from the principle of quotas and requisitions.

There is no method of steering clear of this inconvenience, but by authorizing the national government to raise its own revenues in its own way. Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for such impositions. If inequalities should arise in some States from duties on particular objects, these will, in all probability, be counterbalanced by proportional inequalities in other States, from the duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere. Or, if inequalities should still exist, they would neither be so great in their degree, so uniform in their operation, nor so odious in their appearance, as those which would necessarily spring from quotas, upon any scale that can possibly be devised.

It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit; which cannot be exceeded without defeating the end proposed, that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that, "in political arithmetic, two and two do not always make four." If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.

Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard. The state of agriculture and the populousness of a country have been considered as nearly connected with each other. And, as a rule, for the purpose intended, numbers, in the view of simplicity and certainty, are entitled to a preference. In every country it is a herculean task to obtain a valuation of the land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability. The expense of an accurate valuation is, in all situations, a formidable objection. In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large.

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FEDERALIST No. 22. The Same Subject Continued (Other Defects of the Present Confederation)

From the New York Packet. Friday, December 14, 1787.

HAMILTON

To the People of the State of New York:

IN ADDITION to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number. The utility of such a power has been anticipated under the first head of our inquiries; and for this reason, as well as from the universal conviction entertained upon the subject, little need be added in this place. It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States. No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, by which they conceded privileges of any importance to them, while they were apprised that the engagements on the part of the Union might at any moment be violated by its members, and while they found from experience that they might enjoy every advantage they desired in our markets, without granting us any return but such as their momentary convenience might suggest. It is not, therefore, to be wondered at that Mr. Jenkinson, in ushering into the House of Commons a bill for regulating the temporary intercourse between the two countries, should preface its introduction by a declaration that similar provisions in former bills had been found to answer every purpose to the commerce of Great Britain, and that it would be prudent to persist in the plan until it should appear whether the American government was likely or not to acquire greater consistency.(1)

Several States have endeavored, by separate prohibitions, restrictions, and exclusions, to influence the conduct of that kingdom in this particular, but the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the State, has hitherto frustrated every experiment of the kind, and will continue to do so as long as the same obstacles to a uniformity of measures continue to exist.

The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy. “The commerce of the German empire(2) is in continual trammels from the multiplicity of the duties which the several princes and states exact upon the merchandises passing through their territories, by means of which the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless.” Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect, from the gradual conflicts of State regulations, that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

The power of raising armies, by the most obvious construction of the articles of the Confederation, is merely a power of making requisitions upon the States for quotas of men. This practice in the course of the late war, was found replete with obstructions to a vigorous and to an economical system of defense. It gave birth to a competition between the States which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size. The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment, and disinclined them from engaging for any considerable periods. Hence, slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure.

This method of raising troops is not more unfriendly to economy and vigor than it is to an equal distribution of the burden. The States near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance from danger were, for the most part, as remiss as the others were diligent, in their exertions. The immediate pressure of this inequality was not in this case, as in that of the contributions of money, alleviated by the hope of a final liquidation. The States which did not pay their proportions of money might at least be charged with their deficiencies; but no account could be formed of the deficiencies in the supplies of men. We shall not, however, see much reason to regret the want of this hope, when we consider how little prospect there is, that the most delinquent States will ever be able to make compensation for their pecuniary failures. The system of quotas and requisitions, whether it be applied to men or money, is, in every view, a system of imbecility in the Union, and of inequality and injustice among the members.

The right of equal suffrage among the States is another exceptionable part of the Confederation. Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common-sense. It may happen that this majority of States is a small minority of the people of America;(3) and two thirds of the people of America could not long be persuaded, upon the credit of artificial distinctions and syllogistic subtleties, to submit their interests to the management and disposal of one third. The larger States would after a while revolt from the idea of receiving the law from the smaller. To acquiesce in such a privation of their due importance in the political scale, would be not merely to be insensible to the love of power, but even to sacrifice the desire of equality. It is neither rational to expect the first, nor just to require the last. The smaller States, considering how peculiarly their safety and welfare depend on union, ought readily to renounce a pretension which, if not relinquished, would prove fatal to its duration.

It may be objected to this, that not seven but nine States, or two thirds of the whole number, must consent to the most important resolutions; and it may be thence inferred that nine States would always comprehend a majority of the Union. But this does not obviate the impropriety of an equal vote between States of the most unequal dimensions and populousness; nor is the inference accurate in point of fact; for we can enumerate nine States which contain less than a majority of the people;(4) and it is constitutionally possible that these nine may give the vote. Besides, there are matters of considerable moment determinable by a bare majority; and there are others, concerning which doubts have been entertained, which, if interpreted in favor of the sufficiency of a vote of seven States, would extend its operation to interests of the first magnitude. In addition to this, it is to be observed that there is a probability of an increase in the number of States, and no provision for a proportional augmentation of the ratio of votes.

But this is not all: what at first sight may seem a remedy, is, in reality, a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser. Congress, from the nonattendance of a few States, have been frequently in the situation of a Polish diet, where a single VOTE has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations. This is one of those refinements which, in practice, has an effect the reverse of what is expected from it in theory. The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority. In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system, it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

It is not difficult to discover, that a principle of this kind gives greater scope to foreign corruption, as well as to domestic faction, than that which permits the sense of the majority to decide; though the contrary of this has been presumed. The mistake has proceeded from not attending with due care to the mischiefs that may be occasioned by obstructing the progress of government at certain critical seasons. When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely TO BE DONE, but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.

Suppose, for instance, we were engaged in a war, in conjunction with one foreign nation, against another. Suppose the necessity of our situation demanded peace, and the interest or ambition of our ally led him to seek the prosecution of the war, with views that

might justify us in making separate terms. In such a state of things, this ally of ours would evidently find it much easier, by his bribes and intrigues, to tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object, than where a simple majority would suffice. In the first case, he would have to corrupt a smaller number; in the last, a greater number. Upon the same principle, it would be much easier for a foreign power with which we were at war to perplex our councils and embarrass our exertions. And, in a commercial view, we may be subjected to similar inconveniences. A nation, with which we might have a treaty of commerce, could with much greater facility prevent our forming a connection with her competitor in trade, though such a connection should be ever so beneficial to ourselves.

Evils of this description ought not to be regarded as imaginary. One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption. An hereditary monarch, though often disposed to sacrifice his subjects to his ambition, has so great a personal interest in the government and in the external glory of the nation, that it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the state. The world has accordingly been witness to few examples of this species of royal prostitution, though there have been abundant specimens of every other kind.

In republics, persons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust, which, to any but minds animated and guided by superior virtue, may appear to exceed the proportion of interest they have in the common stock, and to overbalance the obligations of duty. Hence it is that history furnishes us with so many mortifying examples of the prevalency of foreign corruption in republican governments. How much this contributed to the ruin of the ancient commonwealths has been already delineated. It is well known that the deputies of the United Provinces have, in various instances, been purchased by the emissaries of the neighboring kingdoms. The Earl of Chesterfield (if my memory serves me right), in a letter to his court, intimates that his success in an important negotiation must depend on his obtaining a major's commission for one of those deputies. And in Sweden the parties were alternately bought by France and England in so barefaced and notorious a manner that it excited universal disgust in the nation, and was a principal cause that the most limited monarch in Europe, in a single day, without tumult, violence, or opposition, became one of the most absolute and uncontrolled.

A circumstance which crowns the defects of the Confederation remains yet to be mentioned, the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the came court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws; for nothing is more natural to men in office than to look with peculiar deference towards that authority to which they owe their official existence.

The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

In this review of the Confederation, I have confined myself to the exhibition of its most material defects; passing over those imperfections in its details by which even a great part of the power intended to be conferred upon it has been in a great measure rendered abortive. It must be by this time evident to all men of reflection, who can divest themselves of the prepossessions of

preconceived opinions, that it is a system so radically vicious and unsound, as to admit not of amendment but by an entire change in its leading features and characters.

The organization of Congress is itself utterly improper for the exercise of those powers which are necessary to be deposited in the Union. A single assembly may be a proper receptacle of those slender, or rather fettered, authorities, which have been heretofore delegated to the federal head; but it would be inconsistent with all the principles of good government, to intrust it with those additional powers which, even the moderate and more rational adversaries of the proposed Constitution admit, ought to reside in the United States. If that plan should not be adopted, and if the necessity of the Union should be able to withstand the ambitious aims of those men who may indulge magnificent schemes of personal aggrandizement from its dissolution, the probability would be, that we should run into the project of conferring supplementary powers upon Congress, as they are now constituted; and either the machine, from the intrinsic feebleness of its structure, will moulder into pieces, in spite of our ill-judged efforts to prop it; or, by successive augmentations of its force an energy, as necessity might prompt, we shall finally accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived. Thus, we should create in reality that very tyranny which the adversaries of the new Constitution either are, or affect to be, solicitous to avert.

It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a PARTY to a COMPACT has a right to revoke that COMPACT, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.

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1. This, as nearly as I can recollect, was the sense of his speech on introducing the last bill.

2. Encyclopedia, article “Empire.”

3. New Hampshire, Rhode Island, New Jersey, Delaware, Georgia, South Carolina, and Maryland are a majority of the whole number of the States, but they do not contain one third of the people.

4. Add New York and Connecticut to the foregoing seven, and they will be less than a majority.

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FEDERALIST No. 23. The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union

From the New York Packet. Tuesday, December 18, 1787.

HAMILTON

To the People of the State of New York:

THE necessity of a Constitution, at least equally energetic with the one proposed, to the preservation of the Union, is the point at the examination of which we are now arrived.

This inquiry will naturally divide itself into three branches—the objects to be provided for by the federal government, the quantity of power necessary to the accomplishment of those objects, the persons upon whom that power ought to operate. Its distribution and organization will more properly claim our attention under the succeeding head.

The principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the MEANS ought to be proportioned to the END; the persons, from whose agency the attainment of any END is expected, ought to possess the MEANS by which it is to be attained.

Whether there ought to be a federal government intrusted with the care of the common defense, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the FORMATION, DIRECTION, or SUPPORT of the NATIONAL FORCES.

Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

If the circumstances of our country are such as to demand a compound instead of a simple, a confederate instead of a sole, government, the essential point which will remain to be adjusted will be to discriminate the OBJECTS, as far as it can be done, which shall appertain to the different provinces or departments of power; allowing to each the most ample authority for fulfilling the objects committed to its charge. Shall the Union be constituted the guardian of the common safety? Are fleets and armies and revenues necessary to this purpose? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend. Is the administration of justice between the citizens of the same State the proper department of the local governments? These must possess all the authorities which are connected with this object, and with every other that may be allotted to their particular cognizance and direction. Not to confer in each case a degree of power commensurate to the end, would be to violate the most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigor and success.

Who is likely to make suitable provisions for the public defense, as that body to which the guardianship of the public safety is confided; which, as the centre of information, will best understand the extent and urgency of the dangers that threaten; as the representative of the WHOLE, will feel itself most deeply interested in the preservation of every part; which, from the

responsibility implied in the duty assigned to it, will be most sensibly impressed with the necessity of proper exertions; and which, by the extension of its authority throughout the States, can alone establish uniformity and concert in the plans and measures by which the common safety is to be secured? Is there not a manifest inconsistency in devolving upon the federal government the care of the general defense, and leaving in the State governments the EFFECTIVE powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, an undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its natural and inevitable concomitants? Have we not had unequivocal experience of its effects in the course of the revolution which we have just accomplished?

Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority, as to all those objects which are intrusted to its management. It will indeed deserve the most vigilant and careful attention of the people, to see that it be modeled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been, or may be, offered to our consideration, should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government, the constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depositary of the NATIONAL INTERESTS. Wherever THESE can with propriety be confided, the coincident powers may safely accompany them. This is the true result of all just reasoning upon the subject. And the adversaries of the plan promulgated by the convention ought to have confined themselves to showing, that the internal structure of the proposed government was such as to render it unworthy of the confidence of the people. They ought not to have wandered into inflammatory declamations and unmeaning cavils about the extent of the powers. The POWERS are not too extensive for the OBJECTS of federal administration, or, in other words, for the management of our NATIONAL INTERESTS; nor can any satisfactory argument be framed to show that they are chargeable with such an excess. If it be true, as has been insinuated by some of the writers on the other side, that the difficulty arises from the nature of the thing, and that the extent of the country will not permit us to form a government in which such ample powers can safely be reposed, it would prove that we ought to contract our views, and resort to the expedient of separate confederacies, which will move within more practicable spheres. For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.

I trust, however, that the impracticability of one general system cannot be shown. I am greatly mistaken, if any thing of weight has yet been advanced of this tendency; and I flatter myself, that the observations which have been made in the course of these papers have served to place the reverse of that position in as clear a light as any matter still in the womb of time and experience can be susceptible of. This, at all events, must be evident, that the very difficulty itself, drawn from the extent of the country, is the strongest argument in favor of an energetic government; for any other can certainly never preserve the Union of so large an empire. If we embrace the tenets of those who oppose the adoption of the proposed Constitution, as the standard of our political creed, we cannot fail to verify the gloomy doctrines which predict the impracticability of a national system pervading entire limits of the present Confederacy.

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FEDERALIST No. 24. The Powers Necessary to the Common Defense Further Considered

For the Independent Journal. Wednesday, December 19, 1787

HAMILTON

To the People of the State of New York:

TO THE powers proposed to be conferred upon the federal government, in respect to the creation and direction of the national forces, I have met with but one specific objection, which, if I understand it right, is this, that proper provision has not been made against the existence of standing armies in time of peace; an objection which, I shall now endeavor to show, rests on weak and unsubstantial foundations.

It has indeed been brought forward in the most vague and general form, supported only by bold assertions, without the appearance of argument; without even the sanction of theoretical opinions; in contradiction to the practice of other free nations, and to the general sense of America, as expressed in most of the existing constitutions. The proprietary of this remark will appear, the moment

it is recollected that the objection under consideration turns upon a supposed necessity of restraining the LEGISLATIVE authority of the nation, in the article of military establishments; a principle unheard of, except in one or two of our State constitutions, and rejected in all the rest.

A stranger to our politics, who was to read our newspapers at the present juncture, without having previously inspected the plan reported by the convention, would be naturally led to one of two conclusions: either that it contained a positive injunction, that standing armies should be kept up in time of peace; or that it vested in the EXECUTIVE the whole power of levying troops, without subjecting his discretion, in any shape, to the control of the legislature.

If he came afterwards to peruse the plan itself, he would be surprised to discover, that neither the one nor the other was the case; that the whole power of raising armies was lodged in the LEGISLATURE, not in the EXECUTIVE; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected; and that instead of the provision he had supposed in favor of standing armies, there was to be found, in respect to this object, an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.

Disappointed in his first surmise, the person I have supposed would be apt to pursue his conjectures a little further. He would naturally say to himself, it is impossible that all this vehement and pathetic declamation can be without some colorable pretext. It must needs be that this people, so jealous of their liberties, have, in all the preceding models of the constitutions which they have established, inserted the most precise and rigid precautions on this point, the omission of which, in the new plan, has given birth to all this apprehension and clamor.

If, under this impression, he proceeded to pass in review the several State constitutions, how great would be his disappointment to find that TWO ONLY of them(1) contained an interdiction of standing armies in time of peace; that the other eleven had either observed a profound silence on the subject, or had in express terms admitted the right of the Legislature to authorize their existence.

Still, however he would be persuaded that there must be some plausible foundation for the cry raised on this head. He would never be able to imagine, while any source of information remained unexplored, that it was nothing more than an experiment upon the public credulity, dictated either by a deliberate intention to deceive, or by the overflowings of a zeal too intemperate to be ingenuous. It would probably occur to him, that he would be likely to find the precautions he was in search of in the primitive compact between the States. Here, at length, he would expect to meet with a solution of the enigma. No doubt, he would observe to himself, the existing Confederation must contain the most explicit provisions against military establishments in time of peace; and a departure from this model, in a favorite point, has occasioned the discontent which appears to influence these political champions.

If he should now apply himself to a careful and critical survey of the articles of Confederation, his astonishment would not only be increased, but would acquire a mixture of indignation, at the unexpected discovery, that these articles, instead of containing the prohibition he looked for, and though they had, with jealous circumspection, restricted the authority of the State legislatures in this particular, had not imposed a single restraint on that of the United States. If he happened to be a man of quick sensibility, or ardent temper, he could now no longer refrain from regarding these clamors as the dishonest artifices of a sinister and unprincipled opposition to a plan which ought at least to receive a fair and candid examination from all sincere lovers of their country! How else, he would say, could the authors of them have been tempted to vent such loud censures upon that plan, about a point in which it seems to have conformed itself to the general sense of America as declared in its different forms of government, and in which it has even superadded a new and powerful guard unknown to any of them? If, on the contrary, he happened to be a man of calm and dispassionate feelings, he would indulge a sigh for the frailty of human nature, and would lament, that in a matter so interesting to the happiness of millions, the true merits of the question should be perplexed and entangled by expedients so unfriendly to an impartial and right determination. Even such a man could hardly forbear remarking, that a conduct of this kind has too much the appearance of an intention to mislead the people by alarming their passions, rather than to convince them by arguments addressed to their understandings.

But however little this objection may be countenanced, even by precedents among ourselves, it may be satisfactory to take a nearer view of its intrinsic merits. From a close examination it will appear that restraints upon the discretion of the legislature in respect to

military establishments in time of peace, would be improper to be imposed, and if imposed, from the necessities of society, would be unlikely to be observed.

Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of confidence or security. On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain. This situation and the vicinity of the West India Islands, belonging to these two powers create between them, in respect to their American possessions and in relation to us, a common interest. The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies, because they have most to fear from us, and most to hope from them. The improvements in the art of navigation have, as to the facility of communication, rendered distant nations, in a great measure, neighbors. Britain and Spain are among the principal maritime powers of Europe. A future concert of views between these nations ought not to be regarded as improbable. The increasing remoteness of consanguinity is every day diminishing the force of the family compact between France and Spain. And politicians have ever with great reason considered the ties of blood as feeble and precarious links of political connection. These circumstances combined, admonish us not to be too sanguine in considering ourselves as entirely out of the reach of danger.

Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon or compelled to do it, the increased expense of a frequent rotation of service, and the loss of labor and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as ruinous to private citizens. The latter resource of permanent corps in the pay of the government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small. Here is a simple view of the subject, that shows us at once the impropriety of a constitutional interdiction of such establishments, and the necessity of leaving the matter to the discretion and prudence of the legislature.

In proportion to our increase in strength, it is probable, nay, it may be said certain, that Britain and Spain would augment their military establishments in our neighborhood. If we should not be willing to be exposed, in a naked and defenseless condition, to their insults and encroachments, we should find it expedient to increase our frontier garrisons in some ratio to the force by which our Western settlements might be annoyed. There are, and will be, particular posts, the possession of which will include the command of large districts of territory, and facilitate future invasions of the remainder. It may be added that some of those posts will be keys to the trade with the Indian nations. Can any man think it would be wise to leave such posts in a situation to be at any instant seized by one or the other of two neighboring and formidable powers? To act this part would be to desert all the usual maxims of prudence and policy.

If we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy. To this purpose there must be dock-yards and arsenals; and for the defense of these, fortifications, and probably garrisons. When a nation has become so powerful by sea that it can protect its dock-yards by its fleets, this supersedes the necessity of garrisons for that purpose; but where naval establishments are in their infancy, moderate garrisons will, in all likelihood, be found an indispensable security against descents for the destruction of the arsenals and dock-yards, and sometimes of the fleet itself.

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1 This statement of the matter is taken from the printed collection of State constitutions. Pennsylvania and North Carolina are the two which contain the interdiction in these words: “As standing armies in time of peace are dangerous to liberty, THEY OUGHT NOT to be kept up.” This is, in truth, rather a CAUTION than a PROHIBITION. New Hampshire, Massachusetts, Delaware, and Maryland have, in each of their bils of rights, a clause to this effect: “Standing armies are dangerous to liberty, and ought not to be raised or kept up WITHOUT THE CONSENT OF THE LEGISLATURE”; which is a formal admission of the authority of the Legislature. New York has no bills of rights, and her constitution says not a word about the matter. No bills of rights appear annexed to the constitutions of the other States, except the foregoing, and their constitutions are equally silent. I am told, however that one or two States have bills of rights which do not appear in this collection; but that those also recognize the right of the legislative authority in this respect.

FEDERALIST No. 25. The Same Subject Continued (The Powers Necessary to the Common Defense Further Considered)

From the New York Packet. Friday, December 21, 1787.

HAMILTON

To the People of the State of New York:

IT MAY perhaps be urged that the objects enumerated in the preceding number ought to be provided for by the State governments, under the direction of the Union. But this would be, in reality, an inversion of the primary principle of our political association, as it would in practice transfer the care of the common defense from the federal head to the individual members: a project oppressive to some States, dangerous to all, and baneful to the Confederacy.

The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common. And the means of guarding against it ought, in like manner, to be the objects of common councils and of a common treasury. It happens that some States, from local situation, are more directly exposed. New York is of this class. Upon the plan of separate provisions, New York would have to sustain the whole weight of the establishments requisite to her immediate safety, and to the mediate or ultimate protection of her neighbors. This would neither be equitable as it respected New York nor safe as it respected the other States. Various inconveniences would attend such a system. The States, to whose lot it might fall to support the necessary establishments, would be as little able as willing, for a considerable time to come, to bear the burden of competent provisions. The security of all would thus be subjected to the parsimony, improvidence, or inability of a part. If the resources of such part becoming more abundant and extensive, its provisions should be proportionally enlarged, the other States would quickly take the alarm at seeing the whole military force of the Union in the hands of two or three of its members, and those probably amongst the most powerful. They would each choose to have some counterpoise, and pretenses could easily be contrived. In this situation, military establishments, nourished by mutual jealousy, would be apt to swell beyond their natural or proper size; and being at the separate disposal of the members, they would be engines for the abridgment or demolition of the national authority.

Reasons have been already given to induce a supposition that the State governments will too naturally be prone to a rivalship with that of the Union, the foundation of which will be the love of power; and that in any contest between the federal head and one of its members the people will be most apt to unite with their local government. If, in addition to this immense advantage, the ambition of the members should be stimulated by the separate and independent possession of military forces, it would afford too strong a temptation and too great a facility to them to make enterprises upon, and finally to subvert, the constitutional authority of the Union. On the other hand, the liberty of the people would be less safe in this state of things than in that which left the national forces in the hands of the national government. As far as an army may be considered as a dangerous weapon of power, it had better be in those hands of which the people are most likely to be jealous than in those of which they are least likely to be jealous. For it is a truth, which the experience of ages has attested, that the people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion.

The framers of the existing Confederation, fully aware of the danger to the Union from the separate possession of military forces by the States, have, in express terms, prohibited them from having either ships or troops, unless with the consent of Congress. The truth is, that the existence of a federal government and military establishments under State authority are not less at variance with each other than a due supply of the federal treasury and the system of quotas and requisitions.

There are other lights besides those already taken notice of, in which the impropriety of restraints on the discretion of the national legislature will be equally manifest. The design of the objection, which has been mentioned, is to preclude standing armies in time of peace, though we have never been informed how far it is designed the prohibition should extend; whether to raising armies as well as to KEEPING THEM UP in a season of tranquillity or not. If it be confined to the latter it will have no precise signification, and it will be ineffectual for the purpose intended. When armies are once raised what shall be denominated “keeping them up,” contrary to the sense of the Constitution? What time shall be requisite to ascertain the violation? Shall it be a week, a month, a year? Or shall we say they may be continued as long as the danger which occasioned their being raised continues? This would be to admit that they might be kept up IN TIME OF PEACE, against threatening or impending danger, which would be at once to deviate

from the literal meaning of the prohibition, and to introduce an extensive latitude of construction. Who shall judge of the continuance of the danger? This must undoubtedly be submitted to the national government, and the matter would then be brought to this issue, that the national government, to provide against apprehended danger, might in the first instance raise troops, and might afterwards keep them on foot as long as they supposed the peace or safety of the community was in any degree of jeopardy. It is easy to perceive that a discretion so latitudinary as this would afford ample room for eluding the force of the provision.

The supposed utility of a provision of this kind can only be founded on the supposed probability, or at least possibility, of a combination between the executive and the legislative, in some scheme of usurpation. Should this at any time happen, how easy would it be to fabricate pretenses of approaching danger! Indian hostilities, instigated by Spain or Britain, would always be at hand. Provocations to produce the desired appearances might even be given to some foreign power, and appeased again by timely concessions. If we can reasonably presume such a combination to have been formed, and that the enterprise is warranted by a sufficient prospect of success, the army, when once raised, from whatever cause, or on whatever pretext, may be applied to the execution of the project.

If, to obviate this consequence, it should be resolved to extend the prohibition to the RAISING of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen, that of a nation incapacitated by its Constitution to prepare for defense, before it was actually invaded. As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for, as the legal warrant to the government to begin its levies of men for the protection of the State. We must receive the blow, before we could even prepare to return it. All that kind of policy by which nations anticipate distant danger, and meet the gathering storm, must be abstained from, as contrary to the genuine maxims of a free government. We must expose our property and liberty to the mercy of foreign invaders, and invite them by our weakness to seize the naked and defenseless prey, because we are afraid that rulers, created by our choice, dependent on our will, might endanger that liberty, by an abuse of the means necessary to its preservation.

Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.

All violent policy, as it is contrary to the natural and experienced course of human affairs, defeats itself. Pennsylvania, at this instant, affords an example of the truth of this remark. The Bill of Rights of that State declares that standing armies are dangerous to liberty, and ought not to be kept up in time of peace. Pennsylvania, nevertheless, in a time of profound peace, from the existence of partial disorders in one or two of her counties, has resolved to raise a body of troops; and in all probability will keep them up as long as there is any appearance of danger to the public peace. The conduct of Massachusetts affords a lesson on the same subject, though on different ground. That State (without waiting for the sanction of Congress, as the articles of the Confederation require) was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival of the spirit of revolt. The particular constitution of Massachusetts opposed no obstacle to the measure; but the instance is still of use to instruct us that cases are likely to occur under our government, as well as under those of other nations, which will sometimes render a military force in time of peace essential to the security of the society, and that it is therefore improper in this respect to control the legislative discretion. It also teaches us, in its application to the United States, how little the rights of a feeble government are likely to be respected, even by its own constituents. And it teaches us, in addition to the rest, how unequal parchment provisions are to a struggle with public necessity.

It was a fundamental maxim of the Lacedaemonian commonwealth, that the post of admiral should not be conferred twice on the same person. The Peloponnesian confederates, having suffered a severe defeat at sea from the Athenians, demanded Lysander, who had before served with success in that capacity, to command the combined fleets. The Lacedaemonians, to gratify their allies, and yet preserve the semblance of an adherence to their ancient institutions, had recourse to the flimsy subterfuge of investing Lysander with the real power of admiral, under the nominal title of vice-admiral. This instance is selected from among a multitude that might

be cited to confirm the truth already advanced and illustrated by domestic examples; which is, that nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

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FEDERALIST No. 26. The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered.

For the Independent Journal. Saturday, December 22, 1788

HAMILTON

To the People of the State of New York:

IT WAS a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not cautious to avoid a repetition of the error, in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another; we may try change after change; but we shall never be likely to make any material change for the better.

The idea of restraining the legislative authority, in the means of providing for the national defense, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened. We have seen, however, that it has not had thus far an extensive prevalency; that even in this country, where it made its first appearance, Pennsylvania and North Carolina are the only two States by which it has been in any degree patronized; and that all the others have refused to give it the least countenance; wisely judging that confidence must be placed somewhere; that the necessity of doing it, is implied in the very act of delegating power; and that it is better to hazard the abuse of that confidence than to embarrass the government and endanger the public safety by impolitic restrictions on the legislative authority. The opponents of the proposed Constitution combat, in this respect, the general decision of America; and instead of being taught by experience the propriety of correcting any extremes into which we may have heretofore run, they appear disposed to conduct us into others still more dangerous, and more extravagant. As if the tone of government had been found too high, or too rigid, the doctrines they teach are calculated to induce us to depress or to relax it, by expedients which, upon other occasions, have been condemned or forborne. It may be affirmed without the imputation of invective, that if the principles they inculcate, on various points, could so far obtain as to become the popular creed, they would utterly unfit the people of this country for any species of government whatever. But a danger of this kind is not to be apprehended. The citizens of America have too much discernment to be argued into anarchy. And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of government is essential to the welfare and prosperity of the community.

It may not be amiss in this place concisely to remark the origin and progress of the idea, which aims at the exclusion of military establishments in time of peace. Though in speculative minds it may arise from a contemplation of the nature and tendency of such institutions, fortified by the events that have happened in other ages and countries, yet as a national sentiment, it must be traced to those habits of thinking which we derive from the nation from whom the inhabitants of these States have in general sprung.

In England, for a long time after the Norman Conquest, the authority of the monarch was almost unlimited. Inroads were gradually made upon the prerogative, in favor of liberty, first by the barons, and afterwards by the people, till the greatest part of its most formidable pretensions became extinct. But it was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II. had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II. increased to 30,000; who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that “the raising or keeping a standing army within the kingdom in time of peace, UNLESS WITH THE CONSENT OF PARLIAMENT, was against law.”

In that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. The patriots, who effected that memorable revolution, were too temperate, too wellinformed, to think of any restraint on the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government: and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.

From the same source, the people of America may be said to have derived an hereditary impression of danger to liberty, from standing armies in time of peace. The circumstances of a revolution quickened the public sensibility on every point connected with the security of popular rights, and in some instances raise the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic. The attempts of two of the States to restrict the authority of the legislature in the article of military establishments, are of the number of these instances. The principles which had taught us to be jealous of the power of an hereditary monarch were by an injudicious excess extended to the representatives of the people in their popular assemblies. Even in some of the States, where this error was not adopted, we find unnecessary declarations that standing armies ought not to be kept up, in time of peace, WITHOUT THE CONSENT OF THE LEGISLATURE. I call them unnecessary, because the reason which had introduced a similar provision into the English Bill of Rights is not applicable to any of the State constitutions. The power of raising armies at all, under those constitutions, can by no construction be deemed to reside anywhere else, than in the legislatures themselves; and it was superfluous, if not absurd, to declare that a matter should not be done without the consent of a body, which alone had the power of doing it. Accordingly, in some of these constitutions, and among others, in that of this State of New York, which has been justly celebrated, both in Europe and America, as one of the best of the forms of government established in this country, there is a total silence upon the subject.

It is remarkable, that even in the two States which seem to have meditated an interdiction of military establishments in time of peace, the mode of expression made use of is rather cautionary than prohibitory. It is not said, that standing armies SHALL NOT BE kept up, but that they OUGHT NOT to be kept up, in time of peace. This ambiguity of terms appears to have been the result of a conflict between jealousy and conviction; between the desire of excluding such establishments at all events, and the persuasion that an absolute exclusion would be unwise and unsafe.

Can it be doubted that such a provision, whenever the situation of public affairs was understood to require a departure from it, would be interpreted by the legislature into a mere admonition, and would be made to yield to the necessities or supposed necessities of the State? Let the fact already mentioned, with respect to Pennsylvania, decide. What then (it may be asked) is the use of such a provision, if it cease to operate the moment there is an inclination to disregard it?

Let us examine whether there be any comparison, in point of efficacy, between the provision alluded to and that which is contained in the new Constitution, for restraining the appropriations of money for military purposes to the period of two years. The former, by aiming at too much, is calculated to effect nothing; the latter, by steering clear of an imprudent extreme, and by being perfectly compatible with a proper provision for the exigencies of the nation, will have a salutary and powerful operation.

The legislature of the United States will be OBLIGED, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not AT LIBERTY to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be, no doubt, persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favorable topic for declamation. As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

Schemes to subvert the liberties of a great community REQUIRE TIME to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body, which biennial elections would naturally produce in both houses? Is it presumable, that every man, the instant he took his seat in the national Senate or House of Representatives, would commence a traitor to his constituents and to his country? Can it be supposed that there would not be found one man, discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger? If such presumptions can fairly be made, there ought at once to be an end of all delegated authority. The people should resolve to recall all the powers they have heretofore parted with out of their own hands, and to divide themselves into as many States as there are counties, in order that they may be able to manage their own concerns in person.

If such suppositions could even be reasonably made, still the concealment of the design, for any duration, would be impracticable. It would be announced, by the very circumstance of augmenting the army to so great an extent in time of profound peace. What colorable reason could be assigned, in a country so situated, for such vast augmentations of the military force? It is impossible that the people could be long deceived; and the destruction of the project, and of the projectors, would quickly follow the discovery.

It has been said that the provision which limits the appropriation of money for the support of an army to the period of two years would be unavailing, because the Executive, when once possessed of a force large enough to awe the people into submission, would find resources in that very force sufficient to enable him to dispense with supplies from the acts of the legislature. But the question again recurs, upon what pretense could he be put in possession of a force of that magnitude in time of peace? If we suppose it to have been created in consequence of some domestic insurrection or foreign war, then it becomes a case not within the principles of the objection; for this is levelled against the power of keeping up troops in time of peace. Few persons will be so visionary as seriously to contend that military forces ought not to be raised to quell a rebellion or resist an invasion; and if the defense of the community under such circumstances should make it necessary to have an army so numerous as to hazard its liberty, this is one of those calamities for which there is neither preventative nor cure. It cannot be provided against by any possible form of government; it might even result from a simple league offensive and defensive, if it should ever be necessary for the confederates or allies to form an army for common defense.

But it is an evil infinitely less likely to attend us in a united than in a disunited state; nay, it may be safely asserted that it is an evil altogether unlikely to attend us in the latter situation. It is not easy to conceive a possibility that dangers so formidable can assail the whole Union, as to demand a force considerable enough to place our liberties in the least jeopardy, especially if we take into our view the aid to be derived from the militia, which ought always to be counted upon as a valuable and powerful auxiliary. But in a state of disunion (as has been fully shown in another place), the contrary of this supposition would become not only probable, but almost unavoidable.

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FEDERALIST No. 27. The Same Subject Continued (The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered)

From the New York Packet. Tuesday, December 25, 1787.

HAMILTON

To the People of the State of New York:

IT HAS been urged, in different shapes, that a Constitution of the kind proposed by the convention cannot operate without the aid of a military force to execute its laws. This, however, like most other things that have been alleged on that side, rests on mere general assertion, unsupported by any precise or intelligible designation of the reasons upon which it is founded. As far as I have been able to divine the latent meaning of the objectors, it seems to originate in a presupposition that the people will be disinclined to the exercise of federal authority in any matter of an internal nature. Waiving any exception that might be taken to the inaccuracy or inexplicitness of the distinction between internal and external, let us inquire what ground there is to presuppose that disinclination in the people. Unless we presume at the same time that the powers of the general government will be worse administered than those of the State government, there seems to be no room for the presumption of ill-will, disaffection, or

opposition in the people. I believe it may be laid down as a general rule that their confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration. It must be admitted that there are exceptions to this rule; but these exceptions depend so entirely on accidental causes, that they cannot be considered as having any relation to the intrinsic merits or demerits of a constitution. These can only be judged of by general principles and maxims.

Various reasons have been suggested, in the course of these papers, to induce a probability that the general government will be better administered than the particular governments; the principal of which reasons are that the extension of the spheres of election will present a greater option, or latitude of choice, to the people; that through the medium of the State legislatures which are select bodies of men, and which are to appoint the members of the national Senate there is reason to expect that this branch will generally be composed with peculiar care and judgment; that these circumstances promise greater knowledge and more extensive information in the national councils, and that they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humors, or temporary prejudices and propensities, which, in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust. Several additional reasons of considerable force, to fortify that probability, will occur when we come to survey, with a more critical eye, the interior structure of the edifice which we are invited to erect. It will be sufficient here to remark, that until satisfactory reasons can be assigned to justify an opinion, that the federal government is likely to be administered in such a manner as to render it odious or contemptible to the people, there can be no reasonable foundation for the supposition that the laws of the Union will meet with any greater obstruction from them, or will stand in need of any other methods to enforce their execution, than the laws of the particular members.

The hope of impunity is a strong incitement to sedition; the dread of punishment, a proportionably strong discouragement to it. Will not the government of the Union, which, if possessed of a due degree of power, can call to its aid the collective resources of the whole Confederacy, be more likely to repress the FORMER sentiment and to inspire the LATTER, than that of a single State, which can only command the resources within itself? A turbulent faction in a State may easily suppose itself able to contend with the friends to the government in that State; but it can hardly be so infatuated as to imagine itself a match for the combined efforts of the Union. If this reflection be just, there is less danger of resistance from irregular combinations of individuals to the authority of the Confederacy than to that of a single member.

I will, in this place, hazard an observation, which will not be the less just because to some it may appear new; which is, that the more the operations of the national authority are intermingled in the ordinary exercise of government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and attachment of the community. Man is very much a creature of habit. A thing that rarely strikes his senses will generally have but little influence upon his mind. A government continually at a distance and out of sight can hardly be expected to interest the sensations of the people. The inference is, that the authority of the Union, and the affections of the citizens towards it, will be strengthened, rather than weakened, by its extension to what are called matters of internal concern; and will have less occasion to recur to force, in proportion to the familiarity and comprehensiveness of its agency. The more it circulates through those channels and currents in which the passions of mankind naturally flow, the less will it require the aid of the violent and perilous expedients of compulsion.

One thing, at all events, must be evident, that a government like the one proposed would bid much fairer to avoid the necessity of using force, than that species of league contend for by most of its opponents; the authority of which should only operate upon the States in their political or collective capacities. It has been shown that in such a Confederacy there can be no sanction for the laws but force; that frequent delinquencies in the members are the natural offspring of the very frame of the government; and that as often as these happen, they can only be redressed, if at all, by war and violence.

The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State, in addition to the influence on public opinion which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union. It merits particular attention in this place, that the laws of the Confederacy, as to the ENUMERATED and LEGITIMATE objects of its jurisdiction, will become the SUPREME LAW of the

land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government AS FAR AS ITS JUST AND CONSTITUTIONAL AUTHORITY EXTENDS; and will be rendered auxiliary to the enforcement of its laws.(1) Any man who will pursue, by his own reflections, the consequences of this situation, will perceive that there is good ground to calculate upon a regular and peaceable execution of the laws of the Union, if its powers are administered with a common share of prudence. If we will arbitrarily suppose the contrary, we may deduce any inferences we please from the supposition; for it is certainly possible, by an injudicious exercise of the authorities of the best government that ever was, or ever can be instituted, to provoke and precipitate the people into the wildest excesses. But though the adversaries of the proposed Constitution should presume that the national rulers would be insensible to the motives of public good, or to the obligations of duty, I would still ask them how the interests of ambition, or the views of encroachment, can be promoted by such a conduct?

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1. The sophistry which has been employed to show that this will tend to the destruction of the State governments, will, in its will, in its proper place, be fully detected.

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FEDERALIST No. 28. The Same Subject Continued (The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered)

For the Independent Journal. Wednesday, December 26, 1787

HAMILTON

To the People of the State of New York:

THAT there may happen cases in which the national government may be necessitated to resort to force, cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government), has no place but in the reveries of those political doctors whose sagacity disdains the admonitions of experimental instruction.

Should such emergencies at any time happen under the national government, there could be no remedy but force. The means to be employed must be proportioned to the extent of the mischief. If it should be a slight commotion in a small part of a State, the militia of the residue would be adequate to its suppression; and the national presumption is that they would be ready to do their duty. An insurrection, whatever may be its immediate cause, eventually endangers all government. Regard to the public peace, if not to the rights of the Union, would engage the citizens to whom the contagion had not communicated itself to oppose the insurgents; and if the general government should be found in practice conducive to the prosperity and felicity of the people, it were irrational to believe that they would be disinclined to its support.

If, on the contrary, the insurrection should pervade a whole State, or a principal part of it, the employment of a different kind of force might become unavoidable. It appears that Massachusetts found it necessary to raise troops for repressing the disorders within that State; that Pennsylvania, from the mere apprehension of commotions among a part of her citizens, has thought proper to have recourse to the same measure. Suppose the State of New York had been inclined to re-establish her lost jurisdiction over the inhabitants of Vermont, could she have hoped for success in such an enterprise from the efforts of the militia alone? Would she not have been compelled to raise and to maintain a more regular force for the execution of her design? If it must then be admitted that the necessity of recurring to a force different from the militia, in cases of this extraordinary nature, is applicable to the State governments themselves, why should the possibility, that the national government might be under a like necessity, in similar extremities, be made an objection to its existence? Is it not surprising that men who declare an attachment to the Union in the abstract, should urge as an objection to the proposed Constitution what applies with tenfold weight to the plan for which they contend; and what, as far as it has any foundation in truth, is an inevitable consequence of civil society upon an enlarged scale? Who would not prefer that possibility to the unceasing agitations and frequent revolutions which are the continual scourges of petty republics?

Let us pursue this examination in another light. Suppose, in lieu of one general system, two, or three, or even four Confederacies were to be formed, would not the same difficulty oppose itself to the operations of either of these Confederacies? Would not each of them be exposed to the same casualties; and when these happened, be obliged to have recourse to the same expedients for upholding its authority which are objected to in a government for all the States? Would the militia, in this supposition, be more ready or more able to support the federal authority than in the case of a general union? All candid and intelligent men must, upon due consideration, acknowledge that the principle of the objection is equally applicable to either of the two cases; and that whether we have one government for all the States, or different governments for different parcels of them, or even if there should be an entire separation of the States, there might sometimes be a necessity to make use of a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions.

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace, to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people, which is attainable in civil society.(1)

If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers, may be exerted with infinitely better prospect of success than against those of the rulers of an individual state. In a single state, if the persons intrusted with supreme power become usurpers, the different parcels, subdivisions, or districts of which it consists, having no distinct government in each, can take no regular measures for defense. The citizens must rush tumultuously to arms, without concert, without system, without resource; except in their courage and despair. The usurpers, clothed with the forms of legal authority, can too often crush the opposition in embryo. The smaller the extent of the territory, the more difficult will it be for the people to form a regular or systematic plan of opposition, and the more easy will it be to defeat their early efforts. Intelligence can be more speedily obtained of their preparations and movements, and the military force in the possession of the usurpers can be more rapidly directed against the part where the opposition has begun. In this situation there must be a peculiar coincidence of circumstances to insure success to the popular resistance.

The obstacles to usurpation and the facilities of resistance increase with the increased extent of the state, provided the citizens understand their rights and are disposed to defend them. The natural strength of the people in a large community, in proportion to the artificial strength of the government, is greater than in a small, and of course more competent to a struggle with the attempts of the government to establish a tyranny. But in a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. How wise will it be in them by cherishing the union to preserve to themselves an advantage which can never be too highly prized!

It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign power. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive.

We should recollect that the extent of the military force must, at all events, be regulated by the resources of the country. For a long time to come, it will not be possible to maintain a large army; and as the means of doing this increase, the population and natural

strength of the community will proportionably increase. When will the time arrive that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity, and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning.

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1. Its full efficacy will be examined hereafter.

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FEDERALIST No. 29. Concerning the Militia

From the New York Packet. Wednesday, January 9, 1788

HAMILTON

To the People of the State of New York:

THE power of regulating the militia, and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defense, and of watching over the internal peace of the Confederacy.

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority. It is, therefore, with the most evident propriety, that the plan of the convention proposes to empower the Union “to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, RESERVING TO THE STATES RESPECTIVELY THE APPOINTMENT OF THE OFFICERS, AND THE AUTHORITY OF TRAINING THE MILITIA ACCORDING TO THE DISCIPLINE PRESCRIBED BY CONGRESS.”

Of the different grounds which have been taken in opposition to the plan of the convention, there is none that was so little to have been expected, or is so untenable in itself, as the one from which this particular provision has been attacked. If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary, will be a more certain method of preventing its existence than a thousand prohibitions upon paper.

In order to cast an odium upon the power of calling forth the militia to execute the laws of the Union, it has been remarked that there is nowhere any provision in the proposed Constitution for calling out the POSSE COMITATUS, to assist the magistrate in the execution of his duty, whence it has been inferred, that military force was intended to be his only auxiliary. There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it. It would be as absurd to doubt, that a right to pass all laws NECESSARY AND PROPER to execute its declared powers, would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws, as it would be to believe, that a right to enact laws necessary and proper for the imposition and collection of taxes would involve that of varying the rules of descent and of the alienation of landed property, or of abolishing the trial by jury in cases relating to it. It being therefore evident that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of color, it will follow,

that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia, is as uncandid as it is illogical. What reason could there be to infer, that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary? What shall we think of the motives which could induce men of sense to reason in this manner? How shall we prevent a conflict between charity and conviction?

By a curious refinement upon the spirit of republican jealousy, we are even taught to apprehend danger from the militia itself, in the hands of the federal government. It is observed that select corps may be formed, composed of the young and ardent, who may be rendered subservient to the views of arbitrary power. What plan for the regulation of the militia may be pursued by the national government, is impossible to be foreseen. But so far from viewing the matter in the same light with those who object to select corps as dangerous, were the Constitution ratified, and were I to deliver my sentiments to a member of the federal legislature from this State on the subject of a militia establishment, I should hold to him, in substance, the following discourse:

“The project of disciplining all the militia of the United States is as futile as it would be injurious, if it were capable of being carried into execution. A tolerable expertness in military movements is a business that requires time and practice. It is not a day, or even a week, that will suffice for the attainment of it. To oblige the great body of the yeomanry, and of the other classes of the citizens, to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well-regulated militia, would be a real grievance to the people, and a serious public inconvenience and loss. It would form an annual deduction from the productive labor of the country, to an amount which, calculating upon the present numbers of the people, would not fall far short of the whole expense of the civil establishments of all the States. To attempt a thing which would abridge the mass of labor and industry to so considerable an extent, would be unwise: and the experiment, if made, could not succeed, because it would not long be endured. Little more can reasonably be aimed at, with respect to the people at large, than to have them properly armed and equipped; and in order to see that this be not neglected, it will be necessary to assemble them once or twice in the course of a year.

“But though the scheme of disciplining the whole nation must be abandoned as mischievous or impracticable; yet it is a matter of the utmost importance that a well-digested plan should, as soon as possible, be adopted for the proper establishment of the militia. The attention of the government ought particularly to be directed to the formation of a select corps of moderate extent, upon such principles as will really fit them for service in case of need. By thus circumscribing the plan, it will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it. This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little, if at all, inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow-citizens. This appears to me the only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.”

Thus differently from the adversaries of the proposed Constitution should I reason on the same subject, deducing arguments of safety from the very sources which they represent as fraught with danger and perdition. But how the national legislature may reason on the point, is a thing which neither they nor I can foresee.

There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery; whether to consider it as a mere trial of skill, like the paradoxes of rhetoricians; as a disingenuous artifice to instil prejudices at any price; or as the serious offspring of political fanaticism. Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia, and to command its services when necessary, while the particular States are to have the SOLE AND EXCLUSIVE APPOINTMENT OF THE OFFICERS? If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

In reading many of the publications against the Constitution, a man is apt to imagine that he is perusing some ill-written tale or romance, which instead of natural and agreeable images, exhibits to the mind nothing but frightful and distorted shapes—

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"Gorgons, hydras, and chimeras dire";
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discoloring and disfiguring whatever it represents, and transforming everything it touches into a monster.

A sample of this is to be observed in the exaggerated and improbable suggestions which have taken place respecting the power of calling for the services of the militia. That of New Hampshire is to be marched to Georgia, of Georgia to New Hampshire, of New York to Kentucky, and of Kentucky to Lake Champlain. Nay, the debts due to the French and Dutch are to be paid in militiamen instead of louis d'ors and ducats. At one moment there is to be a large army to lay prostrate the liberties of the people; at another moment the militia of Virginia are to be dragged from their homes five or six hundred miles, to tame the republican contumacy of Massachusetts; and that of Massachusetts is to be transported an equal distance to subdue the refractory haughtiness of the aristocratic Virginians. Do the persons who rave at this rate imagine that their art or their eloquence can impose any conceits or absurdities upon the people of America for infallible truths?

If there should be an army to be made use of as the engine of despotism, what need of the militia? If there should be no army, whither would the militia, irritated by being called upon to undertake a distant and hopeless expedition, for the purpose of riveting the chains of slavery upon a part of their countrymen, direct their course, but to the seat of the tyrants, who had meditated so foolish as well as so wicked a project, to crush them in their imagined intrenchments of power, and to make them an example of the just vengeance of an abused and incensed people? Is this the way in which usurpers stride to dominion over a numerous and enlightened nation? Do they begin by exciting the detestation of the very instruments of their intended usurpations? Do they usually commence their career by wanton and disgustful acts of power, calculated to answer no end, but to draw upon themselves universal hatred and execration? Are suppositions of this sort the sober admonitions of discerning patriots to a discerning people? Or are they the inflammatory ravings of incendiaries or distempered enthusiasts? If we were even to suppose the national rulers actuated by the most ungovernable ambition, it is impossible to believe that they would employ such preposterous means to accomplish their designs.

In times of insurrection, or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition. This was frequently the case, in respect to the first object, in the course of the late war; and this mutual succor is, indeed, a principal end of our political association. If the power of affording it be placed under the direction of the Union, there will be no danger of a supine and listless inattention to the dangers of a neighbor, till its near approach had superadded the incitements of self-preservation to the too feeble impulses of duty and sympathy.

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FEDERALIST No. 30. Concerning the General Power of Taxation

From the New York Packet. Friday, December 28, 1787.

HAMILTON

To the People of the State of New York:

IT HAS been already observed that the federal government ought to possess the power of providing for the support of the national forces; in which proposition was intended to be included the expense of raising troops, of building and equipping fleets, and all other expenses in any wise connected with military arrangements and operations. But these are not the only objects to which the jurisdiction of the Union, in respect to revenue, must necessarily be empowered to extend. It must embrace a provision for the support of the national civil list; for the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury. The conclusion is, that there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.

Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

In the Ottoman or Turkish empire, the sovereign, though in other respects absolute master of the lives and fortunes of his subjects, has no right to impose a new tax. The consequence is that he permits the bashaws or governors of provinces to pillage the people without mercy; and, in turn, squeezes out of them the sums of which he stands in need, to satisfy his own exigencies and those of the state. In America, from a like cause, the government of the Union has gradually dwindled into a state of decay, approaching nearly to annihilation. Who can doubt, that the happiness of the people in both countries would be promoted by competent authorities in the proper hands, to provide the revenues which the necessities of the public might require?

The present Confederation, feeble as it is intended to repose in the United States, an unlimited power of providing for the pecuniary wants of the Union. But proceeding upon an erroneous principle, it has been done in such a manner as entirely to have frustrated the intention. Congress, by the articles which compose that compact (as has already been stated), are authorized to ascertain and call for any sums of money necessary, in their judgment, to the service of the United States; and their requisitions, if conformable to the rule of apportionment, are in every constitutional sense obligatory upon the States. These have no right to question the propriety of the demand; no discretion beyond that of devising the ways and means of furnishing the sums demanded. But though this be strictly and truly the case; though the assumption of such a right would be an infringement of the articles of Union; though it may seldom or never have been avowedly claimed, yet in practice it has been constantly exercised, and would continue to be so, as long as the revenues of the Confederacy should remain dependent on the intermediate agency of its members. What the consequences of this system have been, is within the knowledge of every man the least conversant in our public affairs, and has been amply unfolded in different parts of these inquiries. It is this which has chiefly contributed to reduce us to a situation, which affords ample cause both of mortification to ourselves, and of triumph to our enemies.

What remedy can there be for this situation, but in a change of the system which has produced it in a change of the fallacious and delusive system of quotas and requisitions? What substitute can there be imagined for this ignis fatuus in finance, but that of permitting the national government to raise its own revenues by the ordinary methods of taxation authorized in every well-ordered constitution of civil government? Ingenious men may declaim with plausibility on any subject; but no human ingenuity can point out any other expedient to rescue us from the inconveniences and embarrassments naturally resulting from defective supplies of the public treasury.

The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call INTERNAL and EXTERNAL taxation. The former they would reserve to the State governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the federal head. This distinction, however, would violate the maxim of good sense and sound policy, which dictates that every POWER ought to be in proportion to its OBJECT; and would still leave the general government in a kind of tutelage to the State governments, inconsistent with every idea of vigor or efficiency. Who can pretend that commercial imposts are, or would be, alone equal to the present and future exigencies of the Union? Taking into the account the existing debt, foreign and domestic, upon any plan of extinguishment which a man moderately impressed with the importance of public justice and public credit could approve, in addition to the establishments which all parties will acknowledge to be necessary, we could not reasonably flatter ourselves, that this resource alone, upon the most improved scale, would even suffice for its present necessities. Its future necessities admit not of calculation or limitation; and upon the principle, more than once adverted to, the power of making provision for them as they arise ought to be equally unconfined. I believe it may be regarded as a position warranted by the history of mankind, that, IN THE USUAL PROGRESS OF THINGS, THE NECESSITIES OF A NATION, IN EVERY STAGE OF ITS EXISTENCE, WILL BE FOUND AT LEAST EQUAL TO ITS RESOURCES.

To say that deficiencies may be provided for by requisitions upon the States, is on the one hand to acknowledge that this system cannot be depended upon, and on the other hand to depend upon it for every thing beyond a certain limit. Those who have carefully attended to its vices and deformities as they have been exhibited by experience or delineated in the course of these papers, must feel invincible repugnancy to trusting the national interests in any degree to its operation. Its inevitable tendency, whenever it is brought into activity, must be to enfeeble the Union, and sow the seeds of discord and contention between the federal head and its members, and between the members themselves. Can it be expected that the deficiencies would be better supplied in this mode than the total wants of the Union have heretofore been supplied in the same mode? It ought to be recollected that if less will be required from the States, they will have proportionably less means to answer the demand. If the opinions of those who contend for the distinction which has been mentioned were to be received as evidence of truth, one would be led to conclude that there was some known point in the economy of national affairs at which it would be safe to stop and to say: Thus far the ends of public happiness

will be promoted by supplying the wants of government, and all beyond this is unworthy of our care or anxiety. How is it possible that a government half supplied and always necessitous, can fulfill the purposes of its institution, can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home or respectability abroad? How can its administration be any thing else than a succession of expedients temporizing, impotent, disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can it undertake or execute any liberal or enlarged plans of public good?

Let us attend to what would be the effects of this situation in the very first war in which we should happen to be engaged. We will presume, for argument's sake, that the revenue arising from the impost duties answers the purposes of a provision for the public debt and of a peace establishment for the Union. Thus circumstanced, a war breaks out. What would be the probable conduct of the government in such an emergency? Taught by experience that proper dependence could not be placed on the success of requisitions, unable by its own authority to lay hold of fresh resources, and urged by considerations of national danger, would it not be driven to the expedient of diverting the funds already appropriated from their proper objects to the defense of the State? It is not easy to see how a step of this kind could be avoided; and if it should be taken, it is evident that it would prove the destruction of public credit at the very moment that it was becoming essential to the public safety. To imagine that at such a crisis credit might be dispensed with, would be the extreme of infatuation. In the modern system of war, nations the most wealthy are obliged to have recourse to large loans. A country so little opulent as ours must feel this necessity in a much stronger degree. But who would lend to a government that prefaced its overtures for borrowing by an act which demonstrated that no reliance could be placed on the steadiness of its measures for paying? The loans it might be able to procure would be as limited in their extent as burdensome in their conditions. They would be made upon the same principles that usurers commonly lend to bankrupt and fraudulent debtors, with a sparing hand and at enormous premiums.

It may perhaps be imagined that, from the scantiness of the resources of the country, the necessity of diverting the established funds in the case supposed would exist, though the national government should possess an unrestrained power of taxation. But two considerations will serve to quiet all apprehension on this head: one is, that we are sure the resources of the community, in their full extent, will be brought into activity for the benefit of the Union; the other is, that whatever deficiences there may be, can without difficulty be supplied by loans.

The power of creating new funds upon new objects of taxation, by its own authority, would enable the national government to borrow as far as its necessities might require. Foreigners, as well as the citizens of America, could then reasonably repose confidence in its engagements; but to depend upon a government that must itself depend upon thirteen other governments for the means of fulfilling its contracts, when once its situation is clearly understood, would require a degree of credulity not often to be met with in the pecuniary transactions of mankind, and little reconcilable with the usual sharp-sightedness of avarice.

Reflections of this kind may have trifling weight with men who hope to see realized in America the halcyon scenes of the poetic or fabulous age; but to those who believe we are likely to experience a common portion of the vicissitudes and calamities which have fallen to the lot of other nations, they must appear entitled to serious attention. Such men must behold the actual situation of their country with painful solicitude, and deprecate the evils which ambition or revenge might, with too much facility, inflict upon it.

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FEDERALIST No. 31. The Same Subject Continued (Concerning the General Power of Taxation)

From the New York Packet. Tuesday, January 1, 1788.

HAMILTON

To the People of the State of New York:

IN DISQUISITIONS of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry, that "the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other." Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there

ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. And there are other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common-sense, that they challenge the assent of a sound and unbiased mind, with a degree of force and conviction almost equally irresistible.

The objects of geometrical inquiry are so entirely abstracted from those pursuits which stir up and put in motion the unruly passions of the human heart, that mankind, without difficulty, adopt not only the more simple theorems of the science, but even those abstruse paradoxes which, however they may appear susceptible of demonstration, are at variance with the natural conceptions which the mind, without the aid of philosophy, would be led to entertain upon the subject. The INFINITE DIVISIBILITY of matter, or, in other words, the INFINITE divisibility of a FINITE thing, extending even to the minutest atom, is a point agreed among geometricians, though not less incomprehensible to common-sense than any of those mysteries in religion, against which the batteries of infidelity have been so industriously leveled.

But in the sciences of morals and politics, men are found far less tractable. To a certain degree, it is right and useful that this should be the case. Caution and investigation are a necessary armor against error and imposition. But this untractableness may be carried too far, and may degenerate into obstinacy, perverseness, or disingenuity. Though it cannot be pretended that the principles of moral and political knowledge have, in general, the same degree of certainty with those of the mathematics, yet they have much better claims in this respect than, to judge from the conduct of men in particular situations, we should be disposed to allow them. The obscurity is much oftener in the passions and prejudices of the reasoner than in the subject. Men, upon too many occasions, do not give their own understandings fair play; but, yielding to some untoward bias, they entangle themselves in words and confound themselves in subtleties.

How else could it happen (if we admit the objectors to be sincere in their opposition), that positions so clear as those which manifest the necessity of a general power of taxation in the government of the Union, should have to encounter any adversaries among men of discernment? Though these positions have been elsewhere fully stated, they will perhaps not be improperly recapitulated in this place, as introductory to an examination of what may have been offered by way of objection to them. They are in substance as follows:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.

As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.

As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the States in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes.

Did not experience evince the contrary, it would be natural to conclude that the propriety of a general power of taxation in the national government might safely be permitted to rest on the evidence of these propositions, unassisted by any additional arguments or illustrations. But we find, in fact, that the antagonists of the proposed Constitution, so far from acquiescing in their justness or truth, seem to make their principal and most zealous effort against this part of the plan. It may therefore be satisfactory to analyze the arguments with which they combat it.

Those of them which have been most labored with that view, seem in substance to amount to this: “It is not true, because the exigencies of the Union may not be susceptible of limitation, that its power of laying taxes ought to be unconfined. Revenue is as requisite to the purposes of the local administrations as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power of taxation in the LATTER might, and probably would in time, deprive the FORMER of the means of

providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land, as it is to have power to pass all laws that may be NECESSARY for carrying into execution the authorities with which it is proposed to vest it, the national government might at any time abolish the taxes imposed for State objects upon the pretense of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenues. And thus all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the State governments."

This mode of reasoning appears sometimes to turn upon the supposition of usurpation in the national government; at other times it seems to be designed only as a deduction from the constitutional operation of its intended powers. It is only in the latter light that it can be admitted to have any pretensions to fairness. The moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning. Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to extricate itself from the perplexities into which it has so rashly adventured. Whatever may be the limits or modifications of the powers of the Union, it is easy to imagine an endless train of possible dangers; and by indulging an excess of jealousy and timidity, we may bring ourselves to a state of absolute scepticism and irresolution. I repeat here what I have observed in substance in another place, that all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers. The State governments, by their original constitutions, are invested with complete sovereignty. In what does our security consist against usurpation from that quarter? Doubtless in the manner of their formation, and in a due dependence of those who are to administer them upon the people. If the proposed construction of the federal government be found, upon an impartial examination of it, to be such as to afford, to a proper extent, the same species of security, all apprehensions on the score of usurpation ought to be discarded.

It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments. What side would be likely to prevail in such a conflict, must depend on the means which the contending parties could employ toward insuring success. As in republics strength is always on the side of the people, and as there are weighty reasons to induce a belief that the State governments will commonly possess most influence over them, the natural conclusion is that such contests will be most apt to end to the disadvantage of the Union; and that there is greater probability of encroachments by the members upon the federal head, than by the federal head upon the members. But it is evident that all conjectures of this kind must be extremely vague and fallible: and that it is by far the safest course to lay them altogether aside, and to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Every thing beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the general and the State governments. Upon this ground, which is evidently the true one, it will not be difficult to obviate the objections which have been made to an indefinite power of taxation in the United States.

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FEDERALIST No. 32. The Same Subject Continued (Concerning the General Power of Taxation)

From The Independent Journal. Wednesday, January 2, 1788.

HAMILTON

To the People of the State of New York:

ALTHOUGH I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the POLICY of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise “EXCLUSIVE LEGISLATION” over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress “to lay and collect taxes, duties, imposts and excises”; and the second clause of the tenth section of the same article declares that, “NO STATE SHALL, without the consent of Congress, lay any imposts or duties on imports or exports, except for the purpose of executing its inspection laws.” Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification, it now only extends to the DUTIES ON IMPORTS. This answers to the second case. The third will be found in that clause which declares that Congress shall have power “to establish an UNIFORM RULE of naturalization throughout the United States.” This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power EXCLUSIVE in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT that is, a NEGATION of one thing, and an AFFIRMANCE of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them ABSOLUTELY from the imposition of taxes of the former kind, and to leave them at liberty to lay others SUBJECT TO THE CONTROL of the national legislature. The restraining or prohibitory clause only says, that they shall not, WITHOUT THE CONSENT OF CONGRESS, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, WITH THE CONSENT of the national legislature, might tax imports and exports; and that they might tax every other article, UNLESS CONTROLLED by the same body. If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it INEXPEDIENT that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an

increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary.

PUBLIUSHome

FEDERALIST No. 33. The Same Subject Continued (Concerning the General Power of Taxation)

From The Independent Journal. Wednesday, January 2, 1788.

HAMILTON

To the People of the State of New York:

THE residue of the argument against the provisions of the Constitution in respect to taxation is ingrafted upon the following clause. The last clause of the eighth section of the first article of the plan under consideration authorizes the national legislature “to make all laws which shall be NECESSARY and PROPER for carrying into execution THE POWERS by that Constitution vested in the government of the United States, or in any department or officer thereof”; and the second clause of the sixth article declares, “that the Constitution and the laws of the United States made IN PURSUANCE THEREOF, and the treaties made by their authority shall be the SUPREME LAW of the land, any thing in the constitution or laws of any State to the contrary notwithstanding.”

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. This is so clear a proposition, that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the MEANS necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the MEANS to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes, but a LEGISLATIVE POWER, or a power of MAKING LAWS, to lay and collect taxes? What are the proper means of executing such a power, but NECESSARY and PROPER laws?

This simple train of inquiry furnishes us at once with a test by which to judge of the true nature of the clause complained of. It conducts us to this palpable truth, that a power to lay and collect taxes must be a power to pass all laws NECESSARY and PROPER for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws NECESSARY and PROPER to carry it into effect? I have applied these observations thus particularly to the power of taxation, because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is EXPRESSLY to execute these powers that the sweeping clause,

as it has been affectedly called, authorizes the national legislature to pass all NECESSARY and PROPER laws. If there is any thing exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

But SUSPICION may ask, Why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare.

But it may be again asked, Who is to judge of the NECESSITY and PROPRIETY of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a landtax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

But it is said that the laws of the Union are to be the SUPREME LAW of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation, that it EXPRESSLY confines this supremacy to laws made PURSUANT TO THE CONSTITUTION; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.

Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of the State, (unless upon imports and exports), would not be the supreme law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other, in a manner equally disadvantageous to both. It is to be hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience. The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of

which they may stand in need, by every kind of taxation, except duties on imports and exports. It will be shown in the next paper that this CONCURRENT JURISDICTION in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union.

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FEDERALIST No. 34. The Same Subject Continued (Concerning the General Power of Taxation)

From The Independent Journal. Saturday, January 5, 1788.

HAMILTON

To the People of the State of New York:

I FLATTER myself it has been clearly shown in my last number that the particular States, under the proposed Constitution, would have COEQUAL authority with the Union in the article of revenue, except as to duties on imports. As this leaves open to the States far the greatest part of the resources of the community, there can be no color for the assertion that they would not possess means as abundant as could be desired for the supply of their own wants, independent of all external control. That the field is sufficiently wide will more fully appear when we come to advert to the inconsiderable share of the public expenses for which it will fall to the lot of the State governments to provide.

To argue upon abstract principles that this co-ordinate authority cannot exist, is to set up supposition and theory against fact and reality. However proper such reasonings might be to show that a thing OUGHT NOT TO EXIST, they are wholly to be rejected when they are made use of to prove that it does not exist contrary to the evidence of the fact itself. It is well known that in the Roman republic the legislative authority, in the last resort, resided for ages in two different political bodies not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed: in one the patrician; in the other, the plebian. Many arguments might have been adduced to prove the unfitness of two such seemingly contradictory authorities, each having power to ANNUL or REPEAL the acts of the other. But a man would have been regarded as frantic who should have attempted at Rome to disprove their existence. It will be readily understood that I allude to the COMITIA CENTURIATA and the COMITIA TRIBUTA. The former, in which the people voted by centuries, was so arranged as to give a superiority to the patrician interest; in the latter, in which numbers prevailed, the plebian interest had an entire predominancy. And yet these two legislatures coexisted for ages, and the Roman republic attained to the utmost height of human greatness.

In the case particularly under consideration, there is no such contradiction as appears in the example cited; there is no power on either side to annul the acts of the other. And in practice there is little reason to apprehend any inconvenience; because, in a short course of time, the wants of the States will naturally reduce themselves within A VERY NARROW COMPASS; and in the interim, the United States will, in all probability, find it convenient to abstain wholly from those objects to which the particular States would be inclined to resort.

To form a more precise judgment of the true merits of this question, it will be well to advert to the proportion between the objects that will require a federal provision in respect to revenue, and those which will require a State provision. We shall discover that the former are altogether unlimited, and that the latter are circumscribed within very moderate bounds. In pursuing this inquiry, we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. It is true, perhaps, that a computation might be made with sufficient accuracy to answer the purpose of the quantity of revenue requisite to discharge the subsisting engagements of the Union, and to maintain those establishments which, for some time to come, would suffice in time of peace. But would it be wise, or would it not rather be the extreme of folly, to stop at this point, and to leave the government intrusted with the care of the national defense in a state of absolute incapacity to provide for the protection of the community against future invasions of the public peace, by foreign war or domestic convulsions? If, on the contrary, we ought to exceed this point, where can we stop, short of an indefinite power of providing for emergencies as they may arise? Though it is easy to assert, in general terms, the possibility of forming a rational judgment of a due provision against probable dangers, yet we may safely challenge those who make the assertion to bring forward

their data, and may affirm that they would be found as vague and uncertain as any that could be produced to establish the probable duration of the world. Observations confined to the mere prospects of internal attacks can deserve no weight; though even these will admit of no satisfactory calculation: but if we mean to be a commercial people, it must form a part of our policy to be able one day to defend that commerce. The support of a navy and of naval wars would involve contingencies that must baffle all the efforts of political arithmetic.

Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations. A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No reasonable man would hastily pronounce that we are entirely out of its reach. Or if the combustible materials that now seem to be collecting should be dissipated without coming to maturity, or if a flame should be kindled without extending to us, what security can we have that our tranquillity will long remain undisturbed from some other cause or from some other quarter? Let us recollect that peace or war will not always be left to our option; that however moderate or unambitious we may be, we cannot count upon the moderation, or hope to extinguish the ambition of others. Who could have imagined at the conclusion of the last war that France and Britain, wearied and exhausted as they both were, would so soon have looked with so hostile an aspect upon each other? To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity, is to calculate on the weaker springs of the human character.

What are the chief sources of expense in every government? What has occasioned that enormous accumulation of debts with which several of the European nations are oppressed? The answers plainly is, wars and rebellions; the support of those institutions which are necessary to guard the body politic against these two most mortal diseases of society. The expenses arising from those institutions which are relative to the mere domestic police of a state, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure), are insignificant in comparison with those which relate to the national defense.

In the kingdom of Great Britain, where all the ostentatious apparatus of monarchy is to be provided for, not above a fifteenth part of the annual income of the nation is appropriated to the class of expenses last mentioned; the other fourteen fifteenths are absorbed in the payment of the interest of debts contracted for carrying on the wars in which that country has been engaged, and in the maintenance of fleets and armies. If, on the one hand, it should be observed that the expenses incurred in the prosecution of the ambitious enterprises and vainglorious pursuits of a monarchy are not a proper standard by which to judge of those which might be necessary in a republic, it ought, on the other hand, to be remarked that there should be as great a disproportion between the profusion and extravagance of a wealthy kingdom in its domestic administration, and the frugality and economy which in that particular become the modest simplicity of republican government. If we balance a proper deduction from one side against that which it is supposed ought to be made from the other, the proportion may still be considered as holding good.

But let us advert to the large debt which we have ourselves contracted in a single war, and let us only calculate on a common share of the events which disturb the peace of nations, and we shall instantly perceive, without the aid of any elaborate illustration, that there must always be an immense disproportion between the objects of federal and state expenditures. It is true that several of the States, separately, are encumbered with considerable debts, which are an excrescence of the late war. But this cannot happen again, if the proposed system be adopted; and when these debts are discharged, the only call for revenue of any consequence, which the State governments will continue to experience, will be for the mere support of their respective civil list; to which, if we add all contingencies, the total amount in every State ought to fall considerably short of two hundred thousand pounds.

In framing a government for posterity as well as ourselves, we ought, in those provisions which are designed to be permanent, to calculate, not on temporary, but on permanent causes of expense. If this principle be a just one our attention would be directed to a provision in favor of the State governments for an annual sum of about two hundred thousand pounds; while the exigencies of the Union could be susceptible of no limits, even in imagination. In this view of the subject, by what logic can it be maintained that the local governments ought to command, in perpetuity, an EXCLUSIVE source of revenue for any sum beyond the extent of two hundred thousand pounds? To extend its power further, in EXCLUSION of the authority of the Union, would be to take the resources of the community out of those hands which stood in need of them for the public welfare, in order to put them into other hands which could have no just or proper occasion for them.

Suppose, then, the convention had been inclined to proceed upon the principle of a repartition of the objects of revenue, between the Union and its members, in PROPORTION to their comparative necessities; what particular fund could have been selected for the use of the States, that would not either have been too much or too little too little for their present, too much for their future wants? As to the line of separation between external and internal taxes, this would leave to the States, at a rough computation, the command of two thirds of the resources of the community to defray from a tenth to a twentieth part of its expenses; and to the Union, one third of the resources of the community, to defray from nine tenths to nineteen twentieths of its expenses. If we desert this boundary and content ourselves with leaving to the States an exclusive power of taxing houses and lands, there would still be a great disproportion between the MEANS and the END; the possession of one third of the resources of the community to supply, at most, one tenth of its wants. If any fund could have been selected and appropriated, equal to and not greater than the object, it would have been inadequate to the discharge of the existing debts of the particular States, and would have left them dependent on the Union for a provision for this purpose.

The preceding train of observation will justify the position which has been elsewhere laid down, that "A CONCURRENT JURISDICTION in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of State authority to that of the Union." Any separation of the objects of revenue that could have been fallen upon, would have amounted to a sacrifice of the great INTERESTS of the Union to the POWER of the individual States. The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the Federal government with an adequate and independent power in the States to provide for their own necessities. There remain a few other lights, in which this important subject of taxation will claim a further consideration.

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FEDERALIST No. 35. The Same Subject Continued (Concerning the General Power of Taxation)

For the Independent Journal. Saturday, January 5, 1788

HAMILTON

To the People of the State of New York:

BEFORE we proceed to examine any other objections to an indefinite power of taxation in the Union, I shall make one general remark; which is, that if the jurisdiction of the national government, in the article of revenue, should be restricted to particular objects, it would naturally occasion an undue proportion of the public burdens to fall upon those objects. Two evils would spring from this source: the oppression of particular branches of industry; and an unequal distribution of the taxes, as well among the several States as among the citizens of the same State.

Suppose, as has been contended for, the federal power of taxation were to be confined to duties on imports, it is evident that the government, for want of being able to command other resources, would frequently be tempted to extend these duties to an injurious excess. There are persons who imagine that they can never be carried to too great a length; since the higher they are, the more it is alleged they will tend to discourage an extravagant consumption, to produce a favorable balance of trade, and to promote domestic manufactures. But all extremes are pernicious in various ways. Exorbitant duties on imported articles would beget a general spirit of smuggling; which is always prejudicial to the fair trader, and eventually to the revenue itself: they tend to render other classes of the community tributary, in an improper degree, to the manufacturing classes, to whom they give a premature monopoly of the markets; they sometimes force industry out of its more natural channels into others in which it flows with less advantage; and in the last place, they oppress the merchant, who is often obliged to pay them himself without any retribution from the consumer. When the demand is equal to the quantity of goods at market, the consumer generally pays the duty; but when the markets happen to be overstocked, a great proportion falls upon the merchant, and sometimes not only exhausts his profits, but breaks in upon his capital. I am apt to think that a division of the duty, between the seller and the buyer, more often happens than is commonly imagined. It is not always possible to raise the price of a commodity in exact proportion to every additional imposition laid upon it. The merchant, especially in a country of small commercial capital, is often under a necessity of keeping prices down in order to a more expeditious sale.

The maxim that the consumer is the payer, is so much oftener true than the reverse of the proposition, that it is far more equitable that the duties on imports should go into a common stock, than that they should redound to the exclusive benefit of the importing

States. But it is not so generally true as to render it equitable, that those duties should form the only national fund. When they are paid by the merchant they operate as an additional tax upon the importing State, whose citizens pay their proportion of them in the character of consumers. In this view they are productive of inequality among the States; which inequality would be increased with the increased extent of the duties. The confinement of the national revenues to this species of imposts would be attended with inequality, from a different cause, between the manufacturing and the non-manufacturing States. The States which can go farthest towards the supply of their own wants, by their own manufactures, will not, according to their numbers or wealth, consume so great a proportion of imported articles as those States which are not in the same favorable situation. They would not, therefore, in this mode alone contribute to the public treasury in a ratio to their abilities. To make them do this it is necessary that recourse be had to excises, the proper objects of which are particular kinds of manufactures. New York is more deeply interested in these considerations than such of her citizens as contend for limiting the power of the Union to external taxation may be aware of. New York is an importing State, and is not likely speedily to be, to any great extent, a manufacturing State. She would, of course, suffer in a double light from restraining the jurisdiction of the Union to commercial imposts.

So far as these observations tend to inculcate a danger of the import duties being extended to an injurious extreme it may be observed, conformably to a remark made in another part of these papers, that the interest of the revenue itself would be a sufficient guard against such an extreme. I readily admit that this would be the case, as long as other resources were open; but if the avenues to them were closed, HOPE, stimulated by necessity, would beget experiments, fortified by rigorous precautions and additional penalties, which, for a time, would have the intended effect, till there had been leisure to contrive expedients to elude these new precautions. The first success would be apt to inspire false opinions, which it might require a long course of subsequent experience to correct. Necessity, especially in politics, often occasions false hopes, false reasonings, and a system of measures correspondingly erroneous. But even if this supposed excess should not be a consequence of the limitation of the federal power of taxation, the inequalities spoken of would still ensue, though not in the same degree, from the other causes that have been noticed. Let us now return to the examination of objections.

One which, if we may judge from the frequency of its repetition, seems most to be relied on, is, that the House of Representatives is not sufficiently numerous for the reception of all the different classes of citizens, in order to combine the interests and feelings of every part of the community, and to produce a due sympathy between the representative body and its constituents. This argument presents itself under a very specious and seducing form; and is well calculated to lay hold of the prejudices of those to whom it is addressed. But when we come to dissect it with attention, it will appear to be made up of nothing but fair-sounding words. The object it seems to aim at is, in the first place, impracticable, and in the sense in which it is contended for, is unnecessary. I reserve for another place the discussion of the question which relates to the sufficiency of the representative body in respect to numbers, and shall content myself with examining here the particular use which has been made of a contrary supposition, in reference to the immediate subject of our inquiries.

The idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution, that each different occupation should send one or more members, the thing would never take place in practice. Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants, in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them, indeed, are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend; and they are aware, that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchant than by themselves. They are sensible that their habits in life have not been such as to give them those acquired endowments, without which, in a deliberative assembly, the greatest natural abilities are for the most part useless; and that the influence and weight, and superior acquirements of the merchants render them more equal to a contest with any spirit which might happen to infuse itself into the public councils, unfriendly to the manufacturing and trading interests. These considerations, and many others that might be mentioned prove, and experience confirms it, that artisans and manufacturers will commonly be disposed to bestow their votes upon merchants and those whom they recommend. We must therefore consider merchants as the natural representatives of all these classes of the community.

With regard to the learned professions, little need be observed; they truly form no distinct interest in society, and according to their situation and talents, will be indiscriminately the objects of the confidence and choice of each other, and of other parts of the community.

Nothing remains but the landed interest; and this, in a political view, and particularly in relation to taxes, I take to be perfectly united, from the wealthiest landlord down to the poorest tenant. No tax can be laid on land which will not affect the proprietor of millions of acres as well as the proprietor of a single acre. Every landholder will therefore have a common interest to keep the taxes on land as low as possible; and common interest may always be reckoned upon as the surest bond of sympathy. But if we even could suppose a distinction of interest between the opulent landholder and the middling farmer, what reason is there to conclude, that the first would stand a better chance of being deputed to the national legislature than the last? If we take fact as our guide, and look into our own senate and assembly, we shall find that moderate proprietors of land prevail in both; nor is this less the case in the senate, which consists of a smaller number, than in the assembly, which is composed of a greater number. Where the qualifications of the electors are the same, whether they have to choose a small or a large number, their votes will fall upon those in whom they have most confidence; whether these happen to be men of large fortunes, or of moderate property, or of no property at all.

It is said to be necessary, that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free. Where this is the case, the representative body, with too few exceptions to have any influence on the spirit of the government, will be composed of landholders, merchants, and men of the learned professions. But where is the danger that the interests and feelings of the different classes of citizens will not be understood or attended to by these three descriptions of men? Will not the landholder know and feel whatever will promote or insure the interest of landed property? And will he not, from his own interest in that species of property, be sufficiently prone to resist every attempt to prejudice or encumber it? Will not the merchant understand and be disposed to cultivate, as far as may be proper, the interests of the mechanic and manufacturing arts, to which his commerce is so nearly allied? Will not the man of the learned profession, who will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society?

If we take into the account the momentary humors or dispositions which may happen to prevail in particular parts of the society, and to which a wise administration will never be inattentive, is the man whose situation leads to extensive inquiry and information less likely to be a competent judge of their nature, extent, and foundation than one whose observation does not travel beyond the circle of his neighbors and acquaintances? Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true, and they are the strong chords of sympathy between the representative and the constituent.

There is no part of the administration of government that requires extensive information and a thorough knowledge of the principles of political economy, so much as the business of taxation. The man who understands those principles best will be least likely to resort to oppressive expedients, or sacrifice any particular class of citizens to the procurement of revenue. It might be demonstrated that the most productive system of finance will always be the least burdensome. There can be no doubt that in order to a judicious exercise of the power of taxation, it is necessary that the person in whose hands it should be acquainted with the general genius, habits, and modes of thinking of the people at large, and with the resources of the country. And this is all that can be reasonably meant by a knowledge of the interests and feelings of the people. In any other sense the proposition has either no meaning, or an absurd one. And in that sense let every considerate citizen judge for himself where the requisite qualification is most likely to be found.

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FEDERALIST No. 36. The Same Subject Continued (Concerning the General Power of Taxation)

From the New York Packet. Tuesday, January 8, 1788.

HAMILTON

To the People of the State of New York:

WE HAVE seen that the result of the observations, to which the foregoing number has been principally devoted, is, that from the natural operation of the different interests and views of the various classes of the community, whether the representation of the

people be more or less numerous, it will consist almost entirely of proprietors of land, of merchants, and of members of the learned professions, who will truly represent all those different interests and views. If it should be objected that we have seen other descriptions of men in the local legislatures, I answer that it is admitted there are exceptions to the rule, but not in sufficient number to influence the general complexion or character of the government. There are strong minds in every walk of life that will rise superior to the disadvantages of situation, and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all; and I trust, for the credit of human nature, that we shall see examples of such vigorous plants flourishing in the soil of federal as well as of State legislation; but occasional instances of this sort will not render the reasoning founded upon the general course of things, less conclusive.

The subject might be placed in several other lights that would all lead to the same result; and in particular it might be asked, What greater affinity or relation of interest can be conceived between the carpenter and blacksmith, and the linen manufacturer or stocking weaver, than between the merchant and either of them? It is notorious that there are often as great rivalships between different branches of the mechanic or manufacturing arts as there are between any of the departments of labor and industry; so that, unless the representative body were to be far more numerous than would be consistent with any idea of regularity or wisdom in its deliberations, it is impossible that what seems to be the spirit of the objection we have been considering should ever be realized in practice. But I forbear to dwell any longer on a matter which has hitherto worn too loose a garb to admit even of an accurate inspection of its real shape or tendency.

There is another objection of a somewhat more precise nature that claims our attention. It has been asserted that a power of internal taxation in the national legislature could never be exercised with advantage, as well from the want of a sufficient knowledge of local circumstances, as from an interference between the revenue laws of the Union and of the particular States. The supposition of a want of proper knowledge seems to be entirely destitute of foundation. If any question is depending in a State legislature respecting one of the counties, which demands a knowledge of local details, how is it acquired? No doubt from the information of the members of the county. Cannot the like knowledge be obtained in the national legislature from the representatives of each State? And is it not to be presumed that the men who will generally be sent there will be possessed of the necessary degree of intelligence to be able to communicate that information? Is the knowledge of local circumstances, as applied to taxation, a minute topographical acquaintance with all the mountains, rivers, streams, highways, and bypaths in each State; or is it a general acquaintance with its situation and resources, with the state of its agriculture, commerce, manufactures, with the nature of its products and consumptions, with the different degrees and kinds of its wealth, property, and industry?

Nations in general, even under governments of the more popular kind, usually commit the administration of their finances to single men or to boards composed of a few individuals, who digest and prepare, in the first instance, the plans of taxation, which are afterwards passed into laws by the authority of the sovereign or legislature.

Inquisitive and enlightened statesmen are deemed everywhere best qualified to make a judicious selection of the objects proper for revenue; which is a clear indication, as far as the sense of mankind can have weight in the question, of the species of knowledge of local circumstances requisite to the purposes of taxation.

The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the DIRECT and those of the INDIRECT kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended. The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself, or can easily be procured from any well-informed man, especially of the mercantile class. The circumstances that may distinguish its situation in one State from its situation in another must be few, simple, and easy to be comprehended. The principal thing to be attended to, would be to avoid those articles which had been previously appropriated to the use of a particular State; and there could be no difficulty in ascertaining the revenue system of each. This could always be known from the respective codes of laws, as well as from the information of the members from the several States.

The objection, when applied to real property or to houses and lands, appears to have, at first sight, more foundation, but even in this view it will not bear a close examination. Land taxes are commonly laid in one of two modes, either by ACTUAL valuations, permanent or periodical, or by OCCASIONAL assessments, at the discretion, or according to the best judgment, of certain officers whose duty it is to make them. In either case, the EXECUTION of the business, which alone requires the knowledge of local details, must be devolved upon discreet persons in the character of commissioners or assessors, elected by the people or appointed

by the government for the purpose. All that the law can do must be to name the persons or to prescribe the manner of their election or appointment, to fix their numbers and qualifications and to draw the general outlines of their powers and duties. And what is there in all this that cannot as well be performed by the national legislature as by a State legislature? The attention of either can only reach to general principles; local details, as already observed, must be referred to those who are to execute the plan.

But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the SYSTEM OF EACH STATE WITHIN THAT STATE. The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government.

Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection. In addition to the precaution just mentioned, there is a provision that “all duties, imposts, and excises shall be UNIFORM throughout the United States.”

It has been very properly observed by different speakers and writers on the side of the Constitution, that if the exercise of the power of internal taxation by the Union should be discovered on experiment to be really inconvenient, the federal government may then forbear the use of it, and have recourse to requisitions in its stead. By way of answer to this, it has been triumphantly asked, Why not in the first instance omit that ambiguous power, and rely upon the latter resource? Two solid answers may be given. The first is, that the exercise of that power, if convenient, will be preferable, because it will be more effectual; and it is impossible to prove in theory, or otherwise than by the experiment, that it cannot be advantageously exercised. The contrary, indeed, appears most probable. The second answer is, that the existence of such a power in the Constitution will have a strong influence in giving efficacy to requisitions. When the States know that the Union can apply itself without their agency, it will be a powerful motive for exertion on their part.

As to the interference of the revenue laws of the Union, and of its members, we have already seen that there can be no clashing or repugnancy of authority. The laws cannot, therefore, in a legal sense, interfere with each other; and it is far from impossible to avoid an interference even in the policy of their different systems. An effectual expedient for this purpose will be, mutually, to abstain from those objects which either side may have first had recourse to. As neither can CONTROL the other, each will have an obvious and sensible interest in this reciprocal forbearance. And where there is an IMMEDIATE common interest, we may safely count upon its operation. When the particular debts of the States are done away, and their expenses come to be limited within their natural compass, the possibility almost of interference will vanish. A small land tax will answer the purpose of the States, and will be their most simple and most fit resource.

Many spectres have been raised out of this power of internal taxation, to excite the apprehensions of the people: double sets of revenue officers, a duplication of their burdens by double taxations, and the frightful forms of odious and oppressive poll-taxes, have been played off with all the ingenious dexterity of political legerdemain.

As to the first point, there are two cases in which there can be no room for double sets of officers: one, where the right of imposing the tax is exclusively vested in the Union, which applies to the duties on imports; the other, where the object has not fallen under any State regulation or provision, which may be applicable to a variety of objects. In other cases, the probability is that the United States will either wholly abstain from the objects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people. At all events, here is a practicable expedient for avoiding such an inconvenience; and nothing more can be required than to show that evils predicted to not necessarily result from the plan.

As to any argument derived from a supposed system of influence, it is a sufficient answer to say that it ought not to be presumed; but the supposition is susceptible of a more precise answer. If such a spirit should infest the councils of the Union, the most certain road to the accomplishment of its aim would be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government, instead of making federal influence flow in an opposite and adverse current. But all suppositions of this kind are invidious, and ought to be banished from the consideration of the great question before the people. They can answer no other end than to cast a mist over the truth.

As to the suggestion of double taxation, the answer is plain. The wants of the Union are to be supplied in one way or another; if to be done by the authority of the federal government, it will not be to be done by that of the State government. The quantity of taxes to be paid by the community must be the same in either case; with this advantage, if the provision is to be made by the Union that the capital resource of commercial imposts, which is the most convenient branch of revenue, can be prudently improved to a much greater extent under federal than under State regulation, and of course will render it less necessary to recur to more inconvenient methods; and with this further advantage, that as far as there may be any real difficulty in the exercise of the power of internal taxation, it will impose a disposition to greater care in the choice and arrangement of the means; and must naturally tend to make it a fixed point of policy in the national administration to go as far as may be practicable in making the luxury of the rich tributary to the public treasury, in order to diminish the necessity of those impositions which might create dissatisfaction in the poorer and most numerous classes of the society. Happy it is when the interest which the government has in the preservation of its own power, coincides with a proper distribution of the public burdens, and tends to guard the least wealthy part of the community from oppression!

As to poll taxes, I, without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those States(1) which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government. But does it follow because there is a power to lay them that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice. Are the State governments to be stigmatized as tyrannies, because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption? As little friendly as I am to the species of imposition, I still feel a thorough conviction that the power of having recourse to it ought to exist in the federal government. There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them. The real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself, for not abridging the discretion of the national councils in this respect. There may exist certain critical and tempestuous conjunctures of the State, in which a poll tax may become an inestimable resource. And as I know nothing to exempt this portion of the globe from the common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security.

(I have now gone through the examination of such of the powers proposed to be vested in the United States, which may be considered as having an immediate relation to the energy of the government; and have endeavored to answer the principal objections which have been made to them. I have passed over in silence those minor authorities, which are either too inconsiderable to have been thought worthy of the hostilities of the opponents of the Constitution, or of too manifest propriety to admit of controversy. The mass of judiciary power, however, might have claimed an investigation under this head, had it not been for the consideration that its organization and its extent may be more advantageously considered in connection. This has determined me to refer it to the branch of our inquiries upon which we shall next enter.)(E1)

(I have now gone through the examination of those powers proposed to be conferred upon the federal government which relate more peculiarly to its energy, and to its efficiency for answering the great and primary objects of union. There are others which, though omitted here, will, in order to render the view of the subject more complete, be taken notice of under the next head of our inquiries. I flatter myself the progress already made will have sufficed to satisfy the candid and judicious part of the community that some of the objections which have been most strenuously urged against the Constitution, and which were most formidable in their first appearance, are not only destitute of substance, but if they had operated in the formation of the plan, would have rendered it incompetent to the great ends of public happiness and national prosperity. I equally flatter myself that a further and more critical investigation of the system will serve to recommend it still more to every sincere and disinterested advocate for good government and will leave no doubt with men of this character of the propriety and expediency of adopting it. Happy will it be for ourselves, and more honorable for human nature, if we have wisdom and virtue enough to set so glorious an example to mankind!)(E1)

PUBLIUS

1. The New England States.

E1. Two versions of this paragraph appear in different editions.

FEDERALIST No. 37. Concerning the Difficulties of the Convention in Devising a Proper Form of Government.

From the Daily Advertiser. Friday, January 11, 1788.

MADISON

To the People of the State of New York:

IN REVIEWING the defects of the existing Confederation, and showing that they cannot be supplied by a government of less energy than that before the public, several of the most important principles of the latter fell of course under consideration. But as the ultimate object of these papers is to determine clearly and fully the merits of this Constitution, and the expediency of adopting it, our plan cannot be complete without taking a more critical and thorough survey of the work of the convention, without examining it on all its sides, comparing it in all its parts, and calculating its probable effects. That this remaining task may be executed under impressions conducive to a just and fair result, some reflections must in this place be indulged, which candor previously suggests.

It is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than promoted, by those occasions which require an unusual exercise of it. To those who have been led by experience to attend to this consideration, it could not appear surprising, that the act of the convention, which recommends so many important changes and innovations, which may be viewed in so many lights and relations, and which touches the springs of so many passions and interests, should find or excite dispositions unfriendly, both on one side and on the other, to a fair discussion and accurate judgment of its merits. In some, it has been too evident from their own publications, that they have scanned the proposed Constitution, not only with a predisposition to censure, but with a predetermination to condemn; as the language held by others betrays an opposite predetermination or bias, which must render their opinions also of little moment in the question. In placing, however, these different characters on a level, with respect to the weight of their opinions, I wish not to insinuate that there may not be a material difference in the purity of their intentions. It is but just to remark in favor of the latter description, that as our situation is universally admitted to be peculiarly critical, and to require indispensably that something should be done for our relief, the predetermined patron of what has been actually done may have taken his bias from the weight of these considerations, as well as from considerations of a sinister nature. The predetermined adversary, on the other hand, can have been governed by no venial motive whatever. The intentions of the first may be upright, as they may on the contrary be culpable. The views of the last cannot be upright, and must be culpable. But the truth is, that these papers are not addressed to persons falling under either of these characters. They solicit the attention of those only, who add to a sincere zeal for the happiness of their country, a temper favorable to a just estimate of the means of promoting it.

Persons of this character will proceed to an examination of the plan submitted by the convention, not only without a disposition to find or to magnify faults; but will see the propriety of reflecting, that a faultless plan was not to be expected. Nor will they barely make allowances for the errors which may be chargeable on the fallibility to which the convention, as a body of men, were liable; but will keep in mind, that they themselves also are but men, and ought not to assume an infallibility in rejudging the fallible opinions of others.

With equal readiness will it be perceived, that besides these inducements to candor, many allowances ought to be made for the difficulties inherent in the very nature of the undertaking referred to the convention.

The novelty of the undertaking immediately strikes us. It has been shown in the course of these papers, that the existing Confederation is founded on principles which are fallacious; that we must consequently change this first foundation, and with it the superstructure resting upon it. It has been shown, that the other confederacies which could be consulted as precedents have been vitiated by the same erroneous principles, and can therefore furnish no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued. The most that the convention could do in such a situation, was to avoid the errors suggested by the past experience of other countries, as well as of our own; and to provide a convenient mode of rectifying their own errors, as future experiences may unfold them.

Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form. Without substantially accomplishing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment, or the expectation of the public; yet that it could not be easily accomplished, will be denied by no one who is unwilling to betray his ignorance of the subject. Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations. On comparing, however, these valuable ingredients with the vital principles of liberty, we must perceive at once the difficulty of mingling them together in their due proportions. The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in independence on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands. Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men: whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand.

How far the convention may have succeeded in this part of their work, will better appear on a more accurate view of it. From the cursory view here taken, it must clearly appear to have been an arduous part.

Not less arduous must have been the task of marking the proper line of partition between the authority of the general and that of the State governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects extensive and complicated in their nature. The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated by such delicate shades and minute gradations that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy. The boundaries between the great kingdom of nature, and, still more, between the various provinces, and lesser portions, into which they are subdivided, afford another illustration of the same important truth. The most sagacious and laborious naturalists have never yet succeeded in tracing with certainty the line which separates the district of vegetable life from the neighboring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire. A still greater obscurity lies in the distinctive characters by which the objects in each of these great departments of nature have been arranged and assorted.

When we pass from the works of nature, in which all the delineations are perfectly accurate, and appear to be otherwise only from the imperfection of the eye which surveys them, to the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated, we must perceive the necessity of moderating still further our expectations and hopes from the efforts of human sagacity. Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.

The experience of ages, with the continued and combined labors of the most enlightened legislatures and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the

imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.

Here, then, are three sources of vague and incorrect definitions: indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas. Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all.

To the difficulties already mentioned may be added the interfering pretensions of the larger and smaller States. We cannot err in supposing that the former would contend for a participation in the government, fully proportioned to their superior wealth and importance; and that the latter would not be less tenacious of the equality at present enjoyed by them. We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise. It is extremely probable, also, that after the ratio of representation had been adjusted, this very compromise must have produced a fresh struggle between the same parties, to give such a turn to the organization of the government, and to the distribution of its powers, as would increase the importance of the branches, in forming which they had respectively obtained the greatest share of influence. There are features in the Constitution which warrant each of these suppositions; and as far as either of them is well founded, it shows that the convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.

Nor could it have been the large and small States only, which would marshal themselves in opposition to each other on various points. Other combinations, resulting from a difference of local position and policy, must have created additional difficulties. As every State may be divided into different districts, and its citizens into different classes, which give birth to contending interests and local jealousies, so the different parts of the United States are distinguished from each other by a variety of circumstances, which produce a like effect on a larger scale. And although this variety of interests, for reasons sufficiently explained in a former paper, may have a salutary influence on the administration of the government when formed, yet every one must be sensible of the contrary influence, which must have been experienced in the task of forming it.

Would it be wonderful if, under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination? The real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.

We had occasion, in a former paper, to take notice of the repeated trials which have been unsuccessfully made in the United Netherlands for reforming the baneful and notorious vices of their constitution. The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests, is a history of factions, contentions, and disappointments, and may be classed among the most dark and degraded pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth; and by their lustre to darken the gloom of the adverse prospect to which they are contrasted. In revolving the causes from which these exceptions result, and applying them to the particular instances before us, we are necessarily led to two important conclusions. The first is, that the convention must have enjoyed, in a very singular degree, an exemption from the pestilential influence of party animosities the disease most incident to deliberative bodies, and most apt to contaminate their proceedings. The second conclusion is that all the deputations composing the convention were satisfactorily accommodated by the final act, or were induced to accede to it by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good, and by a despair of seeing this necessity diminished by delays or by new experiments.

FEDERALIST No. 38. The Same Subject Continued, and the Incoherence of the Objections to the New Plan Exposed.

From The Independent Journal. Saturday, January 12, 1788.

MADISON

To the People of the State of New York:

IT IS not a little remarkable that in every case reported by ancient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men, but has been performed by some individual citizen of preeminent wisdom and approved integrity.

Minos, we learn, was the primitive founder of the government of Crete, as Zaleucus was of that of the Locrians. Theseus first, and after him Draco and Solon, instituted the government of Athens. Lycurgus was the lawgiver of Sparta. The foundation of the original government of Rome was laid by Romulus, and the work completed by two of his elective successors, Numa and Tullius Hostilius. On the abolition of royalty the consular administration was substituted by Brutus, who stepped forward with a project for such a reform, which, he alleged, had been prepared by Tullius Hostilius, and to which his address obtained the assent and ratification of the senate and people. This remark is applicable to confederate governments also. Amphictyon, we are told, was the author of that which bore his name. The Achaean league received its first birth from Achaeus, and its second from Aratus.

What degree of agency these reputed lawgivers might have in their respective establishments, or how far they might be clothed with the legitimate authority of the people, cannot in every instance be ascertained. In some, however, the proceeding was strictly regular. Draco appears to have been intrusted by the people of Athens with indefinite powers to reform its government and laws. And Solon, according to Plutarch, was in a manner compelled, by the universal suffrage of his fellow-citizens, to take upon him the sole and absolute power of new-modeling the constitution. The proceedings under Lycurgus were less regular; but as far as the advocates for a regular reform could prevail, they all turned their eyes towards the single efforts of that celebrated patriot and sage, instead of seeking to bring about a revolution by the intervention of a deliberative body of citizens.

Whence could it have proceeded, that a people, jealous as the Greeks were of their liberty, should so far abandon the rules of caution as to place their destiny in the hands of a single citizen? Whence could it have proceeded, that the Athenians, a people who would not suffer an army to be commanded by fewer than ten generals, and who required no other proof of danger to their liberties than the illustrious merit of a fellow-citizen, should consider one illustrious citizen as a more eligible depositary of the fortunes of themselves and their posterity, than a select body of citizens, from whose common deliberations more wisdom, as well as more safety, might have been expected? These questions cannot be fully answered, without supposing that the fears of discord and disunion among a number of counsellors exceeded the apprehension of treachery or incapacity in a single individual. History informs us, likewise, of the difficulties with which these celebrated reformers had to contend, as well as the expedients which they were obliged to employ in order to carry their reforms into effect. Solon, who seems to have indulged a more temporizing policy, confessed that he had not given to his countrymen the government best suited to their happiness, but most tolerable to their prejudices. And Lycurgus, more true to his object, was under the necessity of mixing a portion of violence with the authority of superstition, and of securing his final success by a voluntary renunciation, first of his country, and then of his life. If these lessons teach us, on one hand, to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government, they serve not less, on the other, to admonish us of the hazards and difficulties incident to such experiments, and of the great imprudence of unnecessarily multiplying them.

Is it an unreasonable conjecture, that the errors which may be contained in the plan of the convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject, than from a want of accuracy or care in the investigation of it; and, consequently such as will not be ascertained until an actual trial shall have pointed them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular case of the Articles of Confederation. It is observable that among the numerous objections and amendments suggested by the several States, when these articles were submitted for their ratification, not one is found which alludes to the great and radical error which on actual trial has discovered itself. And if we except the observations which New Jersey was led to make, rather by her local situation, than by her peculiar foresight, it may be questioned whether a single suggestion was of sufficient moment to justify a revision of the system.

There is abundant reason, nevertheless, to suppose that immaterial as these objections were, they would have been adhered to with a very dangerous inflexibility, in some States, had not a zeal for their opinions and supposed interests been stifled by the more powerful sentiment of self-preservation. One State, we may remember, persisted for several years in refusing her concurrence, although the enemy remained the whole period at our gates, or rather in the very bowels of our country. Nor was her pliancy in the end effected by a less motive, than the fear of being chargeable with protracting the public calamities, and endangering the event of the contest. Every candid reader will make the proper reflections on these important facts.

A patient who finds his disorder daily growing worse, and that an efficacious remedy can no longer be delayed without extreme danger, after coolly revolving his situation, and the characters of different physicians, selects and calls in such of them as he judges most capable of administering relief, and best entitled to his confidence. The physicians attend; the case of the patient is carefully examined; a consultation is held; they are unanimously agreed that the symptoms are critical, but that the case, with proper and timely relief, is so far from being desperate, that it may be made to issue in an improvement of his constitution. They are equally unanimous in prescribing the remedy, by which this happy effect is to be produced. The prescription is no sooner made known, however, than a number of persons interpose, and, without denying the reality or danger of the disorder, assure the patient that the prescription will be poison to his constitution, and forbid him, under pain of certain death, to make use of it. Might not the patient reasonably demand, before he ventured to follow this advice, that the authors of it should at least agree among themselves on some other remedy to be substituted? And if he found them differing as much from one another as from his first counsellors, would he not act prudently in trying the experiment unanimously recommended by the latter, rather than be hearkening to those who could neither deny the necessity of a speedy remedy, nor agree in proposing one?

Such a patient and in such a situation is America at this moment. She has been sensible of her malady. She has obtained a regular and unanimous advice from men of her own deliberate choice. And she is warned by others against following this advice under pain of the most fatal consequences. Do the monitors deny the reality of her danger? No. Do they deny the necessity of some speedy and powerful remedy? No. Are they agreed, are any two of them agreed, in their objections to the remedy proposed, or in the proper one to be substituted? Let them speak for themselves. This one tells us that the proposed Constitution ought to be rejected, because it is not a confederation of the States, but a government over individuals. Another admits that it ought to be a government over individuals to a certain extent, but by no means to the extent proposed. A third does not object to the government over individuals, or to the extent proposed, but to the want of a bill of rights. A fourth concurs in the absolute necessity of a bill of rights, but contends that it ought to be declaratory, not of the personal rights of individuals, but of the rights reserved to the States in their political capacity. A fifth is of opinion that a bill of rights of any sort would be superfluous and misplaced, and that the plan would be unexceptionable but for the fatal power of regulating the times and places of election. An objector in a large State exclaims loudly against the unreasonable equality of representation in the Senate. An objector in a small State is equally loud against the dangerous inequality in the House of Representatives. From this quarter, we are alarmed with the amazing expense, from the number of persons who are to administer the new government. From another quarter, and sometimes from the same quarter, on another occasion, the cry is that the Congress will be but a shadow of a representation, and that the government would be far less objectionable if the number and the expense were doubled. A patriot in a State that does not import or export, discerns insuperable objections against the power of direct taxation. The patriotic adversary in a State of great exports and imports, is not less dissatisfied that the whole burden of taxes may be thrown on consumption. This politician discovers in the Constitution a direct and irresistible tendency to monarchy; that is equally sure it will end in aristocracy. Another is puzzled to say which of these shapes it will ultimately assume, but sees clearly it must be one or other of them; whilst a fourth is not wanting, who with no less confidence affirms that the Constitution is so far from having a bias towards either of these dangers, that the weight on that side will not be sufficient to keep it upright and firm against its opposite propensities. With another class of adversaries to the Constitution the language is that the legislative, executive, and judiciary departments are intermixed in such a manner as to contradict all the ideas of regular government and all the requisite precautions in favor of liberty. Whilst this objection circulates in vague and general expressions, there are but a few who lend their sanction to it. Let each one come forward with his particular explanation, and scarce any two are exactly agreed upon the subject. In the eyes of one the junction of the Senate with the President in the responsible function of appointing to offices, instead of vesting this executive power in the Executive alone, is the vicious part of the organization. To another, the exclusion of the House of Representatives, whose numbers alone could be a due security against corruption and partiality in the exercise of such a power, is equally obnoxious. With another, the admission of the President into any share of a power which ever must be a dangerous engine in the hands of the executive magistrate, is an unpardonable violation of the maxims of republican jealousy. No part of the arrangement, according to some, is more inadmissible than the trial

of impeachments by the Senate, which is alternately a member both of the legislative and executive departments, when this power so evidently belonged to the judiciary department. “We concur fully,” reply others, “in the objection to this part of the plan, but we can never agree that a reference of impeachments to the judiciary authority would be an amendment of the error. Our principal dislike to the organization arises from the extensive powers already lodged in that department.” Even among the zealous patrons of a council of state the most irreconcilable variance is discovered concerning the mode in which it ought to be constituted. The demand of one gentleman is, that the council should consist of a small number to be appointed by the most numerous branch of the legislature. Another would prefer a larger number, and considers it as a fundamental condition that the appointment should be made by the President himself.

As it can give no umbrage to the writers against the plan of the federal Constitution, let us suppose, that as they are the most zealous, so they are also the most sagacious, of those who think the late convention were unequal to the task assigned them, and that a wiser and better plan might and ought to be substituted. Let us further suppose that their country should concur, both in this favorable opinion of their merits, and in their unfavorable opinion of the convention; and should accordingly proceed to form them into a second convention, with full powers, and for the express purpose of revising and remoulding the work of the first. Were the experiment to be seriously made, though it required some effort to view it seriously even in fiction, I leave it to be decided by the sample of opinions just exhibited, whether, with all their enmity to their predecessors, they would, in any one point, depart so widely from their example, as in the discord and ferment that would mark their own deliberations; and whether the Constitution, now before the public, would not stand as fair a chance for immortality, as Lycurgus gave to that of Sparta, by making its change to depend on his own return from exile and death, if it were to be immediately adopted, and were to continue in force, not until a BETTER, but until ANOTHER should be agreed upon by this new assembly of lawgivers.

It is a matter both of wonder and regret, that those who raise so many objections against the new Constitution should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect; it is sufficient that the latter is more imperfect. No man would refuse to give brass for silver or gold, because the latter had some alloy in it. No man would refuse to quit a shattered and tottering habitation for a firm and commodious building, because the latter had not a porch to it, or because some of the rooms might be a little larger or smaller, or the ceilings a little higher or lower than his fancy would have planned them. But waiving illustrations of this sort, is it not manifest that most of the capital objections urged against the new system lie with tenfold weight against the existing Confederation? Is an indefinite power to raise money dangerous in the hands of the federal government? The present Congress can make requisitions to any amount they please, and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow, both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. Is it improper and unsafe to intermix the different powers of government in the same body of men? Congress, a single body of men, are the sole depositary of all the federal powers. Is it particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands? The Confederation places them both in the hands of Congress. Is a bill of rights essential to liberty? The Confederation has no bill of rights. Is it an objection against the new Constitution, that it empowers the Senate, with the concurrence of the Executive, to make treaties which are to be the laws of the land? The existing Congress, without any such control, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land. Is the importation of slaves permitted by the new Constitution for twenty years? By the old it is permitted forever.

I shall be told, that however dangerous this mixture of powers may be in theory, it is rendered harmless by the dependence of Congress on the State for the means of carrying them into practice; that however large the mass of powers may be, it is in fact a lifeless mass. Then, say I, in the first place, that the Confederation is chargeable with the still greater folly of declaring certain powers in the federal government to be absolutely necessary, and at the same time rendering them absolutely nugatory; and, in the next place, that if the Union is to continue, and no better government be substituted, effective powers must either be granted to, or assumed by, the existing Congress; in either of which events, the contrast just stated will hold good. But this is not all. Out of this lifeless mass has already grown an excrescent power, which tends to realize all the dangers that can be apprehended from a defective construction of the supreme government of the Union. It is now no longer a point of speculation and hope, that the Western territory is a mine of vast wealth to the United States; and although it is not of such a nature as to extricate them from their present distresses, or for some time to come, to yield any regular supplies for the public expenses, yet must it hereafter be able, under proper management, both to effect a gradual discharge of the domestic debt, and to furnish, for a certain period, liberal tributes to the federal treasury. A very large proportion of this fund has been already surrendered by individual States; and it may

with reason be expected that the remaining States will not persist in withholding similar proofs of their equity and generosity. We may calculate, therefore, that a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has been done; and done without the least color of constitutional authority. Yet no blame has been whispered; no alarm has been sounded. A GREAT and INDEPENDENT fund of revenue is passing into the hands of a SINGLE BODY of men, who can RAISE TROOPS to an INDEFINITE NUMBER, and appropriate money to their support for an INDEFINITE PERIOD OF TIME. And yet there are men, who have not only been silent spectators of this prospect, but who are advocates for the system which exhibits it; and, at the same time, urge against the new system the objections which we have heard. Would they not act with more consistency, in urging the establishment of the latter, as no less necessary to guard the Union against the future powers and resources of a body constructed like the existing Congress, than to save it from the dangers threatened by the present impotency of that Assembly?

I mean not, by any thing here said, to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed.

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FEDERALIST No. 39. The Conformity of the Plan to Republican Principles

For the Independent Journal. Wednesday, January 16, 1788

MADISON

To the People of the State of New York:

THE last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitution of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.

According to the constitution of every State in the Union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behavior.

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions The House of Representatives is periodically elective, as in all the States; and for the period of two years, as in the State of South Carolina. The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia. The President is to continue in office for the period of four years; as in New York and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other States the election is annual. In several of the States, however, no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behavior. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter.

“But it was not sufficient,” say the adversaries of the proposed Constitution, “for the convention to adhere to the republican form. They ought, with equal care, to have preserved the FEDERAL form, which regards the Union as a CONFEDERACY of sovereign states; instead of which, they have framed a NATIONAL government, which regards the Union as a CONSOLIDATION of the States.” And it is asked by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country could supply any defect of regular authority.

First. In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a NATIONAL, but a FEDERAL act.

That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a MAJORITY of the people of the Union, nor from that of a MAJORITY of the States. It must result from the UNANIMOUS assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being

expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules have been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution.

The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is FEDERAL, not NATIONAL. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many FEDERAL as NATIONAL features.

The difference between a federal and national government, as it relates to the OPERATION OF THE GOVERNMENT, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the NATIONAL, not the FEDERAL character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a NATIONAL government.

But if the government be national with regard to the OPERATION of its powers, it changes its aspect again when we contemplate it in relation to the EXTENT of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the Constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly NATIONAL nor wholly FEDERAL. Were it wholly national, the supreme and ultimate authority would reside in the MAJORITY of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded

on either of these principles. In requiring more than a majority, and principles. In requiring more than a majority, and particularly in computing the proportion by STATES, not by CITIZENS, it departs from the NATIONAL and advances towards the FEDERAL character; in rendering the concurrence of less than the whole number of States sufficient, it loses again the FEDERAL and partakes of the NATIONAL character.

The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

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FEDERALIST No. 40. On the Powers of the Convention to Form a Mixed Government Examined and Sustained.

For the New York Packet. Friday, January 18, 1788.

MADISON

To the People of the State of New York:

THE SECOND point to be examined is, whether the convention were authorized to frame and propose this mixed Constitution.

The powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents. As all of these, however, had reference, either to the recommendation from the meeting at Annapolis, in September, 1786, or to that from Congress, in February, 1787, it will be sufficient to recur to these particular acts.

The act from Annapolis recommends the "appointment of commissioners to take into consideration the situation of the United States; to devise SUCH FURTHER PROVISIONS as shall appear to them necessary to render the Constitution of the federal government ADEQUATE TO THE EXIGENCIES OF THE UNION; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same."

The recommendatory act of Congress is in the words following: "WHEREAS, There is provision in the articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States; and whereas experience hath evinced, that there are defects in the present Confederation; as a mean to remedy which, several of the States, and PARTICULARLY THE STATE OF NEW YORK, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States A FIRM NATIONAL GOVERNMENT:

"Resolved, That in the opinion of Congress it is expedient, that on the second Monday of May next a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose OF REVISING THE ARTICLES OF CONFEDERATION, and reporting to Congress and the several legislatures such ALTERATIONS AND PROVISIONS THEREIN, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution ADEQUATE TO THE EXIGENCIES OF GOVERNMENT AND THE PRESERVATION OF THE UNION."

From these two acts, it appears, 1st, that the object of the convention was to establish, in these States, A FIRM NATIONAL GOVERNMENT; 2d, that this government was to be such as would be ADEQUATE TO THE EXIGENCIES OF GOVERNMENT and THE PRESERVATION OF THE UNION; 3d, that these purposes were to be effected by ALTERATIONS AND PROVISIONS IN THE ARTICLES OF CONFEDERATION, as it is expressed in the act of Congress, or by SUCH FURTHER PROVISIONS AS SHOULD APPEAR NECESSARY, as it stands in the recommendatory act from Annapolis; 4th, that the alterations and provisions were to be reported to Congress, and to the States, in order to be agreed to by the former and confirmed by the latter.

From a comparison and fair construction of these several modes of expression, is to be deduced the authority under which the convention acted. They were to frame a NATIONAL GOVERNMENT, adequate to the EXIGENCIES OF GOVERNMENT, and OF THE UNION; and to reduce the articles of Confederation into such form as to accomplish these purposes.

There are two rules of construction, dictated by plain reason, as well as founded on legal axioms. The one is, that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end. The other is, that where the several parts cannot be made to coincide, the less important should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.

Suppose, then, that the expressions defining the authority of the convention were irreconcilably at variance with each other; that a NATIONAL and ADEQUATE GOVERNMENT could not possibly, in the judgment of the convention, be affected by ALTERATIONS and PROVISIONS in the ARTICLES OF CONFEDERATION; which part of the definition ought to have been embraced, and which rejected? Which was the more important, which the less important part? Which the end; which the means? Let the most scrupulous expositors of delegated powers; let the most inveterate objectors against those exercised by the convention, answer these questions. Let them declare, whether it was of most importance to the happiness of the people of America, that the articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the articles of Confederation preserved. Let them declare, whether the preservation of these articles was the end, for securing which a reform of the government was to be introduced as the means; or whether the establishment of a government, adequate to the national happiness, was the end at which these articles themselves originally aimed, and to which they ought, as insufficient means, to have been sacrificed.

But is it necessary to suppose that these expressions are absolutely irreconcilable to each other; that no ALTERATIONS or PROVISIONS in the articles of the confederation could possibly mould them into a national and adequate government; into such a government as has been proposed by the convention?

No stress, it is presumed, will, in this case, be laid on the TITLE; a change of that could never be deemed an exercise of ungranted power. ALTERATIONS in the body of the instrument are expressly authorized. NEW PROVISIONS therein are also expressly authorized. Here then is a power to change the title; to insert new articles; to alter old ones. Must it of necessity be admitted that this power is infringed, so long as a part of the old articles remain? Those who maintain the affirmative ought at least to mark the boundary between authorized and usurped innovations; between that degree of change which lies within the compass of ALTERATIONS AND FURTHER PROVISIONS, and that which amounts to a TRANSMUTATION of the government. Will it be said that the alterations ought not to have touched the substance of the Confederation? The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some SUBSTANTIAL reform had not been in contemplation. Will it be said that the FUNDAMENTAL PRINCIPLES of the Confederation were not within the purview of the convention, and ought not to have been varied? I ask, What are these principles? Do they require that, in the establishment of the Constitution, the States should be regarded as distinct and independent sovereigns? They are so regarded by the Constitution proposed. Do they require that the members of the government should derive their appointment from the legislatures, not from the people of the States? One branch of the new government is to be appointed by these legislatures; and under the Confederation, the delegates to Congress MAY ALL be appointed immediately by the people, and in two States(1) are actually so appointed. Do they require that the powers of the government should act on the States, and not immediately on individuals? In some instances, as has been shown, the powers of the new government will act on the States in their collective characters. In some instances, also, those of the existing government act immediately on individuals. In cases of capture; of piracy; of the post office; of coins, weights, and measures; of trade with the Indians; of claims under grants of land by different States; and, above all, in the case of trials by courts-marshal in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil magistrate; in all these cases the powers of the Confederation operate immediately on the persons and interests of individual citizens. Do these fundamental principles require, particularly, that no tax should be levied without the intermediate agency of the States? The Confederation itself authorizes a direct tax, to a certain extent, on the post office. The power of coinage has been so construed by Congress as to levy a tribute immediately from that source also. But pretermitting these instances, was it not an acknowledged object of the convention and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue? Had not Congress repeatedly recommended this measure as not inconsistent with the fundamental principles of the Confederation? Had not every State but one; had not New York herself, so far complied with the plan of Congress as to recognize the PRINCIPLE of the innovation? Do these principles, in fine, require that the powers of the general government should be limited, and that, beyond this limit, the States should be left in possession of their sovereignty and independence? We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.

In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation OF THE LEGISLATURES OF ALL THE STATES, they have reported a plan which is to be confirmed by the PEOPLE, and may be carried into effect by NINE STATES ONLY. It is worthy of remark that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by a MAJORITY of one sixtieth of the people of America to a measure approved and called for by the voice of twelve States, comprising fifty-nine sixtieths of the people an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection, therefore, has been in a manner waived by those who have criticised the powers of the convention, I dismiss it without further observation.

The THIRD point to be inquired into is, how far considerations of duty arising out of the case itself could have supplied any defect of regular authority.

In the preceding inquiries the powers of the convention have been analyzed and tried with the same rigor, and by the same rules, as if they had been real and final powers for the establishment of a Constitution for the United States. We have seen in what manner they have borne the trial even on that supposition. It is time now to recollect that the powers were merely advisory and recommendatory; that they were so meant by the States, and so understood by the convention; and that the latter have accordingly planned and proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed. This reflection places the subject in a point of view altogether different, and will enable us to judge with propriety of the course taken by the convention.

Let us view the ground on which the convention stood. It may be collected from their proceedings, that they were deeply and unanimously impressed with the crisis, which had led their country almost with one voice to make so singular and solemn an experiment for correcting the errors of a system by which this crisis had been produced; that they were no less deeply and unanimously convinced that such a reform as they have proposed was absolutely necessary to effect the purposes of their appointment. It could not be unknown to them that the hopes and expectations of the great body of citizens, throughout this great empire, were turned with the keenest anxiety to the event of their deliberations. They had every reason to believe that the contrary sentiments agitated the minds and bosoms of every external and internal foe to the liberty and prosperity of the United States. They had seen in the origin and progress of the experiment, the alacrity with which the PROPOSITION, made by a single State (Virginia), towards a partial amendment of the Confederation, had been attended to and promoted. They had seen the LIBERTY ASSUMED by a VERY FEW deputies from a VERY FEW States, convened at Annapolis, of recommending a great and critical object, wholly foreign to their commission, not only justified by the public opinion, but actually carried into effect by twelve out of the thirteen States. They had seen, in a variety of instances, assumptions by Congress, not only of recommendatory, but of operative, powers, warranted, in the public estimation, by occasions and objects infinitely less urgent than those by which their conduct was to be governed. They must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory the transcendent and precious right of the people to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness,”(2) since it is impossible for the people spontaneously and universally to move in concert towards their object; and it is therefore essential that such changes be instituted by some INFORMAL AND UNAUTHORIZED PROPOSITIONS, made by some patriotic and respectable citizen or number of citizens. They must have recollected that it was by this irregular and assumed privilege of proposing to the people plans for their safety and happiness, that the States were first united against the danger with which they were threatened by their ancient government; that committees and congresses were formed for concentrating their efforts and defending their rights; and that CONVENTIONS were ELECTED in THE SEVERAL STATES for establishing the constitutions under which they are now governed; nor could it have been forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen, except in those who wished to indulge, under these masks, their secret enmity to the substance contended for. They must have borne in mind, that as the plan to be framed and proposed was to be submitted TO

THE PEOPLE THEMSELVES, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities. It might even have occurred to them, that where a disposition to cavil prevailed, their neglect to execute the degree of power vested in them, and still more their recommendation of any measure whatever, not warranted by their commission, would not less excite animadversion, than a recommendation at once of a measure fully commensurate to the national exigencies.

Had the convention, under all these impressions, and in the midst of all these considerations, instead of exercising a manly confidence in their country, by whose confidence they had been so peculiarly distinguished, and of pointing out a system capable, in their judgment, of securing its happiness, taken the cold and sullen resolution of disappointing its ardent hopes, of sacrificing substance to forms, of committing the dearest interests of their country to the uncertainties of delay and the hazard of events, let me ask the man who can raise his mind to one elevated conception, who can awaken in his bosom one patriotic emotion, what judgment ought to have been pronounced by the impartial world, by the friends of mankind, by every virtuous citizen, on the conduct and character of this assembly? Or if there be a man whose propensity to condemn is susceptible of no control, let me then ask what sentence he has in reserve for the twelve States who USURPED THE POWER of sending deputies to the convention, a body utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to the Confederation; and for the State of New York, in particular, which first urged and then complied with this unauthorized interposition?

But that the objectors may be disarmed of every pretext, it shall be granted for a moment that the convention were neither authorized by their commission, nor justified by circumstances in proposing a Constitution for their country: does it follow that the Constitution ought, for that reason alone, to be rejected? If, according to the noble precept, it be lawful to accept good advice even from an enemy, shall we set the ignoble example of refusing such advice even when it is offered by our friends? The prudent inquiry, in all cases, ought surely to be, not so much FROM WHOM the advice comes, as whether the advice be GOOD.

The sum of what has been here advanced and proved is, that the charge against the convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted, but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assume; and that finally, if they had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America. How far this character is due to the Constitution, is the subject under investigation.

PUBLIUS

1. Connecticut and Rhode Island.

2. Declaration of Independence.

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FEDERALIST No. 41. General View of the Powers Conferred by The Constitution

For the Independent Journal. Saturday, January 19, 1788

MADISON

To the People of the State of New York:

THE Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States. The SECOND, to the particular structure of the government, and the distribution of this power among its several branches.

Under the FIRST view of the subject, two important questions arise: 1. Whether any part of the powers transferred to the general government be unnecessary or improper? 2. Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several States?

Is the aggregate power of the general government greater than ought to have been vested in it? This is the FIRST question.

It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government, that the authors of them have very little considered how far these powers were necessary means of attaining a

necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust, of which a beneficial use can be made. This method of handling the subject cannot impose on the good sense of the people of America. It may display the subtlety of the writer; it may open a boundless field for rhetoric and declamation; it may inflame the passions of the unthinking, and may confirm the prejudices of the misthinking: but cool and candid people will at once reflect, that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused. They will see, therefore, that in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be reduced into different classes as they relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers.

The powers falling within the FIRST class are those of declaring war and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils.

Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof of the affirmative. The existing Confederation establishes this power in the most ample form.

Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.

But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?

The answer to these questions has been too far anticipated in another place to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions. The fifteenth century was the unhappy epoch of military establishments in the time of peace. They were introduced by Charles VII. of France. All Europe has followed, or been forced into, the example. Had the example not been followed by other nations, all Europe must long ago have worn the chains of a universal monarch. Were every nation except France now to disband its peace establishments, the same event might follow. The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations and rendered her the mistress of the world.

Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its

safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.

The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat. It was remarked, on a former occasion, that the want of this pretext had saved the liberties of one nation in Europe. Being rendered by her insular situation and her maritime resources impregnable to the armies of her neighbors, the rulers of Great Britain have never been able, by real or artificial dangers, to cheat the public into an extensive peace establishment. The distance of the United States from the powerful nations of the world gives them the same happy security. A dangerous establishment can never be necessary or plausible, so long as they continue a united people. But let it never, for a moment, be forgotten that they are indebted for this advantage to the Union alone. The moment of its dissolution will be the date of a new order of things. The fears of the weaker, or the ambition of the stronger States, or Confederacies, will set the same example in the New, as Charles VII. did in the Old World. The example will be followed here from the same motives which produced universal imitation there. Instead of deriving from our situation the precious advantage which Great Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes. The fortunes of disunited America will be even more disastrous than those of Europe. The sources of evil in the latter are confined to her own limits. No superior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animosities, and render them the instruments of foreign ambition, jealousy, and revenge. In America the miseries springing from her internal jealousies, contentions, and wars, would form a part only of her lot. A plentiful addition of evils would have their source in that relation in which Europe stands to this quarter of the earth, and which no other quarter of the earth bears to Europe.

This picture of the consequences of disunion cannot be too highly colored, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty, ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America, and be able to set a due value on the means of preserving it.

Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added. I will not repeat here the observations which I flatter myself have placed this subject in a just and satisfactory light. But it may not be improper to take notice of an argument against this part of the Constitution, which has been drawn from the policy and practice of Great Britain. It is said that the continuance of an army in that kingdom requires an annual vote of the legislature; whereas the American Constitution has lengthened this critical period to two years. This is the form in which the comparison is usually stated to the public: but is it a just form? Is it a fair comparison? Does the British Constitution restrain the parliamentary discretion to one year? Does the American impose on the Congress appropriations for two years? On the contrary, it cannot be unknown to the authors of the fallacy themselves, that the British Constitution fixes no limit whatever to the discretion of the legislature, and that the American ties down the legislature to two years, as the longest admissible term.

Had the argument from the British example been truly stated, it would have stood thus: The term for which supplies may be appropriated to the army establishment, though unlimited by the British Constitution, has nevertheless, in practice, been limited by parliamentary discretion to a single year. Now, if in Great Britain, where the House of Commons is elected for seven years; where so great a proportion of the members are elected by so small a proportion of the people; where the electors are so corrupted by the representatives, and the representatives so corrupted by the Crown, the representative body can possess a power to make appropriations to the army for an indefinite term, without desiring, or without daring, to extend the term beyond a single year, ought not suspicion herself to blush, in pretending that the representatives of the United States, elected FREELY by the WHOLE BODY of the people, every SECOND YEAR, cannot be safely intrusted with the discretion over such appropriations, expressly limited to the short period of TWO YEARS?

A bad cause seldom fails to betray itself. Of this truth, the management of the opposition to the federal government is an unvaried exemplification. But among all the blunders which have been committed, none is more striking than the attempt to enlist on that side the prudent jealousy entertained by the people, of standing armies. The attempt has awakened fully the public attention to that important subject; and has led to investigations which must terminate in a thorough and universal conviction, not only that the constitution has provided the most effectual guards against danger from that quarter, but that nothing short of a Constitution fully

adequate to the national defense and the preservation of the Union, can save America from as many standing armies as it may be split into States or Confederacies, and from such a progressive augmentation, of these establishments in each, as will render them as burdensome to the properties and ominous to the liberties of the people, as any establishment that can become necessary, under a united and efficient government, must be tolerable to the former and safe to the latter.

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America, that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety, are happily such as can never be turned by a perfidious government against our liberties.

The inhabitants of the Atlantic frontier are all of them deeply interested in this provision for naval protection, and if they have hitherto been suffered to sleep quietly in their beds; if their property has remained safe against the predatory spirit of licentious adventurers; if their maritime towns have not yet been compelled to ransom themselves from the terrors of a conflagration, by yielding to the exactions of daring and sudden invaders, these instances of good fortune are not to be ascribed to the capacity of the existing government for the protection of those from whom it claims allegiance, but to causes that are fugitive and fallacious. If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eastern frontiers, no part of the Union ought to feel more anxiety on this subject than New York. Her seacoast is extensive. A very important district of the State is an island. The State itself is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reservoir of its wealth, lies every moment at the mercy of events, and may almost be regarded as a hostage for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians. Should a war be the result of the precarious situation of European affairs, and all the unruly passions attending it be let loose on the ocean, our escape from insults and depredations, not only on that element, but every part of the other bordering on it, will be truly miraculous. In the present condition of America, the States more immediately exposed to these calamities have nothing to hope from the phantom of a general government which now exists; and if their single resources were equal to the task of fortifying themselves against the danger, the object to be protected would be almost consumed by the means of protecting them.

The power of regulating and calling forth the militia has been already sufficiently vindicated and explained.

The power of levying and borrowing money, being the sinew of that which is to be exerted in the national defense, is properly thrown into the same class with it. This power, also, has been examined already with much attention, and has, I trust, been clearly shown to be necessary, both in the extent and form given to it by the Constitution. I will address one additional reflection only to those who contend that the power ought to have been restrained to external—taxation by which they mean, taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable source of revenue; that for a considerable time it must be a principal source; that at this moment it is an essential one. But we may form very mistaken ideas on this subject, if we do not call to mind in our calculations, that the extent of revenue drawn from foreign commerce must vary with the variations, both in the extent and the kind of imports; and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labor, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote stage, the imports may consist in a considerable part of raw materials, which will be wrought into articles for exportation, and will, therefore, require rather the encouragement of bounties, than to be loaded with discouraging duties. A system of government, meant for duration, ought to contemplate these revolutions, and be able to accommodate itself to them.

Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed, that the power “to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,” amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by

jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms “to raise money for the general welfare.”

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are “their common defense, security of their liberties, and mutual and general welfare.” The terms of article eighth are still more identical: “All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,” etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation!

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FEDERALIST No. 42. The Powers Conferred by the Constitution Further Considered

From the New York Packet. Tuesday, January 22, 1788.

MADISON

To the People of the State of New York:

THE SECOND class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations.

This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

The powers to make treaties and to send and receive ambassadors, speak their own propriety. Both of them are comprised in the articles of Confederation, with this difference only, that the former is disembarrassed, by the plan of the convention, of an exception, under which treaties might be substantially frustrated by regulations of the States; and that a power of appointing and receiving “other public ministers and consuls,” is expressly and very properly added to the former provision concerning ambassadors. The term ambassador, if taken strictly, as seems to be required by the second of the articles of Confederation, comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer, where foreign embassies may be necessary. And under no latitude of construction will the term comprehend consuls. Yet it has been found expedient, and has been the practice of Congress, to employ the inferior grades of public ministers, and to send and receive consuls.

It is true, that where treaties of commerce stipulate for the mutual appointment of consuls, whose functions are connected with commerce, the admission of foreign consuls may fall within the power of making commercial treaties; and that where no such treaties exist, the mission of American consuls into foreign countries may PERHAPS be covered under the authority, given by the ninth article of the Confederation, to appoint all such civil officers as may be necessary for managing the general affairs of the United States. But the admission of consuls into the United States, where no previous treaty has stipulated it, seems to have been nowhere provided for. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them. But the most minute provisions become important when they tend to obviate the necessity or the pretext for gradual and unobserved usurpations of power. A list of the cases in which Congress have been betrayed, or forced by the defects of the Confederation, into violations of their chartered authorities, would not a little surprise those who have paid no attention to the subject; and would be no inconsiderable argument in favor of the new Constitution, which seems to have provided no less studiously for the lesser, than the more obvious and striking defects of the old.

The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government, and is a still greater improvement on the articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper.

The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.

It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period, it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union. Happy would it be for the unfortunate Africans, if an equal prospect lay before them of being redeemed from the oppressions of their European brethren!

Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer, for they deserve none, but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.

The powers included in the THIRD class are those which provide for the harmony and proper intercourse among the States.

Under this head might be included the particular restraints imposed on the authority of the States, and certain powers of the judicial department; but the former are reserved for a distinct class, and the latter will be particularly examined when we arrive at the structure and organization of the government. I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit: to regulate commerce among the several States and the Indian tribes; to coin money, regulate the value thereof, and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy, to prescribe the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads.

The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience, that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquillity. To those who do not view the question through the medium of passion or of interest, the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned, before public bodies as well as individuals, by the clamors of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated States, has been illustrated by other examples as well as our own. In Switzerland, where the Union is so very slight, each canton is obliged to allow to merchandises a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany it is a law of the empire, that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and the diet; though it appears from a quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the Union of the Netherlands on its members, one is, that they shall not establish imposts disadvantageous to their neighbors, without the general permission.

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

All that need be remarked on the power to coin money, regulate the value thereof, and of foreign coin, is, that by providing for this last case, the Constitution has supplied a material omission in the articles of Confederation. The authority of the existing Congress is restrained to the regulation of coin STRUCK by their own authority, or that of the respective States. It must be seen at once that the proposed uniformity in the VALUE of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States.

The punishment of counterfeiting the public securities, as well as the current coin, is submitted of course to that authority which is to secure the value of both.

The regulation of weights and measures is transferred from the articles of Confederation, and is founded on like considerations with the preceding power of regulating coin.

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. In the fourth article of the Confederation, it is declared “that the FREE INHABITANTS of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all privileges and immunities of FREE CITIZENS in the several States; and THE PEOPLE of each State shall, in every other, enjoy all the privileges of trade and commerce,” etc. There is a confusion of language here, which is remarkable. Why the terms FREE INHABITANTS are used in one part of the article, FREE CITIZENS in another, and PEOPLE in another; or what was meant by superadding to “all privileges and immunities of free citizens,” “all the privileges of trade and commerce,” cannot easily be determined. It seems to be a construction

scarcely avoidable, however, that those who come under the denomination of FREE INHABITANTS of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of FREE CITIZENS of the latter; that is, to greater privileges than they may be entitled to in their own State: so that it may be in the power of a particular State, or rather every State is laid under a necessity, not only to confer the rights of citizenship in other States upon any whom it may admit to such rights within itself, but upon any whom it may allow to become inhabitants within its jurisdiction. But were an exposition of the term "inhabitants" to be admitted which would confine the stipulated privileges to citizens alone, the difficulty is diminished only, not removed. The very improper power would still be retained by each State, of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped. By the laws of several States, certain descriptions of aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent not only with the rights of citizenship but with the privilege of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted, of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The power of prescribing by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.

The power of establishing post roads must, in every view, be a harmless power, and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.

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FEDERALIST No. 43. The Same Subject Continued (The Powers Conferred by the Constitution Further Considered)

For the Independent Journal. Wednesday, January 23, 1788

MADISON

To the People of the State of New York:

THE FOURTH class comprises the following miscellaneous powers:

1. A power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries."

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

2. "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like

authority over all places purchased by the consent of the legislatures of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State in their adoption of the Constitution, every imaginable objection seems to be obviated.

The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, requires that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment.

3. "To declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.

4. "To admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

In the articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other COLONIES, by which were evidently meant the other British colonies, at the discretion of nine States. The eventual establishment of NEW STATES seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution, that no new States shall be formed, without the concurrence of the federal authority, and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution, against a junction of States without their consent.

5. "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," with a proviso, that "nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

6. “To guarantee to every State in the Union a republican form of government; to protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.”

In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. “As the confederate republic of Germany,” says Montesquieu, “consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.” “Greece was undone,” he adds, “as soon as the king of Macedon obtained a seat among the Amphictyons.” In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events. It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a GUARANTY of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.

Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

At first view, it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently, that the federal interposition can never be required, but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations, for purposes of violence, be formed as well by a majority of a State, especially a small State as by a majority of a county, or a district of the same State; and if the authority of the State ought, in the latter case, to protect the local magistracy, ought not the federal authority, in the former, to support the State authority? Besides, there are certain parts of the State constitutions which are so interwoven with the federal Constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a right to interpose, will generally prevent the necessity of exerting it.

Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of CITIZENS may become a

majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

Should it be asked, what is to be the redress for an insurrection pervading all the States, and comprising a superiority of the entire force, though not a constitutional right? the answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal Constitution, that it diminishes the risk of a calamity for which no possible constitution can provide a cure.

Among the advantages of a confederate republic enumerated by Montesquieu, an important one is, “that should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound.”

7. “To consider all debts contracted, and engagements entered into, before the adoption of this Constitution, as being no less valid against the United States, under this Constitution, than under the Confederation.”

This can only be considered as a declaratory proposition; and may have been inserted, among other reasons, for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine, that a change in the political form of civil society has the magical effect of dissolving its moral obligations.

Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been asserted in favor of the United States, as well as against them; and in the spirit which usually characterizes little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told, what few others need to be informed of, that as engagements are in their nature reciprocal, an assertion of their validity on one side, necessarily involves a validity on the other side; and that as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told, that every constitution must limit its precautions to dangers that are not altogether imaginary; and that no real danger can exist that the government would DARE, with, or even without, this constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned.

8. “To provide for amendments to be ratified by three fourths of the States under two exceptions only.”

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations which produced the privilege defended by it.

9. “The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States, ratifying the same.”

This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocality seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical forbids an overcurious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain MODERATION on one side, and PRUDENCE on the other.

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FEDERALIST No. 44. Restrictions on the Authority of the Several States

From the New York Packet. Friday, January 25, 1788.

MADISON

To the People of the State of New York:

A FIFTH class of provisions in favor of the federal authority consists of the following restrictions on the authority of the several States:

1. "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver a legal tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility."

The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution. The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.

The right of coining money, which is here taken from the States, was left in their hands by the Confederation, as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance, also, the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and

weights of the circulating pieces. The latter inconveniency defeats one purpose for which the power was originally submitted to the federal head; and as far as the former might prevent an inconvenient remittance of gold and silver to the central mint for recoinage, the end can be as well attained by local mints established under the general authority.

The extension of the prohibition to bills of credit must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed, that the same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money, than to coin gold or silver. The power to make any thing but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of issuing a paper currency.

Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society. The prohibition with respect to titles of nobility is copied from the articles of Confederation and needs no comment.

2. “No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.”

The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion. The remaining particulars of this clause fall within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark.

The SIXTH and last class consists of the several powers and provisions by which efficacy is given to all the rest.

1. Of these the first is, the “power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

Few parts of the Constitution have been assailed with more intemperance than this; yet on a fair investigation of it, no part can appear more completely invulnerable. Without the SUBSTANCE of this power, the whole Constitution would be a dead letter. Those who object to the article, therefore, as a part of the Constitution, can only mean that the FORM of the provision is improper. But have they considered whether a better form could have been substituted?

There are four other possible methods which the Constitution might have taken on this subject. They might have copied the second article of the existing Confederation, which would have prohibited the exercise of any power not EXPRESSLY delegated; they might have attempted a positive enumeration of the powers comprehended under the general terms “necessary and proper”; they might have attempted a negative enumeration of them, by specifying the powers excepted from the general definition; they might have been altogether silent on the subject, leaving these necessary and proper powers to construction and inference.

Had the convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term “EXPRESSLY” with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction. It would be easy to show, if it were necessary, that no important power, delegated by the articles of Confederation, has been or can be executed by Congress, without recurring more or less to the doctrine of CONSTRUCTION or IMPLICATION. As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing, or of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not EXPRESSLY granted.

Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the PARTICULAR POWERS, which are the means of attaining the OBJECT of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.

Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical; and would have been liable to this further objection, that every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue by the general terms, NOT NECESSARY OR PROPER, it must have happened that the enumeration would comprehend a few of the excepted powers only; that these would be such as would be least likely to be assumed or tolerated, because the enumeration would of course select such as would be least necessary or proper; and that the unnecessary and improper powers included in the residuum, would be less forcibly excepted, than if no partial enumeration had been made.

Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included. Had this last method, therefore, been pursued by the convention, every objection now urged against their plan would remain in all its plausibility; and the real inconveniency would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union.

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrespective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers. The truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal than of the State legislatures, for this plain reason, that as every such act of the former will be an invasion of the rights of the latter, these will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the State legislatures and the people interested in watching the conduct of the former, violations of the State constitutions are more likely to remain unnoticed and unredressed.

2. “This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.”

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

In the first place, as these constitutions invest the State legislatures with absolute sovereignty, in all cases not excepted by the existing articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power contained in the proposed Constitution.

In the third place, as the constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

3. “The Senators and Representatives, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution.”

It has been asked why it was thought necessary, that the State magistracy should be bound to support the federal Constitution, and unnecessary that a like oath should be imposed on the officers of the United States, in favor of the State constitutions.

Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the federal Constitution. The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers, and according to the laws, of the States.

4. Among the provisions for giving efficacy to the federal powers might be added those which belong to the executive and judiciary departments: but as these are reserved for particular examination in another place, I pass them over in this.

We have now reviewed, in detail, all the articles composing the sum or quantity of power delegated by the proposed Constitution to the federal government, and are brought to this undeniable conclusion, that no part of the power is unnecessary or improper for accomplishing the necessary objects of the Union. The question, therefore, whether this amount of power shall be granted or not, resolves itself into another question, whether or not a government commensurate to the exigencies of the Union shall be established; or, in other words, whether the Union itself shall be preserved.

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FEDERALIST No. 45. The Alleged Danger From the Powers of the Union to the State Governments.

Considered For the Independent Journal. Saturday, January 26, 1788

MADISON

To the People of the State of New York:

HAVING shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States.

The adversaries to the plan of the convention, instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States? Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary, has been shown. How far the unsacrificed residue will be endangered, is the question before us.

Several important considerations have been touched in the course of these papers, which discountenance the supposition that the operation of the federal government will by degrees prove fatal to the State governments. The more I revolve the subject, the more fully I am persuaded that the balance is much more likely to be disturbed by the preponderancy of the last than of the first scale.

We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. Although, in most of these examples, the system has been so dissimilar from that under consideration as greatly to weaken any inference concerning the latter from the fate of the former, yet, as the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded. In the Achaean league it is probable that the federal head had a degree and species of power, which gave it a considerable likeness to the government framed by the convention. The Lycian Confederacy, as far as its principles and form are transmitted, must have borne a still greater analogy to it. Yet history does not inform us that either of them ever degenerated, or tended to degenerate, into one consolidated government. On the contrary, we know that the ruin of one of them proceeded from the incapacity of the federal authority to prevent the dissensions, and finally the disunion, of the subordinate authorities. These cases are the more worthy of our attention, as the external causes by which the component parts were pressed together were much more numerous and powerful than in our case; and consequently less powerful ligaments within would be sufficient to bind the members to the head, and to each other.

In the feudal system, we have seen a similar propensity exemplified. Notwithstanding the want of proper sympathy in every instance between the local sovereigns and the people, and the sympathy in some instances between the general sovereign and the latter, it usually happened that the local sovereigns prevailed in the rivalship for encroachments. Had no external dangers enforced internal harmony and subordination, and particularly, had the local sovereigns possessed the affections of the people, the great kingdoms in Europe would at this time consist of as many independent princes as there were formerly feudatory barons.

The State governments will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other.

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the

United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures. Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them. On the other side, the component parts of the State governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little, if at all, to the local influence of its members.

The number of individuals employed under the Constitution of the United States will be much smaller than the number employed under the particular States. There will consequently be less of personal influence on the side of the former than of the latter. The members of the legislative, executive, and judiciary departments of thirteen and more States, the justices of peace, officers of militia, ministerial officers of justice, with all the county, corporation, and town officers, for three millions and more of people, intermixed, and having particular acquaintance with every class and circle of people, must exceed, beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system. Compare the members of the three great departments of the thirteen States, excluding from the judiciary department the justices of peace, with the members of the corresponding departments of the single government of the Union; compare the militia officers of three millions of people with the military and marine officers of any establishment which is within the compass of probability, or, I may add, of possibility, and in this view alone, we may pronounce the advantage of the States to be decisive. If the federal government is to have collectors of revenue, the State governments will have theirs also. And as those of the former will be principally on the seacoast, and not very numerous, whilst those of the latter will be spread over the face of the country, and will be very numerous, the advantage in this view also lies on the same side. It is true, that the Confederacy is to possess, and may exercise, the power of collecting internal as well as external taxes throughout the States; but it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the States to supply their quotas by previous collections of their own; and that the eventual collection, under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable, that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed with the correspondent authority of the Union. Should it happen, however, that separate collectors of internal revenue should be appointed under the federal government, the influence of the whole number would not bear a comparison with that of the multitude of State officers in the opposite scale. Within every district to which a federal collector would be allotted, there would not be less than thirty or forty, or even more, officers of different descriptions, and many of them persons of character and weight, whose influence would lie on the side of the State.

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important; and yet the present Congress have as complete authority to REQUIRE of the States indefinite supplies of money for the common

defense and general welfare, as the future Congress will have to require them of individual citizens; and the latter will be no more bound than the States themselves have been, to pay the quotas respectively taxed on them. Had the States complied punctually with the articles of Confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion, that the State governments would have lost their constitutional powers, and have gradually undergone an entire consolidation. To maintain that such an event would have ensued, would be to say at once, that the existence of the State governments is incompatible with any system whatever that accomplishes the essential purposes of the Union.

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FEDERALIST No. 46. The Influence of the State and Federal Governments Compared

From the New York Packet. Tuesday, January 29, 1788.

MADISON

To the People of the State of New York:

RESUMING the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.

Experience speaks the same language in this case. The federal administration, though hitherto very defective in comparison with what may be hoped under a better system, had, during the war, and particularly whilst the independent fund of paper emissions was in credit, an activity and importance as great as it can well have in any future circumstances whatever. It was engaged, too, in a course of measures which had for their object the protection of everything that was dear, and the acquisition of everything that could be desirable to the people at large. It was, nevertheless, invariably found, after the transient enthusiasm for the early Congresses was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that opposition to proposed enlargements of its powers and importance was the side usually taken by the men who wished to build their political consequence on the prepossessions of their fellow-citizens.

If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due; but even in that case the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.

The remaining points on which I propose to compare the federal and State governments, are the disposition and the faculty they may respectively possess, to resist and frustrate the measures of each other.

It has been already proved that the members of the federal will be more dependent on the members of the State governments, than the latter will be on the former. It has appeared also, that the prepossessions of the people, on whom both will depend, will be more on the side of the State governments, than of the federal government. So far as the disposition of each towards the other may be influenced by these causes, the State governments must clearly have the advantage. But in a distinct and very important point of view, the advantage will lie on the same side. The prepossessions, which the members themselves will carry into the federal government, will generally be favorable to the States; whilst it will rarely happen, that the members of the State governments will carry into the public councils a bias in favor of the general government. A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States. Every one knows that a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State, to the particular and separate views of the counties or districts in which they reside. And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, the members of the federal legislature will be likely to attach themselves too much to local objects. The States will be to the latter what counties and towns are to the former. Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. What is the spirit that has in general characterized the proceedings of Congress? A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the members have but too frequently displayed the character, rather of partisans of their respective States, than of impartial guardians of a common interest; that where on one occasion improper sacrifices have been made of local considerations, to the aggrandizement of the federal government, the great interests of the nation have suffered on a hundred, from an undue attention to the local prejudices, interests, and views of the particular States. I mean not by these reflections to insinuate, that the new federal government will not embrace a more enlarged plan of policy than the existing government may have pursued; much less, that its views will be as confined as those of the State legislatures; but only that it will partake sufficiently of the spirit of both, to be disinclined to invade the rights of the individual States, or the prerogatives of their governments. The motives on the part of the State governments, to augment their prerogatives by defalcations from the federal government, will be overruled by no reciprocal predispositions in the members.

Were it admitted, however, that the Federal government may feel an equal disposition with the State governments to extend its power beyond the due limits, the latter would still have the advantage in the means of defeating such encroachments. If an act of a particular State, though unfriendly to the national government, be generally popular in that State and should not too grossly violate the oaths of the State officers, it is executed immediately and, of course, by means on the spot and depending on the State alone. The opposition of the federal government, or the interposition of federal officers, would but inflame the zeal of all parties on the side of the State, and the evil could not be prevented or repaired, if at all, without the employment of means which must always be resorted to with reluctance and difficulty. On the other hand, should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity. In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part

invaded the rights of the less numerous part. The attempt was unjust and unwise; but it was not in speculation absolutely chimerical. But what would be the contest in the case we are supposing? Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter.

The only refuge left for those who prophesy the downfall of the State governments is the visionary supposition that the federal government may previously accumulate a military force for the projects of ambition. The reasonings contained in these papers must have been employed to little purpose indeed, if it could be necessary now to disprove the reality of this danger. That the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both; that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment; that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads, must appear to every one more like the incoherent dreams of a delirious jealousy, or the misjudged exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism. Extravagant as the supposition is, let it however be made. Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it. Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of. Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain, that with this aid alone they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will and direct the national force, and of officers appointed out of the militia, by these governments, and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

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FEDERALIST No. 47. The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts.

For the Independent Journal. Wednesday, January 30, 1788.

MADISON

To the People of the State of New York:

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.

The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” or, “if the power of judging be not separated from the legislative and executive powers,” he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole

executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. “When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner.” Again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.” Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring “that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other AS THE NATURE OF A FREE GOVERNMENT WILL ADMIT; OR AS IS CONSISTENT WITH THAT CHAIN OF CONNECTION THAT BINDS THE WHOLE FABRIC OF THE CONSTITUTION IN ONE INDISSOLUBLE BOND OF UNITY AND AMITY.” Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares “that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.” This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated

with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive council are made EX-OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

The language of Virginia is still more pointed on this subject. Her constitution declares, “that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly.” Yet we find not only this express exception, with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares “that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other,” refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia, where it is declared “that the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other,” we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no

instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

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FEDERALIST No. 48. These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other.

From the New York Packet. Friday, February 1, 1788.

MADISON

To the People of the State of New York:

IT WAS shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect

measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory, evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting Notes on the State of Virginia, p. 195. “All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS. The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, IN MANY instances, DECIDED RIGHTS which should have been left to JUDICIARY CONTROVERSY, and THE DIRECTION OF THE EXECUTIVE, DURING THE WHOLE TIME OF THEIR SESSION, IS BECOMING HABITUAL AND FAMILIAR.”

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was “to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution.” In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature.

The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution.

Executive powers had been usurped.

The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head: FIRST, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; SECOND, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; THIRD, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUSHome

FEDERALIST No. 49. Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention.

For the Independent Journal. Saturday, February 2, 1788.

MADISON

To the People of the State of New York:

THE author of the “Notes on the State of Virginia,” quoted in the last paper, has subjoined to that valuable work the draught of a constitution, which had been prepared in order to be laid before a convention, expected to be called in 1783, by the legislature, for the establishment of a constitution for that commonwealth. The plan, like every thing from the same pen, marks a turn of thinking, original, comprehensive, and accurate; and is the more worthy of attention as it equally displays a fervent attachment to republican government and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power against the invasions of the stronger, is perhaps altogether his own, and as it immediately relates to the subject of our present inquiry, ought not to be overlooked.

His proposition is, “that whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the constitution, or CORRECTING BREACHES OF IT, a convention shall be called for the purpose.”

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers; and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commissions, can alone declare its true meaning, and enforce its observance?

There is certainly great force in this reasoning, and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits.

In the first place, the provision does not reach the case of a combination of two of the departments against the third. If the legislative authority, which possesses so many means of operating on the motives of the other departments, should be able to gain to its interest either of the others, or even one third of its members, the remaining department could derive no advantage from its remedial provision. I do not dwell, however, on this objection, because it may be thought to be rather against the modification of the principle, than against the principle itself.

In the next place, it may be considered as an objection inherent in the principle, that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself, is timid and cautious when left alone, and acquires firmness and confidence in proportion to the number with which it is associated. When the examples which fortify opinion are ANCIENT as well as NUMEROUS, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side.

The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is, that the decisions which would probably result from such appeals would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy, and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

But the legislative party would not only be able to plead their cause most successfully with the people. They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might, however, sometimes happen, that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden, as to admit of no specious coloring. A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favorite

of the people. In such a posture of things, the public decision might be less swayed by prepossessions in favor of the legislative party. But still it could never be expected to turn on the true merits of the question. It would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would relate. The PASSIONS, therefore, not the REASON, of the public would sit in judgment. But it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.

We found in the last paper, that mere declarations in the written constitution are not sufficient to restrain the several departments within their legal rights. It appears in this, that occasional appeals to the people would be neither a proper nor an effectual provision for that purpose. How far the provisions of a different nature contained in the plan above quoted might be adequate, I do not examine. Some of them are unquestionably founded on sound political principles, and all of them are framed with singular ingenuity and precision.

PUBLIUSHome

FEDERALIST No. 50. Periodical Appeals to the People Considered

From the New York Packet. Tuesday, February 5, 1788.

MADISON

To the People of the State of New York:

IT MAY be contended, perhaps, that instead of OCCASIONAL appeals to the people, which are liable to the objections urged against them, PERIODICAL appeals are the proper and adequate means of PREVENTING AND CORRECTING INFRACTIONS OF THE CONSTITUTION.

It will be attended to, that in the examination of these expedients, I confine myself to their aptitude for ENFORCING the Constitution, by keeping the several departments of power within their due bounds, without particularly considering them as provisions for ALTERING the Constitution itself. In the first view, appeals to the people at fixed periods appear to be nearly as ineligible as appeals on particular occasions as they emerge. If the periods be separated by short intervals, the measures to be reviewed and rectified will have been of recent date, and will be connected with all the circumstances which tend to vitiate and pervert the result of occasional revisions. If the periods be distant from each other, the same remark will be applicable to all recent measures; and in proportion as the remoteness of the others may favor a dispassionate review of them, this advantage is inseparable from inconveniences which seem to counterbalance it. In the first place, a distant prospect of public censure would be a very feeble restraint on power from those excesses to which it might be urged by the force of present motives. Is it to be imagined that a legislative assembly, consisting of a hundred or two hundred members, eagerly bent on some favorite object, and breaking through the restraints of the Constitution in pursuit of it, would be arrested in their career, by considerations drawn from a censorial revision of their conduct at the future distance of ten, fifteen, or twenty years? In the next place, the abuses would often have completed their mischievous effects before the remedial provision would be applied. And in the last place, where this might not be the case, they would be of long standing, would have taken deep root, and would not easily be extirpated.

The scheme of revising the constitution, in order to correct recent breaches of it, as well as for other purposes, has been actually tried in one of the States. One of the objects of the Council of Censors which met in Pennsylvania in 1783 and 1784, was, as we have seen, to inquire, “whether the constitution had been violated, and whether the legislative and executive departments had encroached upon each other.” This important and novel experiment in politics merits, in several points of view, very particular attention. In some of them it may, perhaps, as a single experiment, made under circumstances somewhat peculiar, be thought to be not absolutely conclusive. But as applied to the case under consideration, it involves some facts, which I venture to remark, as a complete and satisfactory illustration of the reasoning which I have employed.

First. It appears, from the names of the gentlemen who composed the council, that some, at least, of its most active members had also been active and leading characters in the parties which pre-existed in the State.

Second. It appears that the same active and leading members of the council had been active and influential members of the legislative and executive branches, within the period to be reviewed; and even patrons or opponents of the very measures to be thus

brought to the test of the constitution. Two of the members had been vice-presidents of the State, and several other members of the executive council, within the seven preceding years. One of them had been speaker, and a number of others distinguished members, of the legislative assembly within the same period.

Third. Every page of their proceedings witnesses the effect of all these circumstances on the temper of their deliberations. Throughout the continuance of the council, it was split into two fixed and violent parties. The fact is acknowledged and lamented by themselves. Had this not been the case, the face of their proceedings exhibits a proof equally satisfactory. In all questions, however unimportant in themselves, or unconnected with each other, the same names stand invariably contrasted on the opposite columns. Every unbiased observer may infer, without danger of mistake, and at the same time without meaning to reflect on either party, or any individuals of either party, that, unfortunately, PASSION, not REASON, must have presided over their decisions. When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

Fourth. It is at least problematical, whether the decisions of this body do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places.

Fifth. I have never understood that the decisions of the council on constitutional questions, whether rightly or erroneously formed, have had any effect in varying the practice founded on legislative constructions. It even appears, if I mistake not, that in one instance the contemporary legislature denied the constructions of the council, and actually prevailed in the contest.

This censorial body, therefore, proves at the same time, by its researches, the existence of the disease, and by its example, the inefficacy of the remedy.

This conclusion cannot be invalidated by alleging that the State in which the experiment was made was at that crisis, and had been for a long time before, violently heated and distracted by the rage of party. Is it to be presumed, that at any future septennial epoch the same State will be free from parties? Is it to be presumed that any other State, at the same or any other given period, will be exempt from them? Such an event ought to be neither presumed nor desired; because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty.

Were the precaution taken of excluding from the assemblies elected by the people, to revise the preceding administration of the government, all persons who should have been concerned with the government within the given period, the difficulties would not be obviated. The important task would probably devolve on men, who, with inferior capacities, would in other respects be little better qualified. Although they might not have been personally concerned in the administration, and therefore not immediately agents in the measures to be examined, they would probably have been involved in the parties connected with these measures, and have been elected under their auspices.

PUBLIUSHome

FEDERALIST No. 51. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.

For the Independent Journal. Wednesday, February 6, 1788.

MADISON

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for

the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUSHome

FEDERALIST No. 52. The House of Representatives

From the New York Packet. Friday, February 8, 1788.

MADISON

To the People of the State of New York:

FROM the more general inquiries pursued in the four last papers, I pass on to a more particular examination of the several parts of the government. I shall begin with the House of Representatives.

The first view to be taken of this part of the government relates to the qualifications of the electors and the elected. Those of the former are to be the same with those of the electors of the most numerous branch of the State legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress,

would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because, being fixed by the State constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution.

The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the representatives are to be elected falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered: first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

First. As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose, does not appear to be susceptible of any precise calculation, and must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always to be followed whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to ancient polity, it is in more modern times only that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known, and which bear the greatest analogy to our particular case. The first to which this character ought to be applied, is the House of Commons in Great Britain. The history of this branch of the English Constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent date prove that parliaments were to SIT only every year; not that they were to be ELECTED every year. And even these annual sessions were left so much at the discretion of the monarch, that, under various pretexts, very long and dangerous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles II, that the intermissions should not be protracted beyond a period of three years. On the accession of William III, when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people that parliaments ought to be held FREQUENTLY. By another statute, which passed a few years later in the same reign, the term “frequently,” which had alluded to the triennial period settled in the time of Charles II, is reduced to a precise meaning, it being expressly enacted that a new parliament shall be called within three years after the termination of the former. The last change, from three to seven years, is well known to have been introduced pretty early in the present century, under on alarm for the Hanoverian succession. From these facts it appears that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us that biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents.

Elections in Ireland, till of late, were regulated entirely by the discretion of the crown, and were seldom repeated, except on the accession of a new prince, or some other contingent event. The parliament which commenced with George II. was continued

throughout his whole reign, a period of about thirty-five years. The only dependence of the representatives on the people consisted in the right of the latter to supply occasional vacancies by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the control of the crown over the subjects of their deliberation. Of late these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform, must be left to further experience. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be that if the people of that country have been able under all these disadvantages to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty, which might depend on a due connection between their representatives and themselves.

Let us bring our inquiries nearer home. The example of these States, when British colonies, claims particular attention, at the same time that it is so well known as to require little to be said on it. The principle of representation, in one branch of the legislature at least, was established in all of them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer, from the spirit and conduct of the representatives of the people, prior to the Revolution, that biennial elections would have been dangerous to the public liberties? The spirit which everywhere displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs that a sufficient portion of liberty had been everywhere enjoyed to inspire both a sense of its worth and a zeal for its proper enlargement This remark holds good, as well with regard to the then colonies whose elections were least frequent, as to those whose elections were most frequent Virginia was the colony which stood first in resisting the parliamentary usurpations of Great Britain; it was the first also in espousing, by public act, the resolution of independence. In Virginia, nevertheless, if I have not been misinformed, elections under the former government were septennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in those instances was probably accidental; and still less of any advantage in SEPTENNIAL elections, for when compared with a greater frequency they are inadmissible; but merely as a proof, and I conceive it to be a very substantial proof, that the liberties of the people can be in no danger from BIENNIAL elections.

The conclusion resulting from these examples will be not a little strengthened by recollecting three circumstances. The first is, that the federal legislature will possess a part only of that supreme legislative authority which is vested completely in the British Parliament; and which, with a few exceptions, was exercised by the colonial assemblies and the Irish legislature. It is a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power, the more safely may its duration be protracted. In the second place, it has, on another occasion, been shown that the federal legislature will not only be restrained by its dependence on its people, as other legislative bodies are, but that it will be, moreover, watched and controlled by the several collateral legislatures, which other legislative bodies are not. And in the third place, no comparison can be made between the means that will be possessed by the more permanent branches of the federal government for seducing, if they should be disposed to seduce, the House of Representatives from their duty to the people, and the means of influence over the popular branch possessed by the other branches of the government above cited. With less power, therefore, to abuse, the federal representatives can be less tempted on one side, and will be doubly watched on the other.

PUBLIUSHome

FEDERALIST No. 53. The Same Subject Continued (The House of Representatives)

For the Independent Journal. Saturday, February 9, 1788.

MADISON

To the People of the State of New York:

I SHALL here, perhaps, be reminded of a current observation, “that where annual elections end, tyranny begins.” If it be true, as has often been remarked, that sayings which become proverbial are generally founded in reason, it is not less true, that when once established, they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the case before us. What is the reason on which this proverbial observation is founded? No man will subject himself to the ridicule of pretending that any natural connection subsists between the sun or the seasons, and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not, in this respect, confined to any single point of time; but lies within

extremes, which afford sufficient latitude for all the variations which may be required by the various situations and circumstances of civil society. The election of magistrates might be, if it were found expedient, as in some instances it actually has been, daily, weekly, or monthly, as well as annual; and if circumstances may require a deviation from the rule on one side, why not also on the other side? Turning our attention to the periods established among ourselves, for the election of the most numerous branches of the State legislatures, we find them by no means coinciding any more in this instance, than in the elections of other civil magistrates. In Connecticut and Rhode Island, the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial—as is proposed in the federal government. Here is a difference, as four to one, between the longest and shortest periods; and yet it would be not easy to show, that Connecticut or Rhode Island is better governed, or enjoys a greater share of rational liberty, than South Carolina; or that either the one or the other of these States is distinguished in these respects, and by these causes, from the States whose elections are different from both.

In searching for the grounds of this doctrine, I can discover but one, and that is wholly inapplicable to our case. The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution, as the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed, by legislative acts, some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act, continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the corner-stone; and has led them to seek for some security to liberty, against the danger to which it is exposed. Where no Constitution, paramount to the government, either existed or could be obtained, no constitutional security, similar to that established in the United States, was to be attempted. Some other security, therefore, was to be sought for; and what better security would the case admit, than that of selecting and appealing to some simple and familiar portion of time, as a standard for measuring the danger of innovations, for fixing the national sentiment, and for uniting the patriotic exertions? The most simple and familiar portion of time, applicable to the subject was that of a year; and hence the doctrine has been inculcated by a laudable zeal, to erect some barrier against the gradual innovations of an unlimited government, that the advance towards tyranny was to be calculated by the distance of departure from the fixed point of annual elections. But what necessity can there be of applying this expedient to a government limited, as the federal government will be, by the authority of a paramount Constitution? Or who will pretend that the liberties of the people of America will not be more secure under biennial elections, unalterably fixed by such a Constitution, than those of any other nation would be, where elections were annual, or even more frequent, but subject to alterations by the ordinary power of the government?

The second question stated is, whether biennial elections be necessary or useful. The propriety of answering this question in the affirmative will appear from several very obvious considerations.

No man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate. A part of this knowledge may be acquired by means of information which lie within the compass of men in private as well as public stations. Another part can only be attained, or at least thoroughly attained, by actual experience in the station which requires the use of it. The period of service, ought, therefore, in all such cases, to bear some proportion to the extent of practical knowledge requisite to the due performance of the service. The period of legislative service established in most of the States for the more numerous branch is, as we have seen, one year. The question then may be put into this simple form: does the period of two years bear no greater proportion to the knowledge requisite for federal legislation than one year does to the knowledge requisite for State legislation? The very statement of the question, in this form, suggests the answer that ought to be given to it.

In a single State, the requisite knowledge relates to the existing laws which are uniform throughout the State, and with which all the citizens are more or less conversant; and to the general affairs of the State, which lie within a small compass, are not very diversified, and occupy much of the attention and conversation of every class of people. The great theatre of the United States presents a very different scene. The laws are so far from being uniform, that they vary in every State; whilst the public affairs of the

Union are spread throughout a very extensive region, and are extremely diversified by the local affairs connected with them, and can with difficulty be correctly learnt in any other place than in the central councils to which a knowledge of them will be brought by the representatives of every part of the empire. Yet some knowledge of the affairs, and even of the laws, of all the States, ought to be possessed by the members from each of the States. How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided, without a similar knowledge of many internal circumstances by which the States are distinguished from each other? These are the principal objects of federal legislation, and suggest most forcibly the extensive information which the representatives ought to acquire. The other interior objects will require a proportional degree of information with regard to them.

It is true that all these difficulties will, by degrees, be very much diminished. The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code. Improvements on the first draughts will every year become both easier and fewer. Past transactions of the government will be a ready and accurate source of information to new members. The affairs of the Union will become more and more objects of curiosity and conversation among the citizens at large. And the increased intercourse among those of different States will contribute not a little to diffuse a mutual knowledge of their affairs, as this again will contribute to a general assimilation of their manners and laws. But with all these abatements, the business of federal legislation must continue so far to exceed, both in novelty and difficulty, the legislative business of a single State, as to justify the longer period of service assigned to those who are to transact it.

A branch of knowledge which belongs to the acquirements of a federal representative, and which has not been mentioned is that of foreign affairs. In regulating our own commerce he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government. And although the House of Representatives is not immediately to participate in foreign negotiations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve attention in the ordinary course of legislation, and will sometimes demand particular legislative sanction and co-operation. Some portion of this knowledge may, no doubt, be acquired in a man’s closet; but some of it also can only be derived from the public sources of information; and all of it will be acquired to best effect by a practical attention to the subject during the period of actual service in the legislature.

There are other considerations, of less importance, perhaps, but which are not unworthy of notice. The distance which many of the representatives will be obliged to travel, and the arrangements rendered necessary by that circumstance, might be much more serious objections with fit men to this service, if limited to a single year, than if extended to two years. No argument can be drawn on this subject, from the case of the delegates to the existing Congress. They are elected annually, it is true; but their re-election is considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent reelections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the House of Representatives and the Senate.

It is an inconvenience mingled with the advantages of our frequent elections even in single States, where they are large, and hold but one legislative session in a year, that spurious elections cannot be investigated and annulled in time for the decision to have its due effect. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course, is sure of holding it a sufficient time to answer his purposes. Hence, a very pernicious encouragement is given to the use of unlawful means, for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant States. Each house is, as it necessarily must be, the judge of the elections, qualifications, and returns of its members; and whatever improvements may be suggested by experience, for simplifying and accelerating the process in disputed cases, so great a portion of a year would unavoidably elapse, before an illegitimate member

could be dispossessed of his seat, that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat.

All these considerations taken together warrant us in affirming, that biennial elections will be as useful to the affairs of the public as we have seen that they will be safe to the liberty of the people.

PUBLIUSHome

FEDERALIST No. 54. The Apportionment of Members Among the States

From the New York Packet. Tuesday, February 12, 1788.

MADISON

To the People of the State of New York:

THE next view which I shall take of the House of Representatives relates to the appointment of its members to the several States which is to be determined by the same rule with that of direct taxes.

It is not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State. The establishment of the same rule for the appointment of taxes, will probably be as little contested; though the rule itself in this case, is by no means founded on the same principle. In the former case, the rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection. In the latter, it has reference to the proportion of wealth, of which it is in no case a precise measure, and in ordinary cases a very unfit one. But notwithstanding the imperfection of the rule as applied to the relative wealth and contributions of the States, it is evidently the least objectionable among the practicable rules, and had too recently obtained the general sanction of America, not to have found a ready preference with the convention.

All this is admitted, it will perhaps be said; but does it follow, from an admission of numbers for the measure of representation, or of slaves combined with free citizens as a ratio of taxation, that slaves ought to be included in the numerical rule of representation? Slaves are considered as property, not as persons. They ought therefore to be comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons. This is the objection, as I understand it, stated in its full force. I shall be equally candid in stating the reasoning which may be offered on the opposite side.

“We subscribe to the doctrine,” might one of our Southern brethren observe, “that representation relates more immediately to persons, and taxation more immediately to property, and we join in the application of this distinction to the case of our slaves. But we must deny the fact, that slaves are considered merely as property, and in no respect whatever as persons. The true state of the case is, that they partake of both these qualities: being considered by our laws, in some respects, as persons, and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another—the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others—the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied, that these are the proper criterion; because it is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is disputed them in the computation of numbers; and it is admitted, that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.

“This question may be placed in another light. It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation. Would the convention have been impartial or consistent, if they had rejected the slaves from the list of inhabitants, when the shares of representation were to be calculated, and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be reasonably expected, that the Southern States would concur in a system, which considered their slaves in some degree as men, when burdens were to be imposed, but refused to consider them in the same

light, when advantages were to be conferred? Might not some surprise also be expressed, that those who reproach the Southern States with the barbarous policy of considering as property a part of their human brethren, should themselves contend, that the government to which all the States are to be parties, ought to consider this unfortunate race more completely in the unnatural light of property, than the very laws of which they complain?

“It may be replied, perhaps, that slaves are not included in the estimate of representatives in any of the States possessing them. They neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation? In rejecting them altogether, the Constitution would, in this respect, have followed the very laws which have been appealed to as the proper guide.

“This objection is repelled by a single observation. It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. The qualifications on which the right of suffrage depend are not, perhaps, the same in any two States. In some of the States the difference is very material. In every State, a certain proportion of inhabitants are deprived of this right by the constitution of the State, who will be included in the census by which the federal Constitution apportions the representatives. In this point of view the Southern States might retort the complaint, by insisting that the principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants; and consequently, that the slaves, as inhabitants, should have been admitted into the census according to their full number, in like manner with other inhabitants, who, by the policy of other States, are not admitted to all the rights of citizens. A rigorous adherence, however, to this principle, is waived by those who would be gainers by it. All that they ask is that equal moderation be shown on the other side. Let the case of the slaves be considered, as it is in truth, a peculiar one. Let the compromising expedient of the Constitution be mutually adopted, which regards them as inhabitants, but as debased by servitude below the equal level of free inhabitants, which regards the SLAVE as divested of two fifths of the MAN.

“After all, may not another ground be taken on which this article of the Constitution will admit of a still more ready defense? We have hitherto proceeded on the idea that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property, than of the persons, of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government. Upon this principle it is, that in several of the States, and particularly in the State of New York, one branch of the government is intended more especially to be the guardian of property, and is accordingly elected by that part of the society which is most interested in this object of government. In the federal Constitution, this policy does not prevail. The rights of property are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands.

“For another reason, the votes allowed in the federal legislature to the people of each State, ought to bear some proportion to the comparative wealth of the States. States have not, like individuals, an influence over each other, arising from superior advantages of fortune. If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation very frequently guide the votes of others to the objects of his choice; and through this imperceptible channel the rights of property are conveyed into the public representation. A State possesses no such influence over other States. It is not probable that the richest State in the Confederacy will ever influence the choice of a single representative in any other State. Nor will the representatives of the larger and richer States possess any other advantage in the federal legislature, over the representatives of other States, than what may result from their superior number alone. As far, therefore, as their superior wealth and weight may justly entitle them to any advantage, it ought to be secured to them by a superior share of representation. The new Constitution is, in this respect, materially different from the existing Confederation, as well as from that of the United Netherlands, and other similar confederacies. In each of the latter, the efficacy of the federal resolutions depends on the subsequent and voluntary resolutions of the states composing the union. Hence the states, though possessing an equal vote in the public councils, have an unequal influence, corresponding with the unequal importance of these subsequent and voluntary resolutions. Under the proposed Constitution, the federal acts will take effect without the necessary intervention of the individual States. They will depend merely on the majority of votes in the federal legislature, and consequently each vote, whether proceeding from a larger or smaller State, or a State more or less wealthy or powerful, will have an equal weight and efficacy: in the same manner as the votes individually given in a State legislature, by the representatives of unequal counties or other districts, have each a precise

equality of value and effect; or if there be any difference in the case, it proceeds from the difference in the personal character of the individual representative, rather than from any regard to the extent of the district from which he comes."

Such is the reasoning which an advocate for the Southern interests might employ on this subject; and although it may appear to be a little strained in some points, yet, on the whole, I must confess that it fully reconciles me to the scale of representation which the convention have established.

In one respect, the establishment of a common measure for representation and taxation will have a very salutary effect. As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.

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FEDERALIST No. 55. The Total Number of the House of Representatives

For the Independent Journal. Wednesday, February 13, 1788.

MADISON

To the People of the State of New York:

THE number of which the House of Representatives is to consist, forms another and a very interesting point of view, under which this branch of the federal legislature may be contemplated. Scarce any article, indeed, in the whole Constitution seems to be rendered more worthy of attention, by the weight of character and the apparent force of argument with which it has been assailed. The charges exhibited against it are, first, that so small a number of representatives will be an unsafe depositary of the public interests; secondly, that they will not possess a proper knowledge of the local circumstances of their numerous constituents; thirdly, that they will be taken from that class of citizens which will sympathize least with the feelings of the mass of the people, and be most likely to aim at a permanent elevation of the few on the depression of the many; fourthly, that defective as the number will be in the first instance, it will be more and more disproportionate, by the increase of the people, and the obstacles which will prevent a correspondent increase of the representatives.

In general it may be remarked on this subject, that no political problem is less susceptible of a precise solution than that which relates to the number most convenient for a representative legislature; nor is there any point on which the policy of the several States is more at variance, whether we compare their legislative assemblies directly with each other, or consider the proportions which they respectively bear to the number of their constituents. Passing over the difference between the smallest and largest States, as Delaware, whose most numerous branch consists of twenty-one representatives, and Massachusetts, where it amounts to between three and four hundred, a very considerable difference is observable among States nearly equal in population. The number of representatives in Pennsylvania is not more than one fifth of that in the State last mentioned. New York, whose population is to that of South Carolina as six to five, has little more than one third of the number of representatives. As great a disparity prevails between the States of Georgia and Delaware or Rhode Island. In Pennsylvania, the representatives do not bear a greater proportion to their constituents than of one for every four or five thousand. In Rhode Island, they bear a proportion of at least one for every thousand. And according to the constitution of Georgia, the proportion may be carried to one to every ten electors; and must unavoidably far exceed the proportion in any of the other States.

Another general remark to be made is, that the ratio between the representatives and the people ought not to be the same where the latter are very numerous as where they are very few. Were the representatives in Virginia to be regulated by the standard in Rhode Island, they would, at this time, amount to between four and five hundred; and twenty or thirty years hence, to a thousand. On the other hand, the ratio of Pennsylvania, if applied to the State of Delaware, would reduce the representative assembly of the latter to seven or eight members. Nothing can be more fallacious than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionably a better depositary. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits

of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.

It is necessary also to recollect here the observations which were applied to the case of biennial elections. For the same reason that the limited powers of the Congress, and the control of the State legislatures, justify less frequent elections than the public safely might otherwise require, the members of the Congress need be less numerous than if they possessed the whole power of legislation, and were under no other than the ordinary restraints of other legislative bodies.

With these general ideas in our mind, let us weigh the objections which have been stated against the number of members proposed for the House of Representatives. It is said, in the first place, that so small a number cannot be safely trusted with so much power.

The number of which this branch of the legislature is to consist, at the outset of the government, will be sixty-five. Within three years a census is to be taken, when the number may be augmented to one for every thirty thousand inhabitants; and within every successive period of ten years the census is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture that the first census will, at the rate of one for every thirty thousand, raise the number of representatives to at least one hundred. Estimating the negroes in the proportion of three fifths, it can scarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increase, the number of representatives will amount to two hundred, and of fifty years, to four hundred. This is a number which, I presume, will put an end to all fears arising from the smallness of the body. I take for granted here what I shall, in answering the fourth objection, hereafter show, that the number of representatives will be augmented from time to time in the manner provided by the Constitution. On a contrary supposition, I should admit the objection to have very great weight indeed.

The true question to be decided then is, whether the smallness of the number, as a temporary regulation, be dangerous to the public liberty? Whether sixty-five members for a few years, and a hundred or two hundred for a few more, be a safe depositary for a limited and well-guarded power of legislating for the United States? I must own that I could not give a negative answer to this question, without first obliterating every impression which I have received with regard to the present genius of the people of America, the spirit which actuates the State legislatures, and the principles which are incorporated with the political character of every class of citizens I am unable to conceive that the people of America, in their present temper, or under any circumstances which can speedily happen, will choose, and every second year repeat the choice of, sixty-five or a hundred men who would be disposed to form and pursue a scheme of tyranny or treachery. I am unable to conceive that the State legislatures, which must feel so many motives to watch, and which possess so many means of counteracting, the federal legislature, would fail either to detect or to defeat a conspiracy of the latter against the liberties of their common constituents. I am equally unable to conceive that there are at this time, or can be in any short time, in the United States, any sixty-five or a hundred men capable of recommending themselves to the choice of the people at large, who would either desire or dare, within the short space of two years, to betray the solemn trust committed to them. What change of circumstances, time, and a fuller population of our country may produce, requires a prophetic spirit to declare, which makes no part of my pretensions. But judging from the circumstances now before us, and from the probable state of them within a moderate period of time, I must pronounce that the liberties of America cannot be unsafe in the number of hands proposed by the federal Constitution.

From what quarter can the danger proceed? Are we afraid of foreign gold? If foreign gold could so easily corrupt our federal rulers and enable them to ensnare and betray their constituents, how has it happened that we are at this time a free and independent nation? The Congress which conducted us through the Revolution was a less numerous body than their successors will be; they were not chosen by, nor responsible to, their fellowcitizens at large; though appointed from year to year, and recallable at pleasure, they were generally continued for three years, and prior to the ratification of the federal articles, for a still longer term. They held their consultations always under the veil of secrecy; they had the sole transaction of our affairs with foreign nations; through the whole course of the war they had the fate of their country more in their hands than it is to be hoped will ever be the case with our future representatives; and from the greatness of the prize at stake, and the eagerness of the party which lost it, it may well be supposed that the use of other means than force would not have been scrupled. Yet we know by happy experience that the public trust was not betrayed; nor has the purity of our public councils in this particular ever suffered, even from the whispers of calumny.

Is the danger apprehended from the other branches of the federal government? But where are the means to be found by the President, or the Senate, or both? Their emoluments of office, it is to be presumed, will not, and without a previous corruption of the House of Representatives cannot, more than suffice for very different purposes; their private fortunes, as they must all be American citizens, cannot possibly be sources of danger. The only means, then, which they can possess, will be in the dispensation of appointments. Is it here that suspicion rests her charge? Sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate. Now, the fidelity of the other House is to be the victim. The improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension. But, fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election. No offices therefore can be dealt out to the existing members but such as may become vacant by ordinary casualties: and to suppose that these would be sufficient to purchase the guardians of the people, selected by the people themselves, is to renounce every rule by which events ought to be calculated, and to substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause. As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

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FEDERALIST No. 56. The Same Subject Continued (The Total Number of the House of Representatives)

For the Independent Journal. Saturday, February 16, 1788.

MADISON

To the People of the State of New York:

THE SECOND charge against the House of Representatives is, that it will be too small to possess a due knowledge of the interests of its constituents.

As this objection evidently proceeds from a comparison of the proposed number of representatives with the great extent of the United States, the number of their inhabitants, and the diversity of their interests, without taking into view at the same time the circumstances which will distinguish the Congress from other legislative bodies, the best answer that can be given to it will be a brief explanation of these peculiarities.

It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests to which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. In determining the extent of information required in the exercise of a particular authority, recourse then must be had to the objects within the purview of that authority.

What are to be the objects of federal legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.

A proper regulation of commerce requires much information, as has been elsewhere remarked; but as far as this information relates to the laws and local situation of each individual State, a very few representatives would be very sufficient vehicles of it to the federal councils.

Taxation will consist, in a great measure, of duties which will be involved in the regulation of commerce. So far the preceding remark is applicable to this object. As far as it may consist of internal collections, a more diffusive knowledge of the circumstances of the State may be necessary. But will not this also be possessed in sufficient degree by a very few intelligent men, diffusively

elected within the State? Divide the largest State into ten or twelve districts, and it will be found that there will be no peculiar local interests in either, which will not be within the knowledge of the representative of the district. Besides this source of information, the laws of the State, framed by representatives from every part of it, will be almost of themselves a sufficient guide. In every State there have been made, and must continue to be made, regulations on this subject which will, in many cases, leave little more to be done by the federal legislature, than to review the different laws, and reduce them in one general act. A skillful individual in his closet with all the local codes before him, might compile a law on some subjects of taxation for the whole union, without any aid from oral information, and it may be expected that whenever internal taxes may be necessary, and particularly in cases requiring uniformity throughout the States, the more simple objects will be preferred. To be fully sensible of the facility which will be given to this branch of federal legislation by the assistance of the State codes, we need only suppose for a moment that this or any other State were divided into a number of parts, each having and exercising within itself a power of local legislation. Is it not evident that a degree of local information and preparatory labor would be found in the several volumes of their proceedings, which would very much shorten the labors of the general legislature, and render a much smaller number of members sufficient for it? The federal councils will derive great advantage from another circumstance. The representatives of each State will not only bring with them a considerable knowledge of its laws, and a local knowledge of their respective districts, but will probably in all cases have been members, and may even at the very time be members, of the State legislature, where all the local information and interests of the State are assembled, and from whence they may easily be conveyed by a very few hands into the legislature of the United States.

(The observations made on the subject of taxation apply with greater force to the case of the militia. For however different the rules of discipline may be in different States, they are the same throughout each particular State; and depend on circumstances which can differ but little in different parts of the same State.)(E1)

(With regard to the regulation of the militia, there are scarcely any circumstances in reference to which local knowledge can be said to be necessary. The general face of the country, whether mountainous or level, most fit for the operations of infantry or cavalry, is almost the only consideration of this nature that can occur. The art of war teaches general principles of organization, movement, and discipline, which apply universally.)(E1)

The attentive reader will discern that the reasoning here used, to prove the sufficiency of a moderate number of representatives, does not in any respect contradict what was urged on another occasion with regard to the extensive information which the representatives ought to possess, and the time that might be necessary for acquiring it. This information, so far as it may relate to local objects, is rendered necessary and difficult, not by a difference of laws and local circumstances within a single State, but of those among different States. Taking each State by itself, its laws are the same, and its interests but little diversified. A few men, therefore, will possess all the knowledge requisite for a proper representation of them. Were the interests and affairs of each individual State perfectly simple and uniform, a knowledge of them in one part would involve a knowledge of them in every other, and the whole State might be competently represented by a single member taken from any part of it. On a comparison of the different States together, we find a great dissimilarity in their laws, and in many other circumstances connected with the objects of federal legislation, with all of which the federal representatives ought to have some acquaintance. Whilst a few representatives, therefore, from each State, may bring with them a due knowledge of their own State, every representative will have much information to acquire concerning all the other States. The changes of time, as was formerly remarked, on the comparative situation of the different States, will have an assimilating effect. The effect of time on the internal affairs of the States, taken singly, will be just the contrary. At present some of the States are little more than a society of husbandmen. Few of them have made much progress in those branches of industry which give a variety and complexity to the affairs of a nation. These, however, will in all of them be the fruits of a more advanced population, and will require, on the part of each State, a fuller representation. The foresight of the convention has accordingly taken care that the progress of population may be accompanied with a proper increase of the representative branch of the government.

The experience of Great Britain, which presents to mankind so many political lessons, both of the monitory and exemplary kind, and which has been frequently consulted in the course of these inquiries, corroborates the result of the reflections which we have just made. The number of inhabitants in the two kingdoms of England and Scotland cannot be stated at less than eight millions. The representatives of these eight millions in the House of Commons amount to five hundred and fifty-eight. Of this number, one ninth are elected by three hundred and sixty-four persons, and one half, by five thousand seven hundred and twenty-three persons.(1) It cannot be supposed that the half thus elected, and who do not even reside among the people at large, can add any thing either to the security of the people against the government, or to the knowledge of their circumstances and interests in the legislative councils.

On the contrary, it is notorious, that they are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights. They might therefore, with great propriety, be considered as something more than a mere deduction from the real representatives of the nation. We will, however, consider them in this light alone, and will not extend the deduction to a considerable number of others, who do not reside among their constitutents, are very faintly connected with them, and have very little particular knowledge of their affairs. With all these concessions, two hundred and seventy-nine persons only will be the depository of the safety, interest, and happiness of eight millions that is to say, there will be one representative only to maintain the rights and explain the situation of TWENTY-EIGHT THOUSAND SIX HUNDRED AND SEVENTY constitutents, in an assembly exposed to the whole force of executive influence, and extending its authority to every object of legislation within a nation whose affairs are in the highest degree diversified and complicated. Yet it is very certain, not only that a valuable portion of freedom has been preserved under all these circumstances, but that the defects in the British code are chargeable, in a very small proportion, on the ignorance of the legislature concerning the circumstances of the people. Allowing to this case the weight which is due to it, and comparing it with that of the House of Representatives as above explained it seems to give the fullest assurance, that a representative for every THIRTY THOUSAND INHABITANTS will render the latter both a safe and competent guardian of the interests which will be confided to it.

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1. Burgh's "Political Disquisitions."

E1. Two versions of this paragraph appear in different editions.

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FEDERALIST No. 57. The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation.

From the New York Packet. Tuesday, February 19, 1788.

MADISON

To the People of the State of New York:

THE THIRD charge against the House of Representatives is, that it will be taken from that class of citizens which will have least sympathy with the mass of the people, and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.

Of all the objections which have been framed against the federal Constitution, this is perhaps the most extraordinary. Whilst the objection itself is levelled against a pretended oligarchy, the principle of it strikes at the very root of republican government.

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one, is such a limitation of the term of appointments as will maintain a proper responsibility to the people.

Let me now ask what circumstance there is in the constitution of the House of Representatives that violates the principles of republican government, or favors the elevation of the few on the ruins of the many? Let me ask whether every circumstance is not, on the contrary, strictly conformable to these principles, and scrupulously impartial to the rights and pretensions of every class and description of citizens?

Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgement or disappoint the inclination of the people.

If we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents.

In the first place, as they will have been distinguished by the preference of their fellow-citizens, we are to presume that in general they will be somewhat distinguished also by those qualities which entitle them to it, and which promise a sincere and scrupulous regard to the nature of their engagements.

In the second place, they will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation against human nature; and it must be confessed that instances of it are but too frequent and flagrant, both in public and in private life. But the universal and extreme indignation which it inspires is itself a proof of the energy and prevalence of the contrary sentiment.

In the third place, those ties which bind the representative to his constituents are strengthened by motives of a more selfish nature. His pride and vanity attach him to a form of government which favors his pretensions and gives him a share in its honors and distinctions. Whatever hopes or projects might be entertained by a few aspiring characters, it must generally happen that a great proportion of the men deriving their advancement from their influence with the people, would have more to hope from a preservation of the favor, than from innovations in the government subversive of the authority of the people.

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of man. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people? Are they not the identical means on which every State government in the Union relies for the attainment of these important ends? What then are we to understand by the objection which this paper has combated? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?

Were the objection to be read by one who had not seen the mode prescribed by the Constitution for the choice of representatives, he could suppose nothing less than that some unreasonable qualification of property was annexed to the right of suffrage; or that the right of eligibility was limited to persons of particular families or fortunes; or at least that the mode prescribed by the State constitutions was in some respect or other, very grossly departed from. We have seen how far such a supposition would err, as to the two first points. Nor would it, in fact, be less erroneous as to the last. The only difference discoverable between the two cases is, that each representative of the United States will be elected by five or six thousand citizens; whilst in the individual States, the

election of a representative is left to about as many hundreds. Will it be pretended that this difference is sufficient to justify an attachment to the State governments, and an abhorrence to the federal government? If this be the point on which the objection turns, it deserves to be examined.

Is it supported by REASON? This cannot be said, without maintaining that five or six thousand citizens are less capable of choosing a fit representative, or more liable to be corrupted by an unfit one, than five or six hundred. Reason, on the contrary, assures us, that as in so great a number a fit representative would be most likely to be found, so the choice would be less likely to be diverted from him by the intrigues of the ambitious or the ambitious or the bribes of the rich.

Is the CONSEQUENCE from this doctrine admissible? If we say that five or six hundred citizens are as many as can jointly exercise their right of suffrage, must we not deprive the people of the immediate choice of their public servants, in every instance where the administration of the government does not require as many of them as will amount to one for that number of citizens?

Is the doctrine warranted by FACTS? It was shown in the last paper, that the real representation in the British House of Commons very little exceeds the proportion of one for every thirty thousand inhabitants. Besides a variety of powerful causes not existing here, and which favor in that country the pretensions of rank and wealth, no person is eligible as a representative of a county, unless he possess real estate of the clear value of six hundred pounds sterling per year; nor of a city or borough, unless he possess a like estate of half that annual value. To this qualification on the part of the county representatives is added another on the part of the county electors, which restrains the right of suffrage to persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money. Notwithstanding these unfavorable circumstances, and notwithstanding some very unequal laws in the British code, it cannot be said that the representatives of the nation have elevated the few on the ruins of the many.

But we need not resort to foreign experience on this subject. Our own is explicit and decisive. The districts in New Hampshire in which the senators are chosen immediately by the people, are nearly as large as will be necessary for her representatives in the Congress. Those of Massachusetts are larger than will be necessary for that purpose; and those of New York still more so. In the last State the members of Assembly for the cities and counties of New York and Albany are elected by very nearly as many voters as will be entitled to a representative in the Congress, calculating on the number of sixty-five representatives only. It makes no difference that in these senatorial districts and counties a number of representatives are voted for by each elector at the same time. If the same electors at the same time are capable of choosing four or five representatives, they cannot be incapable of choosing one. Pennsylvania is an additional example. Some of her counties, which elect her State representatives, are almost as large as her districts will be by which her federal representatives will be elected. The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives. It forms, however, but one county, in which every elector votes for each of its representatives in the State legislature. And what may appear to be still more directly to our purpose, the whole city actually elects a SINGLE MEMBER for the executive council. This is the case in all the other counties of the State.

Are not these facts the most satisfactory proofs of the fallacy which has been employed against the branch of the federal government under consideration? Has it appeared on trial that the senators of New Hampshire, Massachusetts, and New York, or the executive council of Pennsylvania, or the members of the Assembly in the two last States, have betrayed any peculiar disposition to sacrifice the many to the few, or are in any respect less worthy of their places than the representatives and magistrates appointed in other States by very small divisions of the people?

But there are cases of a stronger complexion than any which I have yet quoted. One branch of the legislature of Connecticut is so constituted that each member of it is elected by the whole State. So is the governor of that State, of Massachusetts, and of this State, and the president of New Hampshire. I leave every man to decide whether the result of any one of these experiments can be said to countenance a suspicion, that a diffusive mode of choosing representatives of the people tends to elevate traitors and to undermine the public liberty.

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FEDERALIST No. 58. Objection That The Number of Members Will Not Be Augmented as the Progress of Population Demands.

Considered For the Independent Journal Wednesday, February 20, 1788.

MADISON

To the People of the State of New York:

THE remaining charge against the House of Representatives, which I am to examine, is grounded on a supposition that the number of members will not be augmented from time to time, as the progress of population may demand.

It has been admitted, that this objection, if well supported, would have great weight. The following observations will show that, like most other objections against the Constitution, it can only proceed from a partial view of the subject, or from a jealousy which discolors and disfigures every object which is beheld.

1. Those who urge the objection seem not to have recollected that the federal Constitution will not suffer by a comparison with the State constitutions, in the security provided for a gradual augmentation of the number of representatives. The number which is to prevail in the first instance is declared to be temporary. Its duration is limited to the short term of three years.

Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives to the number of inhabitants, under the single exception that each State shall have one representative at least; secondly, to augment the number of representatives at the same periods, under the sole limitation that the whole number shall not exceed one for every thirty thousand inhabitants. If we review the constitutions of the several States, we shall find that some of them contain no determinate regulations on this subject, that others correspond pretty much on this point with the federal Constitution, and that the most effectual security in any of them is resolvable into a mere directory provision.

2. As far as experience has taken place on this subject, a gradual increase of representatives under the State constitutions has at least kept pace with that of the constituents, and it appears that the former have been as ready to concur in such measures as the latter have been to call for them.

3. There is a peculiarity in the federal Constitution which insures a watchful attention in a majority both of the people and of their representatives to a constitutional augmentation of the latter. The peculiarity lies in this, that one branch of the legislature is a representation of citizens, the other of the States: in the former, consequently, the larger States will have most weight; in the latter, the advantage will be in favor of the smaller States. From this circumstance it may with certainty be inferred that the larger States will be strenuous advocates for increasing the number and weight of that part of the legislature in which their influence predominates. And it so happens that four only of the largest will have a majority of the whole votes in the House of Representatives. Should the representatives or people, therefore, of the smaller States oppose at any time a reasonable addition of members, a coalition of a very few States will be sufficient to overrule the opposition; a coalition which, notwithstanding the rivalship and local prejudices which might prevent it on ordinary occasions, would not fail to take place, when not merely prompted by common interest, but justified by equity and the principles of the Constitution.

It may be alleged, perhaps, that the Senate would be prompted by like motives to an adverse coalition; and as their concurrence would be indispensable, the just and constitutional views of the other branch might be defeated. This is the difficulty which has probably created the most serious apprehensions in the jealous friends of a numerous representation. Fortunately it is among the difficulties which, existing only in appearance, vanish on a close and accurate inspection. The following reflections will, if I mistake not, be admitted to be conclusive and satisfactory on this point.

Notwithstanding the equal authority which will subsist between the two houses on all legislative subjects, except the originating of money bills, it cannot be doubted that the House, composed of the greater number of members, when supported by the more powerful States, and speaking the known and determined sense of a majority of the people, will have no small advantage in a question depending on the comparative firmness of the two houses.

This advantage must be increased by the consciousness, felt by the same side of being supported in its demands by right, by reason, and by the Constitution; and the consciousness, on the opposite side, of contending against the force of all these solemn considerations.

It is farther to be considered, that in the gradation between the smallest and largest States, there are several, which, though most likely in general to arrange themselves among the former are too little removed in extent and population from the latter, to second an opposition to their just and legitimate pretensions. Hence it is by no means certain that a majority of votes, even in the Senate, would be unfriendly to proper augmentations in the number of representatives.

It will not be looking too far to add, that the senators from all the new States may be gained over to the just views of the House of Representatives, by an expedient too obvious to be overlooked. As these States will, for a great length of time, advance in population with peculiar rapidity, they will be interested in frequent reapportionments of the representatives to the number of inhabitants. The large States, therefore, who will prevail in the House of Representatives, will have nothing to do but to make reapportionments and augmentations mutually conditions of each other; and the senators from all the most growing States will be bound to contend for the latter, by the interest which their States will feel in the former.

These considerations seem to afford ample security on this subject, and ought alone to satisfy all the doubts and fears which have been indulged with regard to it. Admitting, however, that they should all be insufficient to subdue the unjust policy of the smaller States, or their predominant influence in the councils of the Senate, a constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes. The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

But will not the House of Representatives be as much interested as the Senate in maintaining the government in its proper functions, and will they not therefore be unwilling to stake its existence or its reputation on the pliancy of the Senate? Or, if such a trial of firmness between the two branches were hazarded, would not the one be as likely first to yield as the other? These questions will create no difficulty with those who reflect that in all cases the smaller the number, and the more permanent and conspicuous the station, of men in power, the stronger must be the interest which they will individually feel in whatever concerns the government. Those who represent the dignity of their country in the eyes of other nations, will be particularly sensible to every prospect of public danger, or of dishonorable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British House of Commons over the other branches of the government, whenever the engine of a money bill has been employed. An absolute inflexibility on the side of the latter, although it could not have failed to involve every department of the state in the general confusion, has neither been apprehended nor experienced. The utmost degree of firmness that can be displayed by the federal Senate or President, will not be more than equal to a resistance in which they will be supported by constitutional and patriotic principles.

In this review of the Constitution of the House of Representatives, I have passed over the circumstances of economy, which, in the present state of affairs, might have had some effect in lessening the temporary number of representatives, and a disregard of which would probably have been as rich a theme of declamation against the Constitution as has been shown by the smallness of the number proposed. I omit also any remarks on the difficulty which might be found, under present circumstances, in engaging in the federal service a large number of such characters as the people will probably elect. One observation, however, I must be permitted to add on this subject as claiming, in my judgment, a very serious attention. It is, that in all legislative assemblies the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more numerous an assembly may be, of whatever characters composed, the greater is known to be the ascendency of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now, it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation. The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, AFTER SECURING A SUFFICIENT

NUMBER FOR THE PURPOSES OF SAFETY, OF LOCAL INFORMATION, AND OF DIFFUSIVE SYMPATHY WITH THE WHOLE SOCIETY, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed.

As connected with the objection against the number of representatives, may properly be here noticed, that which has been suggested against the number made competent for legislative business. It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences. Lastly, it would facilitate and foster the baneful practice of secessions; a practice which has shown itself even in States where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsions, and the ruin of popular governments, than any other which has yet been displayed among us.

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FEDERALIST No. 59. Concerning the Power of Congress to Regulate the Election of Members

From the New York Packet. Friday, February 22, 1788.

HAMILTON

To the People of the State of New York:

THE natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members. It is in these words: “The TIMES, PLACES, and MANNER of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter SUCH REGULATIONS, except as to the PLACES of choosing senators.”(1) This provision has not only been declaimed against by those who condemn the Constitution in the gross, but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.

I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION. Every just reasoner will, at first sight, approve an adherence to this rule, in the work of the convention; and will disapprove every deviation from it which may not appear to have been dictated by the necessity of incorporating into the work some particular ingredient, with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard and to regret a departure from so fundamental a principle, as a portion of imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.

It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say, that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy can never be dignified with that character. If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government. And as it is more consonant to the rules of a just theory, to trust the Union with the care of its own existence, than to transfer that care to any other hands, if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed.

Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction, that each, as far as possible, ought to depend on itself for its own preservation.

As an objection to this position, it may be remarked that the constitution of the national Senate would involve, in its full extent, the danger which it is suggested might flow from an exclusive power in the State legislatures to regulate the federal elections. It may be alleged, that by declining the appointment of Senators, they might at any time give a fatal blow to the Union; and from this it may be inferred, that as its existence would be thus rendered dependent upon them in so essential a point, there can be no objection to intrusting them with it in the particular case under consideration. The interest of each State, it may be added, to maintain its representation in the national councils, would be a complete security against an abuse of the trust.

This argument, though specious, will not, upon examination, be found solid. It is certainly true that the State legislatures, by forbearing the appointment of senators, may destroy the national government. But it will not follow that, because they have a power to do this in one instance, they ought to have it in every other. There are cases in which the pernicious tendency of such a power may be far more decisive, without any motive equally cogent with that which must have regulated the conduct of the convention in respect to the formation of the Senate, to recommend their admission into the system. So far as that construction may expose the Union to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision. But however wise it may have been to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges, nor any greater good invites.

It may be easily discerned also that the national government would run a much greater risk from a power in the State legislatures over the elections of its House of Representatives, than from their power of appointing the members of its Senate. The senators are to be chosen for the period of six years; there is to be a rotation, by which the seats of a third part of them are to be vacated and replenished every two years; and no State is to be entitled to more than two senators; a quorum of the body is to consist of sixteen members. The joint result of these circumstances would be, that a temporary combination of a few States to intermit the appointment of senators, could neither annul the existence nor impair the activity of the body; and it is not from a general and permanent combination of the States that we can have any thing to fear. The first might proceed from sinister designs in the leading members of a few of the State legislatures; the last would suppose a fixed and rooted disaffection in the great body of the people, which will either never exist at all, or will, in all probability, proceed from an experience of the inaptitude of the general government to the advancement of their happiness in which event no good citizen could desire its continuance.

But with regard to the federal House of Representatives, there is intended to be a general election of members once in two years. If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation, which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election.

I shall not deny, that there is a degree of weight in the observation, that the interests of each State, to be represented in the federal councils, will be a security against the abuse of a power over its elections in the hands of the State legislatures. But the security will not be considered as complete, by those who attend to the force of an obvious distinction between the interest of the people in the public felicity, and the interest of their local rulers in the power and consequence of their offices. The people of America may be warmly attached to the government of the Union, at times when the particular rulers of particular States, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States, may be in a very opposite temper. This diversity of sentiment between a majority of the people, and the individuals who have the greatest credit in their councils, is exemplified in some of the States at the present moment, on the present question. The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal. With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men, in a few of the most considerable States, where the temptation will always be the strongest, might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives. It ought never to be forgotten, that a firm union of this country, under an efficient government, will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers, and will seldom fail to be patronized and abetted by some of them. Its preservation, therefore ought in no case that can be avoided, to be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.

PUBLIUS

1. 1st clause, 4th section, of the 1st article.

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FEDERALIST No. 60. The Same Subject Continued (Concerning the Power of Congress to Regulate the Election of Members)

From The Independent Journal. Saturday, February 23, 1788.

HAMILTON

To the People of the State of New York:

WE HAVE seen, that an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures. Let us now see, what would be the danger on the other side; that is, from confiding the ultimate right of regulating its own elections to the Union itself. It is not pretended, that this right would ever be used for the exclusion of any State from its share in the representation. The interest of all would, in this respect at least, be the security of all. But it is alleged, that it might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others, by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice. Of all chimerical suppositions, this seems to be the most chimerical. On the one hand, no rational calculation of probabilities would lead us to imagine that the disposition which a conduct so violent and extraordinary would imply, could ever find its way into the national councils; and on the other, it may be concluded with certainty, that if so improper a spirit should ever gain admittance into them, it would display itself in a form altogether different and far more decisive.

The improbability of the attempt may be satisfactorily inferred from this single reflection, that it could never be made without causing an immediate revolt of the great body of the people, headed and directed by the State governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated, in respect to a particular class of citizens, by a victorious and overbearing majority; but that so fundamental a privilege, in a country so situated and enlightened, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the government, without occasioning a popular revolution, is altogether inconceivable and incredible.

In addition to this general reflection, there are considerations of a more precise nature, which forbid all apprehension on the subject. The dissimilarity in the ingredients which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views in any partial scheme

of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society. And though an intimate intercourse under the same government will promote a gradual assimilation in some of these respects, yet there are causes, as well physical as moral, which may, in a greater or less degree, permanently nourish different propensities and inclinations in this respect. But the circumstance which will be likely to have the greatest influence in the matter, will be the dissimilar modes of constituting the several component parts of the government. The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

As to the Senate, it is impossible that any regulation of "time and manner," which is all that is proposed to be submitted to the national government in respect to that body, can affect the spirit which will direct the choice of its members. The collective sense of the State legislatures can never be influenced by extraneous circumstances of that sort; a consideration which alone ought to satisfy us that the discrimination apprehended would never be attempted. For what inducement could the Senate have to concur in a preference in which itself would not be included? Or to what purpose would it be established, in reference to one branch of the legislature, if it could not be extended to the other? The composition of the one would in this case counteract that of the other. And we can never suppose that it would embrace the appointments to the Senate, unless we can at the same time suppose the voluntary co-operation of the State legislatures. If we make the latter supposition, it then becomes immaterial where the power in question is placed—whether in their hands or in those of the Union.

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favor of the landed interest, or the moneyed interest, or the mercantile interest, or the manufacturing interest? Or, to speak in the fashionable language of the adversaries to the Constitution, will it court the elevation of "the wealthy and the well-born," to the exclusion and debasement of all the rest of the society?

If this partiality is to be exerted in favor of those who are concerned in any particular description of industry or property, I presume it will readily be admitted, that the competition for it will lie between landed men and merchants. And I scruple not to affirm, that it is infinitely less likely that either of them should gain an ascendant in the national councils, than that the one or the other of them should predominate in all the local councils. The inference will be, that a conduct tending to give an undue preference to either is much less to be dreaded from the former than from the latter.

The several States are in various degrees addicted to agriculture and commerce. In most, if not all of them, agriculture is predominant. In a few of them, however, commerce nearly divides its empire, and in most of them has a considerable share of influence. In proportion as either prevails, it will be conveyed into the national representation; and for the very reason, that this will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single State, it will be much less apt to espouse either of them with a decided partiality, than the representation of any single State.

In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government. As long as this interest prevails in most of the State legislatures, so long it must maintain a correspondent superiority in the national Senate, which will generally be a faithful copy of the majorities of those assemblies. It cannot therefore be presumed, that a sacrifice of the landed to the mercantile class will ever be a favorite object of this branch of the federal legislature. In applying thus particularly to the Senate a general observation suggested by the situation of the country, I am governed by the consideration, that the credulous votaries of State power cannot, upon their own principles, suspect, that the State legislatures would be warped from their duty by any external influence. But in reality the same situation must have the same effect, in the primitive composition at least of the federal House of Representatives: an improper bias towards the mercantile class is as little to be expected from this quarter as from the other.

In order, perhaps, to give countenance to the objection at any rate, it may be asked, is there not danger of an opposite bias in the national government, which may dispose it to endeavor to secure a monopoly of the federal administration to the landed class? As there is little likelihood that the supposition of such a bias will have any terrors for those who would be immediately injured by it, a labored answer to this question will be dispensed with. It will be sufficient to remark, first, that for the reasons elsewhere assigned, it is less likely that any decided partiality should prevail in the councils of the Union than in those of any of its members. Secondly, that there would be no temptation to violate the Constitution in favor of the landed class, because that class would, in the natural

course of things, enjoy as great a preponderancy as itself could desire. And thirdly, that men accustomed to investigate the sources of public prosperity upon a large scale, must be too well convinced of the utility of commerce, to be inclined to inflict upon it so deep a wound as would result from the entire exclusion of those who would best understand its interest from a share in the management of them. The importance of commerce, in the view of revenue alone, must effectually guard it against the enmity of a body which would be continually importuned in its favor, by the urgent calls of public necessity.

I the rather consult brevity in discussing the probability of a preference founded upon a discrimination between the different kinds of industry and property, because, as far as I understand the meaning of the objectors, they contemplate a discrimination of another kind. They appear to have in view, as the objects of the preference with which they endeavor to alarm us, those whom they designate by the description of “the wealthy and the well-born.” These, it seems, are to be exalted to an odious pre-eminence over the rest of their fellow-citizens. At one time, however, their elevation is to be a necessary consequence of the smallness of the representative body; at another time it is to be effected by depriving the people at large of the opportunity of exercising their right of suffrage in the choice of that body.

But upon what principle is the discrimination of the places of election to be made, in order to answer the purpose of the meditated preference? Are “the wealthy and the well-born,” as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct or foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors? If the latter is the case, (as every intelligent man knows it to be,(1)) is it not evident that the policy of confining the places of election to particular districts would be as subversive of its own aim as it would be exceptionable on every other account? The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

Let it, however, be admitted, for argument sake, that the expedient suggested might be successful; and let it at the same time be equally taken for granted that all the scruples which a sense of duty or an apprehension of the danger of the experiment might inspire, were overcome in the breasts of the national rulers, still I imagine it will hardly be pretended that they could ever hope to carry such an enterprise into execution without the aid of a military force sufficient to subdue the resistance of the great body of the people. The improbability of the existence of a force equal to that object has been discussed and demonstrated in different parts of these papers; but that the futility of the objection under consideration may appear in the strongest light, it shall be conceded for a moment that such a force might exist, and the national government shall be supposed to be in the actual possession of it. What will be the conclusion? With a disposition to invade the essential rights of the community, and with the means of gratifying that disposition, is it presumable that the persons who were actuated by it would amuse themselves in the ridiculous task of fabricating election laws for securing a preference to a favorite class of men? Would they not be likely to prefer a conduct better adapted to their own immediate aggrandizement? Would they not rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation, than to trust to precarious expedients which, in spite of all the precautions that might accompany them, might terminate in the dismission, disgrace, and ruin of their authors? Would they not fear that citizens, not less tenacious than conscious of their rights, would flock from the remote extremes of their respective States to the places of election, to overthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people?

PUBLIUS

1. Particularly in the Southern States and in this State.

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FEDERALIST No. 61. The Same Subject Continued (Concerning the Power of Congress to Regulate the Election of Members)

From the New York Packet. Tuesday, February 26, 1788.

HAMILTON

To the People of the State of New York:

THE more candid opposers of the provision respecting elections, contained in the plan of the convention, when pressed in argument, will sometimes concede the propriety of that provision; with this qualification, however, that it ought to have been accompanied with a declaration, that all elections should be had in the counties where the electors resided. This, say they, was a necessary precaution against an abuse of the power. A declaration of this nature would certainly have been harmless; so far as it would have had the effect of quieting apprehensions, it might not have been undesirable. But it would, in fact, have afforded little or no additional security against the danger apprehended; and the want of it will never be considered, by an impartial and judicious examiner, as a serious, still less as an insuperable, objection to the plan. The different views taken of the subject in the two preceding papers must be sufficient to satisfy all dispassionate and discerning men, that if the public liberty should ever be the victim of the ambition of the national rulers, the power under examination, at least, will be guiltless of the sacrifice.

If those who are inclined to consult their jealousy only, would exercise it in a careful inspection of the several State constitutions, they would find little less room for disquietude and alarm, from the latitude which most of them allow in respect to elections, than from the latitude which is proposed to be allowed to the national government in the same respect. A review of their situation, in this particular, would tend greatly to remove any ill impressions which may remain in regard to this matter. But as that view would lead into long and tedious details, I shall content myself with the single example of the State in which I write. The constitution of New York makes no other provision for LOCALITY of elections, than that the members of the Assembly shall be elected in the COUNTIES; those of the Senate, in the great districts into which the State is or may be divided: these at present are four in number, and comprehend each from two to six counties. It may readily be perceived that it would not be more difficult to the legislature of New York to defeat the suffrages of the citizens of New York, by confining elections to particular places, than for the legislature of the United States to defeat the suffrages of the citizens of the Union, by the like expedient. Suppose, for instance, the city of Albany was to be appointed the sole place of election for the county and district of which it is a part, would not the inhabitants of that city speedily become the only electors of the members both of the Senate and Assembly for that county and district? Can we imagine that the electors who reside in the remote subdivisions of the counties of Albany, Saratoga, Cambridge, etc., or in any part of the county of Montgomery, would take the trouble to come to the city of Albany, to give their votes for members of the Assembly or Senate, sooner than they would repair to the city of New York, to participate in the choice of the members of the federal House of Representatives? The alarming indifference discoverable in the exercise of so invaluable a privilege under the existing laws, which afford every facility to it, furnishes a ready answer to this question. And, abstracted from any experience on the subject, we can be at no loss to determine, that when the place of election is at an INCONVENIENT DISTANCE from the elector, the effect upon his conduct will be the same whether that distance be twenty miles or twenty thousand miles. Hence it must appear, that objections to the particular modification of the federal power of regulating elections will, in substance, apply with equal force to the modification of the like power in the constitution of this State; and for this reason it will be impossible to acquit the one, and to condemn the other. A similar comparison would lead to the same conclusion in respect to the constitutions of most of the other States.

If it should be said that defects in the State constitutions furnish no apology for those which are to be found in the plan proposed, I answer, that as the former have never been thought chargeable with inattention to the security of liberty, where the imputations thrown on the latter can be shown to be applicable to them also, the presumption is that they are rather the cavilling refinements of a predetermined opposition, than the well-founded inferences of a candid research after truth. To those who are disposed to consider, as innocent omissions in the State constitutions, what they regard as unpardonable blemishes in the plan of the convention, nothing can be said; or at most, they can only be asked to assign some substantial reason why the representatives of the people in a single State should be more impregnable to the lust of power, or other sinister motives, than the representatives of the people of the United States? If they cannot do this, they ought at least to prove to us that it is easier to subvert the liberties of three millions of people, with the advantage of local governments to head their opposition, than of two hundred thousand people who are destitute of that advantage. And in relation to the point immediately under consideration, they ought to convince us that it is less probable that a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors, than that a similar spirit should take possession of the representatives of thirteen States, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests.

Hitherto my observations have only aimed at a vindication of the provision in question, on the ground of theoretic propriety, on that of the danger of placing the power elsewhere, and on that of the safety of placing it in the manner proposed. But there remains to be mentioned a positive advantage which will result from this disposition, and which could not as well have been obtained from any other: I allude to the circumstance of uniformity in the time of elections for the federal House of Representatives. It is more than possible that this uniformity may be found by experience to be of great importance to the public welfare, both as a security against

the perpetuation of the same spirit in the body, and as a cure for the diseases of faction. If each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year. The times of election in the several States, as they are now established for local purposes, vary between extremes as wide as March and November. The consequence of this diversity would be that there could never happen a total dissolution or renovation of the body at one time. If an improper spirit of any kind should happen to prevail in it, that spirit would be apt to infuse itself into the new members, as they come forward in succession. The mass would be likely to remain nearly the same, assimilating constantly to itself its gradual accretions. There is a contagion in example which few men have sufficient force of mind to resist. I am inclined to think that treble the duration in office, with the condition of a total dissolution of the body at the same time, might be less formidable to liberty than one third of that duration subject to gradual and successive alterations.

Uniformity in the time of elections seems not less requisite for executing the idea of a regular rotation in the Senate, and for conveniently assembling the legislature at a stated period in each year.

It may be asked, Why, then, could not a time have been fixed in the Constitution? As the most zealous adversaries of the plan of the convention in this State are, in general, not less zealous admirers of the constitution of the State, the question may be retorted, and it may be asked, Why was not a time for the like purpose fixed in the constitution of this State? No better answer can be given than that it was a matter which might safely be entrusted to legislative discretion; and that if a time had been appointed, it might, upon experiment, have been found less convenient than some other time. The same answer may be given to the question put on the other side. And it may be added that the supposed danger of a gradual change being merely speculative, it would have been hardly advisable upon that speculation to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government at the same epochs.

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FEDERALIST No. 62. The Senate

For the Independent Journal. Wednesday, February 27, 1788

MADISON

To the People of the State of New York:

HAVING examined the constitution of the House of Representatives, and answered such of the objections against it as seemed to merit notice, I enter next on the examination of the Senate. The heads into which this member of the government may be considered are: I. The qualification of senators; II. The appointment of them by the State legislatures; III. The equality of representation in the Senate; IV. The number of senators, and the term for which they are to be elected; V. The powers vested in the Senate.

I. The qualifications proposed for senators, as distinguished from those of representatives, consist in a more advanced age and a longer period of citizenship. A senator must be thirty years of age at least; as a representative must be twenty-five. And the former must have been a citizen nine years; as seven years are required for the latter. The propriety of these distinctions is explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems.

III. The equality of representation in the Senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion. If indeed it be right, that among a people

thoroughly incorporated into one nation, every district ought to have a PROPORTIONAL share in the government, and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an EQUAL share in the common councils, it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation, of America. A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option, then, for the former, lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.

In this spirit it may be remarked, that the equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

Another advantage accruing from this ingredient in the constitution of the Senate is, the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial; and that the peculiar defense which it involves in favor of the smaller States, would be more rational, if any interests common to them, and distinct from those of the other States, would otherwise be exposed to peculiar danger. But as the larger States will always be able, by their power over the supplies, to defeat unreasonable exertions of this prerogative of the lesser States, and as the faculty and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the Constitution may be more convenient in practice than it appears to many in contemplation.

IV. The number of senators, and the duration of their appointment, come next to be considered. In order to form an accurate judgment on both of these points, it will be proper to inquire into the purposes which are to be answered by a senate; and in order to ascertain these, it will be necessary to review the inconveniences which a republic must suffer from the want of such an institution.

First. It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

Second. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted, need not be proved. All that need be remarked is, that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Third. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be

charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people, of the value of those aids which may be expected from a well-constituted senate?

A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert, that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.

Fourth. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place, it forfeits the respect and confidence of other nations, and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once, by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbors may pity him, but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage from the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the more systematic policy of their wiser neighbors. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any way affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the FEW, not for the MANY.

In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No

government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of order and stability.

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FEDERALIST No. 63. The Senate Continued

For the Independent Journal. Saturday, March 1, 1788

MADISON

To the People of the State of New York:

A FIFTH desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, proceeding from the causes already mentioned, but the national councils will not possess that sensibility to the opinion of the world, which is perhaps not less necessary in order to merit, than it is to obtain, its respect and confidence.

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community. The half-yearly representatives of Rhode Island would probably have been little affected in their deliberations on the iniquitous measures of that State, by arguments drawn from the light in which such measures would be viewed by foreign nations, or even by the sister States; whilst it can scarcely be doubted that if the concurrence of a select and stable body had been necessary, a regard to national character alone would have prevented the calamities under which that misguided people is now laboring.

I add, as a SIXTH defect the want, in some important cases, of a due responsibility in the government to the people, arising from that frequency of elections which in other cases produces this responsibility. This remark will, perhaps, appear not only new, but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility, in order to be reasonable, must be limited to objects within the power of the responsible party, and in order to be effectual, must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. The objects of government may be divided into two general classes: the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well-chosen and well-connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country, needs no explanation. And yet it is evident that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the SHARE of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult to preserve a personal responsibility in the members of a NUMEROUS body, for such acts of the body as have an immediate, detached, and palpable operation on its constituents.

The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well-constructed Senate only as they relate to the representatives of the people. To a people as little blinded by prejudice or corrupted by flattery as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.

It may be suggested, that a people spread over an extensive region cannot, like the crowded inhabitants of a small district, be subject to the infection of violent passions, or to the danger of combining in pursuit of unjust measures. I am far from denying that this is a distinction of peculiar importance. I have, on the contrary, endeavored in a former paper to show, that it is one of the principal recommendations of a confederated republic. At the same time, this advantage ought not to be considered as superseding the use of auxiliary precautions. It may even be remarked, that the same extended situation, which will exempt the people of America from some of the dangers incident to lesser republics, will expose them to the inconveniency of remaining for a longer time under the influence of those misrepresentations which the combined industry of interested men may succeed in distributing among them.

It adds no small weight to all these considerations, to recollect that history informs us of no long-lived republic which had not a senate. Sparta, Rome, and Carthage are, in fact, the only states to whom that character can be applied. In each of the two first there was a senate for life. The constitution of the senate in the last is less known. Circumstantial evidence makes it probable that it was not different in this particular from the two others. It is at least certain, that it had some quality or other which rendered it an anchor against popular fluctuations; and that a smaller council, drawn out of the senate, was appointed not only for life, but filled up vacancies itself. These examples, though as unfit for the imitation, as they are repugnant to the genius, of America, are, notwithstanding, when compared with the fugitive and turbulent existence of other ancient republics, very instructive proofs of the necessity of some institution that will blend stability with liberty. I am not unaware of the circumstances which distinguish the American from other popular governments, as well ancient as modern; and which render extreme circumspection necessary, in reasoning from the one case to the other. But after allowing due weight to this consideration, it may still be maintained, that there are many points of similitude which render these examples not unworthy of our attention. Many of the defects, as we have seen, which can only be supplied by a senatorial institution, are common to a numerous assembly frequently elected by the people, and to the people themselves. There are others peculiar to the former, which require the control of such an institution. The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men, than where the concurrence of separate and dissimilar bodies is required in every public act.

The difference most relied on, between the American and other republics, consists in the principle of representation; which is the pivot on which the former move, and which is supposed to have been unknown to the latter, or at least to the ancient part of them. The use which has been made of this difference, in reasonings contained in former papers, will have shown that I am disposed neither to deny its existence nor to undervalue its importance. I feel the less restraint, therefore, in observing, that the position concerning the ignorance of the ancient governments on the subject of representation, is by no means precisely true in the latitude commonly given to it. Without entering into a disquisition which here would be misplaced, I will refer to a few known facts, in support of what I advance.

In the most pure democracies of Greece, many of the executive functions were performed, not by the people themselves, but by officers elected by the people, and REPRESENTING the people in their EXECUTIVE capacity.

Prior to the reform of Solon, Athens was governed by nine Archons, annually ELECTED BY THE PEOPLE AT LARGE. The degree of power delegated to them seems to be left in great obscurity. Subsequent to that period, we find an assembly, first of four, and afterwards of six hundred members, annually ELECTED BY THE PEOPLE; and PARTIALLY representing them in their

LEGISLATIVE capacity, since they were not only associated with the people in the function of making laws, but had the exclusive right of originating legislative propositions to the people. The senate of Carthage, also, whatever might be its power, or the duration of its appointment, appears to have been ELECTIVE by the suffrages of the people. Similar instances might be traced in most, if not all the popular governments of antiquity.

Lastly, in Sparta we meet with the Ephori, and in Rome with the Tribunes; two bodies, small indeed in numbers, but annually ELECTED BY THE WHOLE BODY OF THE PEOPLE, and considered as the REPRESENTATIVES of the people, almost in their PLENIPOTENTIARY capacity. The Cosmi of Crete were also annually ELECTED BY THE PEOPLE, and have been considered by some authors as an institution analogous to those of Sparta and Rome, with this difference only, that in the election of that representative body the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share in the LATTER, and not in the TOTAL EXCLUSION OF THE REPRESENTATIVES OF THE PEOPLE from the administration of the FORMER. The distinction, however, thus qualified, must be admitted to leave a most advantageous superiority in favor of the United States. But to insure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed, that any form of representative government could have succeeded within the narrow limits occupied by the democracies of Greece.

In answer to all these arguments, suggested by reason, illustrated by examples, and enforced by our own experience, the jealous adversary of the Constitution will probably content himself with repeating, that a senate appointed not immediately by the people, and for the term of six years, must gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical aristocracy.

To this general answer, the general reply ought to be sufficient, that liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, are apparently most to be apprehended by the United States. But a more particular reply may be given.

Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that coequal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order. Is there any man who can seriously persuade himself that the proposed Senate can, by any possible means within the compass of human address, arrive at the object of a lawless ambition, through all these obstructions?

If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the federal Senate will be, indirectly by the people, and for a term less by one year only than the federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment, and, at the same time, is not under the control of any such rotation as is provided for the federal Senate. There are some other lesser distinctions, which would expose the former to colorable objections, that do not lie against the latter. If the federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the federal Constitution, have been gradually extinguished by the progress of the experiment; and the Maryland constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union.

But if anything could silence the jealousies on this subject, it ought to be the British example. The Senate there instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for

seven years, and, in very great proportion, by a very small proportion of the people. Here, unquestionably, ought to be seen in full display the aristocratic usurpations and tyranny which are at some future period to be exemplified in the United States. Unfortunately, however, for the anti-federal argument, the British history informs us that this hereditary assembly has not been able to defend itself against the continual encroachments of the House of Representatives; and that it no sooner lost the support of the monarch, than it was actually crushed by the weight of the popular branch.

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta, the Ephori, the annual representatives of the people, were found an overmatch for the senate for life, continually gained on its authority and finally drew all power into their own hands. The Tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. The fact is the more remarkable, as unanimity was required in every act of the Tribunes, even after their number was augmented to ten. It proves the irresistible force possessed by that branch of a free government, which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had, at the commencement of the second Punic War, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts, that the federal Senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body, we are warranted in believing, that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves.

PUBLIUSHome

FEDERALIST No. 64. The Powers of the Senate

From The Independent Journal. Wednesday, March 5, 1788.

JAY

To the People of the State of New York:

IT IS a just and not a new observation, that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only in either as are worthy of blame. Unless on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed Constitution in the aggregate, and treat with severity some of the most unexceptionable articles in it.

The second section gives power to the President, “BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, TO MAKE TREATIES, PROVIDED TWO THIRDS OF THE SENATORS PRESENT CONCUR.”

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good. The convention appears to have been attentive to both these points: they have directed the President to be chosen by select bodies of electors, to be deputed by the people for that express purpose; and they have committed the appointment of senators to the State legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking the advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.

As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and

patriotism, which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded, that wise kings will always be served by able ministers, it is fair to argue, that as an assembly of select electors possess, in a greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment. The inference which naturally results from these considerations is this, that the President and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not only talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention to provide, not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country. Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way as to obviate the inconvenience of periodically transferring those great affairs entirely to new men; for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information will be preserved.

There are a few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making concurrence of the Senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect SECRECY and immediate DESPATCH are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective, if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other.

But to this plan, as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made, are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the

judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is, that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow, that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.

However useful jealousy may be in republics, yet when like bile in the natural, it abounds too much in the body politic, the eyes of both become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some, that the President and Senate may make treaties without an equal eye to the interests of all the States. Others suspect that two thirds will oppress the remaining third, and ask whether those gentlemen are made sufficiently responsible for their conduct; whether, if they act corruptly, they can be punished; and if they make disadvantageous treaties, how are we to get rid of those treaties?

As all the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons, and to insist on their punctual attendance. In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed, if it should forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compose the whole. It will not be in the power of the President and Senate to make any treaties by which they and their families and estates will not be equally bound and affected with the rest of the community; and, having no private interests distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposable. He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions, who can think it probable that the President and two thirds of the Senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained. But in such a case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the law of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor, oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken the utmost care that they shall be men of talents and integrity, we have reason to be persuaded that the treaties they make will be as advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace can operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.

PUBLIUSHome

FEDERALIST No. 65. The Powers of the Senate Continued

From the New York Packet. Friday, March 7, 1788.

HAMILTON

To the People of the State of New York:

THE remaining powers which the plan of the convention allots to the Senate, in a distinct capacity, are comprised in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will, therefore, conclude this head with a view of the judicial character of the Senate.

A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly, in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and on this account, can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

The convention, it appears, thought the Senate the most fit depositary of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry? The model from which the idea of this institution has been borrowed, pointed out that course to the convention. In Great Britain it is the province of the House of Commons to prefer the impeachment, and of the House of Lords to decide upon it. Several of the State constitutions have followed the example. As well the latter, as the former, seem to have regarded the practice of impeachments as a bridle in the hands of the legislative body upon the executive servants of the government. Is not this the true light in which it ought to be regarded?

Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION, to preserve, unawed and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?

Could the Supreme Court have been relied upon as answering this description? It is much to be doubted, whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task; and it is still more to be doubted, whether they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first, would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects, could only be avoided, if at all, by rendering that tribunal more numerous than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments, is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it. The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

These considerations seem alone sufficient to authorize a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration, which will not a little strengthen this conclusion. It is this: The punishment which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons who had disposed of his fame, and his most valuable rights as a citizen in one trial, should, in another trial, for the same offense, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision? Those who know anything of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismission from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?

Would it have been an improvement of the plan, to have united the Supreme Court with the Senate, in the formation of the court of impeachments? This union would certainly have been attended with several advantages; but would they not have been overbalanced by the signal disadvantage, already stated, arising from the agency of the same judges in the double prosecution to which the offender would be liable? To a certain extent, the benefits of that union will be obtained from making the chief justice of the Supreme Court the president of the court of impeachments, as is proposed to be done in the plan of the convention; while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional pretext for clamor against the judiciary, which so considerable an augmentation of its authority would have afforded.

Would it have been desirable to have composed the court for the trial of impeachments, of persons wholly distinct from the other departments of the government? There are weighty arguments, as well against, as in favor of, such a plan. To some minds it will not appear a trivial objection, that it could tend to increase the complexity of the political machine, and to add a new spring to the government, the utility of which would at best be questionable. But an objection which will not be thought by any unworthy of attention, is this: a court formed upon such a plan, would either be attended with a heavy expense, or might in practice be subject to a variety of casualties and inconveniences. It must either consist of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends, or of certain officers of the State governments to be called upon whenever an impeachment was actually depending. It will not be easy to imagine any third mode materially different, which could rationally be proposed. As the court, for reasons already given, ought to be numerous, the first scheme will be reprobated by every man who can compare the extent of the public wants with the means of supplying them. The second will be espoused with caution by those who will seriously consider the difficulty of collecting men dispersed over the whole Union; the injury to the innocent, from the procrastinated determination of the charges which might be brought against them; the advantage to the guilty, from the opportunities which delay would afford to intrigue and corruption; and in some cases the detriment to the State, from the prolonged inaction of men whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the House of Representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified, yet it ought not to be forgotten that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men.

But though one or the other of the substitutes which have been examined, or some other that might be devised, should be thought preferable to the plan in this respect, reported by the convention, it will not follow that the Constitution ought for this reason to be rejected. If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. Where is the standard of perfection to be found? Who will undertake to unite the discordant opinions of a whole community, in the same judgment of it; and to prevail upon one conceited projector to renounce his INFALLIBLE criterion for the FALLIBLE criterion of his more

CONCEITED NEIGHBOR? To answer the purpose of the adversaries of the Constitution, they ought to prove, not merely that particular provisions in it are not the best which might have been imagined, but that the plan upon the whole is bad and pernicious.

PUBLIUSHome

FEDERALIST No. 66. Objections to the Power of the Senate To Set as a Court for Impeachments Further Considered.

From The Independent Journal. Saturday, March 8, 1788.

HAMILTON

To the People of the State of New York:

A REVIEW of the principal objections that have appeared against the proposed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impressions which may still exist in regard to this matter.

The FIRST of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive. The division of them between the two branches of the legislature, assigning to one the right of accusing, to the other the right of judging, avoids the inconvenience of making the same persons both accusers and judges; and guards against the danger of persecution, from the prevalency of a factious spirit in either of those branches. As the concurrence of two thirds of the Senate will be requisite to a condemnation, the security to innocence, from this additional circumstance, will be as complete as itself can desire.

It is curious to observe, with what vehemence this part of the plan is assailed, on the principle here taken notice of, by men who profess to admire, without exception, the constitution of this State; while that constitution makes the Senate, together with the chancellor and judges of the Supreme Court, not only a court of impeachments, but the highest judicatory in the State, in all causes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the senators, is so inconsiderable, that the judiciary authority of New York, in the last resort, may, with truth, be said to reside in its Senate. If the plan of the convention be, in this respect, chargeable with a departure from the celebrated maxim which has been so often mentioned, and seems to be so little understood, how much more culpable must be the constitution of New York?(1)

A SECOND objection to the Senate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too aristocratic. The Senate, it is observed, is to have concurrent authority with the Executive in the formation of treaties and in the appointment to offices: if, say the objectors, to these prerogatives is added that of deciding in all cases of impeachment, it will give a decided predominancy to senatorial influence. To an objection so little precise in itself, it is not easy to find a very precise answer. Where is the measure or criterion to which we can appeal, for determining what will give the Senate too much, too little, or barely the proper degree of influence? Will it not be more safe, as well as more simple, to dismiss such vague and uncertain calculations, to examine each power by itself, and to decide, on general principles, where it may be deposited with most advantage and least inconvenience?

If we take this course, it will lead to a more intelligible, if not to a more certain result. The disposition of the power of making treaties, which has obtained in the plan of the convention, will, then, if I mistake not, appear to be fully justified by the considerations stated in a former number, and by others which will occur under the next head of our inquiries. The expediency of the junction of the Senate with the Executive, in the power of appointing to offices, will, I trust, be placed in a light not less satisfactory, in the disquisitions under the same head. And I flatter myself the observations in my last paper must have gone no inconsiderable way towards proving that it was not easy, if practicable, to find a more fit receptacle for the power of determining impeachments, than that which has been chosen. If this be truly the case, the hypothetical dread of the too great weight of the Senate ought to be discarded from our reasonings.

But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration in office prescribed for the senators. It was by them shown, as well on the credit of historical examples, as from the reason of the thing, that the most POPULAR branch of every government, partaking of the republican genius, by being generally the favorite of the people, will be as generally a full match, if not an overmatch, for every other member of the Government.

But independent of this most active and operative principle, to secure the equilibrium of the national House of Representatives, the plan of the convention has provided in its favor several important counterpoises to the additional authorities to be conferred upon the Senate. The exclusive privilege of originating money bills will belong to the House of Representatives. The same house will possess the sole right of instituting impeachments: is not this a complete counterbalance to that of determining them? The same house will be the umpire in all elections of the President, which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate though contingent power, of deciding the competitions of the most illustrious citizens of the Union, for the first office in it. It would not perhaps be rash to predict, that as a mean of influence it will be found to outweigh all the peculiar attributes of the Senate.

A THIRD objection to the Senate as a court of impeachments, is drawn from the agency they are to have in the appointments to office. It is imagined that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle of this objection would condemn a practice, which is to be seen in all the State governments, if not in all the governments with which we are acquainted: I mean that of rendering those who hold offices during pleasure, dependent on the pleasure of those who appoint them. With equal plausibility might it be alleged in this case, that the favoritism of the latter would always be an asylum for the misbehavior of the former. But that practice, in contradiction to this principle, proceeds upon the presumption, that the responsibility of those who appoint, for the fitness and competency of the persons on whom they bestow their choice, and the interest they will have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition to dismiss from a share in it all such who, by their conduct, shall have proved themselves unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption, yet if it be, in the main, just, it must destroy the supposition that the Senate, who will merely sanction the choice of the Executive, should feel a bias, towards the objects of that choice, strong enough to blind them to the evidences of guilt so extraordinary, as to have induced the representatives of the nation to become its accusers.

If any further arguments were necessary to evince the improbability of such a bias, it might be found in the nature of the agency of the Senate in the business of appointments. It will be the office of the President to NOMINATE, and, with the advice and consent of the Senate, to APPOINT. There will, of course, be no exertion of CHOICE on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE—they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.

A FOURTH objection to the Senate in the capacity of a court of impeachments, is derived from its union with the Executive in the power of making treaties. This, it has been said, would constitute the senators their own judges, in every case of a corrupt or perfidious execution of that trust. After having combined with the Executive in betraying the interests of the nation in a ruinous treaty, what prospect, it is asked, would there be of their being made to suffer the punishment they would deserve, when they were themselves to decide upon the accusation brought against them for the treachery of which they have been guilty?

This objection has been circulated with more earnestness and with greater show of reason than any other which has appeared against this part of the plan; and yet I am deceived if it does not rest upon an erroneous foundation.

The security essentially intended by the Constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The JOINT AGENCY of the Chief Magistrate of the Union, and of two thirds of the members of a body selected by the collective wisdom of the legislatures of the several States, is designed to be the pledge for the fidelity of the national councils in this particular. The convention might with propriety have meditated the punishment of the Executive, for a deviation from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him; they might also have had in view the punishment of a few leading individuals in the Senate, who

should have prostituted their influence in that body as the mercenary instruments of foreign corruption: but they could not, with more or with equal propriety, have contemplated the impeachment and punishment of two thirds of the Senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature, consenting to a pernicious or unconstitutional law—a principle which, I believe, has never been admitted into any government. How, in fact, could a majority in the House of Representatives impeach themselves? Not better, it is evident, than two thirds of the Senate might try themselves. And yet what reason is there, that a majority of the House of Representatives, sacrificing the interests of the society by an unjust and tyrannical act of legislation, should escape with impunity, more than two thirds of the Senate, sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

So far as might concern the misbehavior of the Executive in perverting the instructions or contravening the views of the Senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence or to vindicate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community, if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding that there would be commonly no defect of inclination in the body to divert the public resentment from themselves by a ready sacrifice of the authors of their mismanagement and disgrace.

PUBLIUS

1. In that of New Jersey, also, the final judiciary authority is in a branch of the legislature. In New Hampshire, Massachusetts, Pennsylvania, and South Carolina, one branch of the legislature is the court for the trial of impeachments.

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FEDERALIST No. 67. The Executive Department

From the New York Packet. Tuesday, March 11, 1788.

HAMILTON

To the People of the State of New York:

THE constitution of the executive department of the proposed government, claims next our attention.

There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticised with less judgment.

Here the writers against the Constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny, of that detested parent. To establish the pretended affinity, they have not scrupled to draw resources even from the regions of fiction. The authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York, have been magnified into more than royal prerogatives. He has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne surrounded with minions and mistresses, giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and voluptuousness have scarcely been wanting to crown the exaggerated scene. We have been taught to tremble at the terrific visages of murdering janizaries, and to blush at the unveiled mysteries of a future seraglio.

Attempts so extravagant as these to disfigure or, it might rather be said, to metamorphose the object, render it necessary to take an accurate view of its real nature and form: in order as well to ascertain its true aspect and genuine appearance, as to unmask the disingenuity and expose the fallacy of the counterfeit resemblances which have been so insidiously, as well as industriously, propagated.

In the execution of this task, there is no man who would not find it an arduous effort either to behold with moderation, or to treat with seriousness, the devices, not less weak than wicked, which have been contrived to pervert the public opinion in relation to the subject. They so far exceed the usual though unjustifiable licenses of party artifice, that even in a disposition the most candid and tolerant, they must force the sentiments which favor an indulgent construction of the conduct of political adversaries to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense of a similitude between a king of Great Britain and a magistrate of the character marked out for that of the President of the United States. It is still more impossible to withhold that imputation from the rash and barefaced expedients which have been employed to give success to the attempted imposition.

In one instance, which I cite as a sample of the general spirit, the temerity has proceeded so far as to ascribe to the President of the United States a power which by the instrument reported is EXPRESSLY allotted to the Executives of the individual States. I mean the power of filling casual vacancies in the Senate.

This bold experiment upon the discernment of his countrymen has been hazarded by a writer who (whatever may be his real merit) has had no inconsiderable share in the applauses of his party(1); and who, upon this false and unfounded suggestion, has built a series of observations equally false and unfounded. Let him now be confronted with the evidence of the fact, and let him, if he be able, justify or extenuate the shameful outrage he has offered to the dictates of truth and to the rules of fair dealing.

The second clause of the second section of the second article empowers the President of the United States “to nominate, and by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other OFFICERS of United States whose appointments are NOT in the Constitution OTHERWISE PROVIDED FOR, and WHICH SHALL BE ESTABLISHED BY LAW.” Immediately after this clause follows another in these words: “The President shall have power to fill up all VACANCIES that may happen DURING THE RECESS OF THE SENATE, by granting commissions which shall EXPIRE AT THE END OF THEIR NEXT SESSION.” It is from this last provision that the pretended power of the President to fill vacancies in the Senate has been deduced. A slight attention to the connection of the clauses, and to the obvious meaning of the terms, will satisfy us that the deduction is not even colorable.

The first of these two clauses, it is clear, only provides a mode for appointing such officers, “whose appointments are NOT OTHERWISE PROVIDED FOR in the Constitution, and which SHALL BE ESTABLISHED BY LAW”; of course it cannot extend to the appointments of senators, whose appointments are OTHERWISE PROVIDED FOR in the Constitution(2), and who are ESTABLISHED BY THE CONSTITUTION, and will not require a future establishment by law. This position will hardly be contested.

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the Senate, for the following reasons: First. The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confined to the President and Senate JOINTLY, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen IN THEIR RECESS, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, SINGLY, to make temporary appointments “during the recess of the Senate, by granting commissions which shall expire at the end of their next session.” Second. If this clause is to be considered as supplementary to the one which precedes, the VACANCIES of which it speaks must be construed to relate to the “officers” described in the preceding one; and this, we have seen, excludes from its description the members of the Senate. Third. The time within which the power is to operate, “during the recess of the Senate,” and the duration of the appointments, “to the end of the next session” of that body, conspire to elucidate the sense of the provision, which, if it had been intended to comprehend senators, would naturally have referred the temporary power of filling vacancies to the recess of the State legislatures, who are to make the permanent appointments, and not to the recess of the national Senate, who are to have no concern in those appointments; and would have extended the duration in office of the temporary senators to the next session of the legislature of the State, in whose representation the vacancies had happened, instead of making it to expire at the end of the ensuing session of the national Senate. The circumstances of the body authorized to make the permanent appointments would, of course, have governed the modification of a power which related to the temporary appointments; and as the national Senate is the body, whose situation is alone contemplated in the clause upon which the suggestion under examination has been founded, the vacancies to which it alludes can

only be deemed to respect those officers in whose appointment that body has a concurrent agency with the President. But last, the first and second clauses of the third section of the first article, not only obviate all possibility of doubt, but destroy the pretext of misconception. The former provides, that “the Senate of the United States shall be composed of two Senators from each State, chosen BY THE LEGISLATURE THEREOF for six years”; and the latter directs, that, “if vacancies in that body should happen by resignation or otherwise, DURING THE RECESS OF THE LEGISLATURE OF ANY STATE, the Executive THEREOF may make temporary appointments until the NEXT MEETING OF THE LEGISLATURE, which shall then fill such vacancies.” Here is an express power given, in clear and unambiguous terms, to the State Executives, to fill casual vacancies in the Senate, by temporary appointments; which not only invalidates the supposition, that the clause before considered could have been intended to confer that power upon the President of the United States, but proves that this supposition, destitute as it is even of the merit of plausibility, must have originated in an intention to deceive the people, too palpable to be obscured by sophistry, too atrocious to be palliated by hypocrisy.

I have taken the pains to select this instance of misrepresentation, and to place it in a clear and strong light, as an unequivocal proof of the unwarrantable arts which are practiced to prevent a fair and impartial judgment of the real merits of the Constitution submitted to the consideration of the people. Nor have I scrupled, in so flagrant a case, to allow myself a severity of animadversion little congenial with the general spirit of these papers. I hesitate not to submit it to the decision of any candid and honest adversary of the proposed government, whether language can furnish epithets of too much asperity, for so shameless and so prostitute an attempt to impose on the citizens of America.

PUBLIUS

1. See CATO, No. V.

2. Article I, section 3, clause 1.

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FEDERALIST No. 68. The Mode of Electing the President

From The Independent Journal. Wednesday, March 12, 1788.

HAMILTON

To the People of the State of New York:

THE mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents. The most plausible of these, who has appeared in print, has even deigned to admit that the election of the President is pretty well guarded.(1) I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for.(E1)

It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preestablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government as the President of the United States. But the precautions which have been so happily concerted in the system under consideration, promise an effectual security against this mischief. The choice of SEVERAL, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of ONE who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office. No senator, representative, or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives, which though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and no less important desideratum was, that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will happily combine in the plan devised by the convention; which is, that the people of each State shall choose a number of persons as electors, equal to the number of senators and representatives of such State in the national government, who shall assemble within the State, and vote for some fit person as President. Their votes, thus given, are to be transmitted to the seat of the national government, and the person who may happen to have a majority of the whole number of votes will be the President. But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.

The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the Constitution, by those who are able to estimate the share which the executive in every government must necessarily have in its good or ill administration. Though we cannot acquiesce in the political heresy of the poet who says:

“For forms of government let fools contest—That which is best administered is best,”—yet we may safely pronounce, that the true test of a good government is its aptitude and tendency to produce a good administration.

The Vice-President is to be chosen in the same manner with the President; with this difference, that the Senate is to do, in respect to the former, what is to be done by the House of Representatives, in respect to the latter.

The appointment of an extraordinary person, as Vice-President, has been objected to as superfluous, if not mischievous. It has been alleged, that it would have been preferable to have authorized the Senate to elect out of their own body an officer answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definite resolution of the body, it is necessary that the President should have only a casting vote. And to take the senator of any State from his seat as senator, to place him in that of President of the Senate, would be to exchange, in regard to the State from which he came, a constant for a contingent vote. The other consideration is, that as the Vice-President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other. It is remarkable that in this, as

in most other instances, the objection which is made would lie against the constitution of this State. We have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.

PUBLIUS

1. Vide federal farmer.

E1. Some editions substitute “desired” for “wished for”.

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FEDERALIST No. 69. The Real Character of the Executive

From the New York Packet. Friday, March 14, 1788.

HAMILTON

To the People of the State of New York:

I PROCEED now to trace the real characters of the proposed Executive, as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.

That magistrate is to be elected for four years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence. In these circumstances there is a total dissimilitude between him and a king of Great Britain, who is an hereditary monarch, possessing the crown as a patrimony descendible to his heirs forever; but there is a close analogy between him and a governor of New York, who is elected for three years, and is re-eligible without limitation or intermission. If we consider how much less time would be requisite for establishing a dangerous influence in a single State, than for establishing a like influence throughout the United States, we must conclude that a duration of four years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of three years for a corresponding office in a single State.

The President of the United States would be liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law. The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution. In this delicate and important circumstance of personal responsibility, the President of Confederated America would stand upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware.

The President of the United States is to have power to return a bill, which shall have passed the two branches of the legislature, for reconsideration; and the bill so returned is to become a law, if, upon that reconsideration, it be approved by two thirds of both houses. The king of Great Britain, on his part, has an absolute negative upon the acts of the two houses of Parliament. The disuse of that power for a considerable time past does not affect the reality of its existence; and is to be ascribed wholly to the crown’s having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the President differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this State, of which the governor is a constituent part. In this respect the power of the President would exceed that of the governor of New York, because the former would possess, singly, what the latter shares with the chancellor and judges; but it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The President is to be the “commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the

United States, except in cases of impeachment; to recommend to the consideration of Congress such measures as he shall judge necessary and expedient; to convene, on extraordinary occasions, both houses of the legislature, or either of them, and, in case of disagreement between them with respect to the time of adjournment, to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed; and to commission all officers of the United States." In most of these particulars, the power of the President will resemble equally that of the king of Great Britain and of the governor of New York. The most material points of difference are these:—First. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. Second. The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.(1) The governor of New York, on the other hand, is by the constitution of the State vested only with the command of its militia and navy. But the constitutions of several of the States expressly declare their governors to be commanders-in-chief, as well of the army as navy; and it may well be a question, whether those of New Hampshire and Massachusetts, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a President of the United States. Third. The power of the President, in respect to pardons, would extend to all cases, except those of impeachment. The governor of New York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor, in this article, on a calculation of political consequences, greater than that of the President? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York, therefore, should be at the head of any such conspiracy, until the design had been ripened into actual hostility he could insure his accomplices and adherents an entire impunity. A President of the Union, on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender, in any degree, from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty, than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed, that the person who was to afford that exemption might himself be involved in the consequences of the measure, and might be incapacitated by his agency in it from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect, that, by the proposed Constitution, the offense of treason is limited "to levying war upon the United States, and adhering to their enemies, giving them aid and comfort"; and that by the laws of New York it is confined within similar bounds. Fourth. The President can only adjourn the national legislature in the single case of disagreement about the time of adjournment. The British monarch may prorogue or even dissolve the Parliament. The governor of New York may also prorogue the legislature of this State for a limited time; a power which, in certain situations, may be employed to very important purposes.

The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification, of Parliament. But I believe this doctrine was never heard of, until it was broached upon the present occasion. Every jurist(2) of that kingdom, and every other man acquainted with its Constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plentitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The Parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause: from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws, to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do

only with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal Executive would exceed that of any State Executive. But this arises naturally from the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question, whether the Executives of the several States were not solely invested with that delicate and important prerogative.

The President is also to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.

The President is to nominate, and, with the advice and consent of the Senate, to appoint ambassadors and other public ministers, judges of the Supreme Court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the Constitution. The king of Great Britain is emphatically and truly styled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority in the power of the President, in this particular, to that of the British king; nor is it equal to that of the governor of New York, if we are to interpret the meaning of the constitution of the State by the practice which has obtained under it. The power of appointment is with us lodged in a council, composed of the governor and four members of the Senate, chosen by the Assembly. The governor claims, and has frequently exercised, the right of nomination, and is entitled to a casting vote in the appointment. If he really has the right of nominating, his authority is in this respect equal to that of the President, and exceeds it in the article of the casting vote. In the national government, if the Senate should be divided, no appointment could be made; in the government of New York, if the council should be divided, the governor can turn the scale, and confirm his own nomination.(3) If we compare the publicity which must necessarily attend the mode of appointment by the President and an entire branch of the national legislature, with the privacy in the mode of appointment by the governor of New York, closeted in a secret apartment with at most four, and frequently with only two persons; and if we at the same time consider how much more easy it must be to influence the small number of which a council of appointment consists, than the considerable number of which the national Senate would consist, we cannot hesitate to pronounce that the power of the chief magistrate of this State, in the disposition of offices, must, in practice, be greatly superior to that of the Chief Magistrate of the Union.

Hence it appears that, except as to the concurrent authority of the President in the article of treaties, it would be difficult to determine whether that magistrate would, in the aggregate, possess more or less power than the Governor of New York. And it appears yet more unequivocally, that there is no pretense for the parallel which has been attempted between him and the king of Great Britain. But to render the contrast in this respect still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer group.

The President of the United States would be an officer elected by the people for four years; the king of Great Britain is a perpetual and hereditary prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable. The one would have a qualified negative upon the acts of the legislative body; the other has an absolute negative. The one would have a right to command the military and naval forces of the nation; the other, in addition to this right, possesses that of declaring war, and of raising and regulating fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties; the other is the sole possessor of the power of making treaties. The one would have a like concurrent authority in appointing to offices; the other is the sole author of all appointments. The one can confer no privileges whatever; the other can make denizens of aliens, noblemen of commoners; can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation; the other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction; the other is the supreme head and governor of the national church! What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS

1. A writer in a Pennsylvania paper, under the signature of TAMONY, has asserted that the king of Great Britain owes his prerogative as commander-in-chief to an annual mutiny bill. The truth is, on the contrary, that his prerogative, in this respect, is immemorial, and was only disputed, “contrary to all reason and precedent,” as Blackstone vol. i., page 262, expresses it, by the Long Parliament of Charles I. but by the statute the 13th of Charles II., chap. 6, it was declared to be in the king alone, for that the sole supreme government and command of the militia within his Majesty’s realms and dominions, and of all forces by sea and land, and of all forts and places of strength, EVER WAS AND IS the undoubted right of his Majesty and his royal predecessors, kings and queens of England, and that both or either house of Parliament cannot nor ought to pretend to the same.

2. Vide Blackstone’s Commentaries, Vol I., p. 257.

3. Candor, however, demands an acknowledgment that I do not think the claim of the governor to a right of nomination well founded. Yet it is always justifiable to reason from the practice of a government, till its propriety has been constitutionally questioned. And independent of this claim, when we take into view the other considerations, and pursue them through all their consequences, we shall be inclined to draw much the same conclusion.

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FEDERALIST No. 70. The Executive Department Further Considered

From The Independent Journal. Saturday, March 15, 1788.

HAMILTON

To the People of the State of New York:

THERE is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people, secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand, while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.(1) Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far, however, as it teaches any thing, it teaches us not to be enamoured of plurality in the Executive. We have seen that the Achaeans, on an experiment of two Praetors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissensions between the Consuls, and between the military Tribunes, who were at times substituted for the Consuls. But it gives us no specimens of any peculiar advantages derived to the state from the circumstance of the plurality of those magistrates. That the dissensions between them were not more frequent or more fatal, is a matter of astonishment, until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy pointed out by the circumstances of the state, and pursued by the Consuls, of making a division of the government between them. The patricians engaged in a perpetual struggle with the plebeians for the preservation of their ancient authorities and dignities; the Consuls, who were generally chosen out of the former body, were commonly united by the personal interest they had in the defense of the privileges of their order. In addition to this motive of union, after the arms of the republic had considerably expanded the bounds of its empire, it became an established custom with the Consuls to divide the administration between themselves by lot—one of them remaining at Rome to govern the city and its environs, the other taking the command in the more distant provinces. This expedient must, no doubt, have had great influence in preventing those collisions and rivalships which might otherwise have embroiled the peace of the republic.

But quitting the dim light of historical research, attaching ourselves purely to the dictates of reason and good sense, we shall discover much greater cause to reject than to approve the idea of plurality in the Executive, under any modification whatever.

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide. If they should unfortunately assail the supreme executive magistracy of a country, consisting of a plurality of persons, they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who composed the magistracy.

Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike. But if they have been consulted, and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor, and by all the motives of personal infallibility, to defeat the success of what has been resolved upon contrary to their sentiments. Men of upright, benevolent tempers have too many opportunities of remarking, with horror, to what desperate lengths this disposition is sometimes carried, and how often the great interests of society are sacrificed to the vanity, to the conceit, and to the obstinacy of individuals, who have credit enough to make their passions and their caprices interesting to mankind. Perhaps the question now before the public may, in its consequences, afford melancholy proofs of the effects of this despicable frailty, or rather detestable vice, in the human character.

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority. When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable

circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it. They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition—vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

It must be confessed that these observations apply with principal weight to the first case supposed—that is, to a plurality of magistrates of equal dignity and authority a scheme, the advocates for which are not likely to form a numerous sect; but they apply, though not with equal, yet with considerable weight to the project of a council, whose concurrence is made constitutionally necessary to the operations of the ostensible Executive. An artful cabal in that council would be able to distract and to enervate the whole system of administration. If no such cabal should exist, the mere diversity of views and opinions would alone be sufficient to tincture the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness.

(But one of the weightiest objections to a plurality in the Executive, and which lies as much against the last as the first plan, is, that it tends to conceal faults and destroy responsibility. Responsibility is of two kinds—to censure and to punishment. The first is the more important of the two, especially in an elective office. Man, in public trust, will much oftener act in such a manner as to render him unworthy of being any longer trusted, than in such a manner as to make him obnoxious to legal punishment. But the multiplication of the Executive adds to the difficulty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that, where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.)(E1)

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“I was overruled by my council. The council were so divided in their opinions that it was impossible to obtain any better resolution on the point.” These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium, of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be collusion between the parties concerned, how easy it is to clothe the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

In the single instance in which the governor of this State is coupled with a council—that is, in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases, indeed, have been so flagrant that ALL PARTIES have agreed in the impropriety of the thing. When inquiry has been made, the blame has been laid by the governor on the members of the council, who, on their part, have charged it upon his nomination; while the people remain altogether at a loss to determine, by whose influence their interests have been committed to hands so unqualified and so manifestly improper. In tenderness to individuals, I forbear to descend to particulars.

It is evident from these considerations, that the plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy, as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and, second, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.

In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred. Nothing, therefore, can be wiser in that kingdom, than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no responsibility whatever in the executive department an idea inadmissible in a free government. But even there the king is not bound by the resolutions of his council, though they are answerable for the advice they give. He is the absolute master of his own conduct in the exercise of his office, and may observe or disregard the counsel given to him at his sole discretion.

But in a republic, where every magistrate ought to be personally responsible for his behavior in office the reason which in the British Constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. In the monarchy of Great Britain, it furnishes a substitute for the prohibited responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself.

The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be “deep, solid, and ingenious,” that “the executive power is more easily confined when it is ONE”;(2) that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.

A little consideration will satisfy us, that the species of security sought for in the multiplication of the Executive, is unattainable. Numbers must be so great as to render combination difficult, or they are rather a source of danger than of security. The united credit and influence of several individuals must be more formidable to liberty, than the credit and influence of either of them separately. When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man; who, from the very circumstance of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The Decemvirs of Rome, whose name denotes their number,(3) were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an Executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers, is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expense; though it be evident that if the council should be numerous enough to answer the principal end aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures too serious to be incurred for an object of equivocal utility. I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.

PUBLIUS

1. New York has no council except for the single purpose of appointing to offices; New Jersey has a council whom the governor may consult. But I think, from the terms of the constitution, their resolutions do not bind him.

2. De Lolme.

3. Ten.

E1. Two versions of these paragraphs appear in different editions.

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FEDERALIST No. 71. The Duration in Office of the Executive

From the New York Packet. Tuesday, March 18, 1788.

HAMILTON

To the People of the State of New York:

DURATION in office has been mentioned as the second requisite to the energy of the Executive authority. This has relation to two objects: to the personal firmness of the executive magistrate, in the employment of his constitutional powers; and to the stability of the system of administration which may have been adopted under his auspices. With regard to the first, it must be evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. It is a general principle of human nature, that a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it; will be less attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one, than for the sake of the other. This remark is not less applicable to a political privilege, or honor, or trust, than to any article of ordinary property. The inference from it is, that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he MUST lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity, from the independent exertion of his powers, or from encountering the ill-humors, however transient, which may happen to prevail, either in a considerable part of the society itself, or even in a predominant faction in the legislative body. If the case should only be, that he MIGHT lay it down, unless continued by a new choice, and if he should be desirous of being continued, his wishes, conspiring with his fears, would tend still more powerfully to corrupt his integrity, or debase his fortitude. In either case, feebleness and irresolution must be the characteristics of the station.

There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted. The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly INTEND the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always REASON RIGHT about the MEANS of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

But however inclined we might be to insist upon an unbounded complaisance in the Executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.

The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established. It is one

thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands. The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.

It may perhaps be asked, how the shortness of the duration in office can affect the independence of the Executive on the legislature, unless the one were possessed of the power of appointing or displacing the other. One answer to this inquiry may be drawn from the principle already remarked that is, from the slender interest a man is apt to take in a short-lived advantage, and the little inducement it affords him to expose himself, on account of it, to any considerable inconvenience or hazard. Another answer, perhaps more obvious, though not more conclusive, will result from the consideration of the influence of the legislative body over the people; which might be employed to prevent the re-election of a man who, by an upright resistance to any sinister project of that body, should have made himself obnoxious to its resentment.

It may be asked also, whether a duration of four years would answer the end proposed; and if it would not, whether a less period, which would at least be recommended by greater security against ambitious designs, would not, for that reason, be preferable to a longer period, which was, at the same time, too short for the purpose of inspiring the desired firmness and independence of the magistrate.

It cannot be affirmed, that a duration of four years, or any other limited duration, would completely answer the end proposed; but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government. Between the commencement and termination of such a period, there would always be a considerable interval, in which the prospect of annihilation would be sufficiently remote, not to have an improper effect upon the conduct of a man indued with a tolerable portion of fortitude; and in which he might reasonably promise himself, that there would be time enough before it arrived, to make the community sensible of the propriety of the measures he might incline to pursue. Though it be probable that, as he approached the moment when the public were, by a new election, to signify their sense of his conduct, his confidence, and with it his firmness, would decline; yet both the one and the other would derive support from the opportunities which his previous continuance in the station had afforded him, of establishing himself in the esteem and good-will of his constituents. He might, then, hazard with safety, in proportion to the proofs he had given of his wisdom and integrity, and to the title he had acquired to the respect and attachment of his fellow-citizens. As, on the one hand, a duration of four years will contribute to the firmness of the Executive in a sufficient degree to render it a very valuable ingredient in the composition; so, on the other, it is not enough to justify any alarm for the public liberty. If a British House of Commons, from the most feeble beginnings, FROM THE MERE POWER OF ASSENTING OR DISAGREEING TO THE IMPOSITION OF A NEW TAX, have, by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government, while they raised themselves to the rank and consequence of a coequal branch of the legislature; if they have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments, as well in the Church as State; if they have been able, on a recent occasion, to make the monarch tremble at the prospect of an innovation(1) attempted by them, what would be to be feared from an elective magistrate of four years' duration, with the confined authorities of a President of the United States? What, but that he might be unequal to the task which the Constitution assigns him? I shall only add, that if his duration be such as to leave a doubt of his firmness, that doubt is inconsistent with a jealousy of his encroachments.

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1. This was the case with respect to Mr. Fox's India bill, which was carried in the House of Commons, and rejected in the House of Lords, to the entire satisfaction, as it is said, of the people.

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FEDERALIST No. 72. The Same Subject Continued, and Re-Eligibility of the Executive Considered.

From The Independent Journal. Wednesday, March 19, 1788.

HAMILTON

To the People of the State of New York:

THE administration of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary; but in its most usual, and perhaps its most precise signification. it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence. This view of the subject will at once suggest to us the intimate connection between the duration of the executive magistrate in office and the stability of the system of administration. To reverse and undo what has been done by a predecessor, is very often considered by a successor as the best proof he can give of his own capacity and desert; and in addition to this propensity, where the alteration has been the result of public choice, the person substituted is warranted in supposing that the dismission of his predecessor has proceeded from a dislike to his measures; and that the less he resembles him, the more he will recommend himself to the favor of his constituents. These considerations, and the influence of personal confidences and attachments, would be likely to induce every new President to promote a change of men to fill the subordinate stations; and these causes together could not fail to occasion a disgraceful and ruinous mutability in the administration of the government.

With a positive duration of considerable extent, I connect the circumstance of re-eligibility. The first is necessary to give to the officer himself the inclination and the resolution to act his part well, and to the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of their merits. The last is necessary to enable the people, when they see reason to approve of his conduct, to continue him in his station, in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration.

Nothing appears more plausible at first sight, nor more ill-founded upon close inspection, than a scheme which in relation to the present point has had some respectable advocates—I mean that of continuing the chief magistrate in office for a certain time, and then excluding him from it, either for a limited period or forever after. This exclusion, whether temporary or perpetual, would have nearly the same effects, and these effects would be for the most part rather pernicious than salutary.

One ill effect of the exclusion would be a diminution of the inducements to good behavior. There are few men who would not feel much less zeal in the discharge of a duty when they were conscious that the advantages of the station with which it was connected must be relinquished at a determinate period, than when they were permitted to entertain a hope of obtaining, by meriting, a continuance of them. This position will not be disputed so long as it is admitted that the desire of reward is one of the strongest incentives of human conduct; or that the best security for the fidelity of mankind is to make their interests coincide with their duty. Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them, if he could flatter himself with the prospect of being allowed to finish what he had begun, would, on the contrary, deter him from the undertaking, when he foresaw that he must quit the scene before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task. The most to be expected from the generality of men, in such a situation, is the negative merit of not doing harm, instead of the positive merit of doing good.

Another ill effect of the exclusion would be the temptation to sordid views, to peculation, and, in some instances, to usurpation. An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed while it lasted, and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man, probably, with a different prospect before him, might content himself with the regular perquisites of his situation, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice. Add to this that the same man might be vain or ambitious, as well as avaricious. And if he could expect to prolong his

honors by his good conduct, he might hesitate to sacrifice his appetite for them to his appetite for gain. But with the prospect before him of approaching an inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity, or his ambition.

An ambitious man, too, when he found himself seated on the summit of his country's honors, when he looked forward to the time at which he must descend from the exalted eminence for ever, and reflected that no exertion of merit on his part could save him from the unwelcome reverse; such a man, in such a situation, would be much more violently tempted to embrace a favorable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty.

Would it promote the peace of the community, or the stability of the government to have half a dozen men who had had credit enough to be raised to the seat of the supreme magistracy, wandering among the people like discontented ghosts, and sighing for a place which they were destined never more to possess?

A third ill effect of the exclusion would be, the depriving the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom, is an adage the truth of which is recognized by the wisest as well as the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation? Can it be wise to put this desirable and essential quality under the ban of the Constitution, and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? This, nevertheless, is the precise import of all those regulations which exclude men from serving their country, by the choice of their fellowcitizens, after they have by a course of service fitted themselves for doing it with a greater degree of utility.

A fourth ill effect of the exclusion would be the banishing men from stations in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest or safety. There is no nation which has not, at one period or another, experienced an absolute necessity of the services of particular men in particular situations; perhaps it would not be too strong to say, to the preservation of its political existence. How unwise, therefore, must be every such self-denying ordinance as serves to prohibit a nation from making use of its own citizens in the manner best suited to its exigencies and circumstances! Without supposing the personal essentiality of the man, it is evident that a change of the chief magistrate, at the breaking out of a war, or at any similar crisis, for another, even of equal merit, would at all times be detrimental to the community, inasmuch as it would substitute inexperience to experience, and would tend to unhinge and set afloat the already settled train of the administration.

A fifth ill effect of the exclusion would be, that it would operate as a constitutional interdiction of stability in the administration. By necessitating a change of men, in the first office of the nation, it would necessitate a mutability of measures. It is not generally to be expected, that men will vary and measures remain uniform. The contrary is the usual course of things. And we need not be apprehensive that there will be too much stability, while there is even the option of changing; nor need we desire to prohibit the people from continuing their confidence where they think it may be safely placed, and where, by constancy on their part, they may obviate the fatal inconveniences of fluctuating councils and a variable policy.

These are some of the disadvantages which would flow from the principle of exclusion. They apply most forcibly to the scheme of a perpetual exclusion; but when we consider that even a partial exclusion would always render the readmission of the person a remote and precarious object, the observations which have been made will apply nearly as fully to one case as to the other.

What are the advantages promised to counterbalance these disadvantages? They are represented to be: 1st, greater independence in the magistrate; 2d, greater security to the people. Unless the exclusion be perpetual, there will be no pretense to infer the first advantage. But even in that case, may he have no object beyond his present station, to which he may sacrifice his independence? May he have no connections, no friends, for whom he may sacrifice it? May he not be less willing by a firm conduct, to make personal enemies, when he acts under the impression that a time is fast approaching, on the arrival of which he not only MAY, but MUST, be exposed to their resentments, upon an equal, perhaps upon an inferior, footing? It is not an easy point to determine whether his independence would be most promoted or impaired by such an arrangement.

As to the second supposed advantage, there is still greater reason to entertain doubts concerning it. If the exclusion were to be perpetual, a man of irregular ambition, of whom alone there could be reason in any case to entertain apprehension, would, with infinite reluctance, yield to the necessity of taking his leave forever of a post in which his passion for power and pre-eminence had acquired the force of habit. And if he had been fortunate or adroit enough to conciliate the good-will of the people, he might induce

them to consider as a very odious and unjustifiable restraint upon themselves, a provision which was calculated to debar them of the right of giving a fresh proof of their attachment to a favorite. There may be conceived circumstances in which this disgust of the people, seconding the thwarted ambition of such a favorite, might occasion greater danger to liberty, than could ever reasonably be dreaded from the possibility of a perpetuation in office, by the voluntary suffrages of the community, exercising a constitutional privilege.

There is an excess of refinement in the idea of disabling the people to continue in office men who had entitled themselves, in their opinion, to approbation and confidence; the advantages of which are at best speculative and equivocal, and are overbalanced by disadvantages far more certain and decisive.

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FEDERALIST No. 73. The Provision For The Support of the Executive, and the Veto Power

From the New York Packet. Friday, March 21, 1788.

HAMILTON

To the People of the State of New York:

THE third ingredient towards constituting the vigor of the executive authority, is an adequate provision for its support. It is evident that, without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations. These expressions, taken in all the latitude of the terms, would no doubt convey more than is intended. There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will. If it were necessary to confirm so plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or seduction of the Executive by the terrors or allurements of the pecuniary arrangements of the legislative body.

It is not easy, therefore, to commend too highly the judicious attention which has been paid to this subject in the proposed Constitution. It is there provided that "The President of the United States shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them." It is impossible to imagine any provision which would have been more eligible than this. The legislature, on the appointment of a President, is once for all to declare what shall be the compensation for his services during the time for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act. He can, of course, have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution.

The last of the requisites to energy, which have been enumerated, are competent powers. Let us proceed to consider those which are proposed to be vested in the President of the United States.

The first thing that offers itself to our observation, is the qualified negative of the President upon the acts or resolutions of the two houses of the legislature; or, in other words, his power of returning all bills with objections, to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single

vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.

But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

The propriety of a negative has, upon some occasions, been combated by an observation, that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that unless this presumption should be entertained, it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflexion, would condemn. The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them.

It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the Executive in a trial of strength with that body, afford a satisfactory security that the negative would generally be employed with great caution; and there would oftener be room for a charge of timidity than of rashness in the exercise of it. A king of Great Britain, with all his train of sovereign attributes, and with all the influence he draws from a thousand sources, would, at this day, hesitate to put a negative upon the joint resolutions of the two houses of Parliament. He would not fail to exert the utmost resources of that influence to strangle a measure disagreeable to him, in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect, or of risking the displeasure of the nation by an opposition to the sense of the legislative body. Nor is it probable, that he would ultimately venture to exert his prerogatives, but in a case of manifest propriety, or extreme necessity. All well-informed men in that kingdom will accede to the justness of this remark. A very considerable period has elapsed since the negative of the crown has been exercised.

If a magistrate so powerful and so well fortified as a British monarch, would have scruples about the exercise of the power under consideration, how much greater caution may be reasonably expected in a President of the United States, clothed for the short period of four years with the executive authority of a government wholly and purely republican?

It is evident that there would be greater danger of his not using his power when necessary, than of his using it too often, or too much. An argument, indeed, against its expediency, has been drawn from this very source. It has been represented, on this account, as a power odious in appearance, useless in practice. But it will not follow, that because it might be rarely exercised, it would never be exercised. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the Executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail

himself of his constitutional means of defense, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents, who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain case. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men who, under any circumstances, will have the courage to do their duty at every hazard.

But the convention have pursued a mean in this business, which will both facilitate the exercise of the power vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body. Instead of an absolute negative, it is proposed to give the Executive the qualified negative already described. This is a power which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single VETO, might not scruple to return it for reconsideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason, it may in practice be found more effectual. It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in spite of the counterposing weight of the Executive. It is at any rate far less probable that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature in the Executive, will often have a silent and unperceived, though forcible, operation. When men, engaged in unjustifiable pursuits, are aware that obstructions may come from a quarter which they cannot control, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.

This qualified negative, as has been elsewhere remarked, is in this State vested in a council, consisting of the governor, with the chancellor and judges of the Supreme Court, or any two of them. It has been freely employed upon a variety of occasions, and frequently with success. And its utility has become so apparent, that persons who, in compiling the Constitution, were violent opposers of it, have from experience become its declared admirers.(1)

I have in another place remarked, that the convention, in the formation of this part of their plan, had departed from the model of the constitution of this State, in favor of that of Massachusetts. Two strong reasons may be imagined for this preference. One is that the judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacities; the other is that by being often associated with the Executive, they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the Executive.

PUBLIUS

1. Mr. Abraham Yates, a warm opponent of the plan of the convention is of this number.

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FEDERALIST No. 74. The Command of the Military and Naval Forces, and the Pardoning Power of the Executive.

From the New York Packet. Tuesday, March 25, 1788.

HAMILTON

To the People of the State of New York:

THE President of the United States is to be “commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States.” The propriety of this provision is so evident in itself, and it is, at the same time, so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part

concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.

"The President may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective officers." This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.

He is also to be authorized to grant "reprieves and pardons for offenses against the United States, except in cases of impeachment." Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. This, it has been urged, ought to have depended upon the assent of one, or both, of the branches of the legislative body. I shall not deny that there are strong reasons to be assigned for requiring in this particular the concurrence of that body, or of a part of it. As treason is a crime levelled at the immediate being of the society, when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. It is not to be doubted, that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever. It deserves particular attention, that treason will often be connected with seditions which embrace a large proportion of the community; as lately happened in Massachusetts. In every such case, we might expect to see the representation of the people tainted with the same spirit which had given birth to the offense. And when parties were pretty equally matched, the secret sympathy of the friends and favorers of the condemned person, availing itself of the good-nature and weakness of others, might frequently bestow impunity where the terror of an example was necessary. On the other hand, when the sedition had proceeded from causes which had inflamed the resentments of the major party, they might often be found obstinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. If it should be observed, that a discretionary power, with a view to such contingencies, might be occasionally conferred upon the President, it may be answered in the first place, that it is questionable, whether, in a limited Constitution, that power could be delegated by law; and in the second place, that it would generally be impolitic beforehand to take any step which might hold out the prospect of impunity. A proceeding of this kind, out of the usual course, would be likely to be construed into an argument of timidity or of weakness, and would have a tendency to embolden guilt.

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FEDERALIST No. 75. The Treaty-Making Power of the Executive

For the Independent Journal. Wednesday, March 26, 1788

HAMILTON

To the People of the State of New York:

THE President is to have power, "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." Though this provision has been assailed, on different grounds, with no small degree of vehemence, I scruple not to declare my firm persuasion, that it is one of the best digested and most unexceptionable parts of the plan. One ground of objection is the trite topic of the intermixture of powers; some contending that the President ought alone to possess the power of making treaties; others, that it ought to have been exclusively deposited in the Senate. Another source of objection is derived from the small number of persons by whom a treaty may be made. Of those who espouse this objection, a part are of opinion that the House of Representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to have substituted two thirds of all the members of the Senate, to two thirds of the members present. As I flatter myself the observations made in a preceding number upon this part of the plan must have sufficed to place it, to a discerning eye, in a very favorable light, I shall here content myself with offering only some supplementary remarks, principally with a view to the objections which have been just stated.

With regard to the intermixture of powers, I shall rely upon the explanations already given in other places, of the true sense of the rule upon which that objection is founded; and shall take it for granted, as an inference from them, that the union of the Executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add, that the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. It has been remarked, upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

To have intrusted the power of making treaties to the Senate alone, would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the

management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security, than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President, will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom, as on that of integrity.

The remarks made in a former number, which have been alluded to in another part of this paper, will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating and, taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and despatch, are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project.

The only objection which remains to be canvassed, is that which would substitute the proportion of two thirds of all the members composing the senatorial body, to that of two thirds of the members present. It has been shown, under the second head of our inquiries, that all provisions which require more than the majority of any body to its resolutions, have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community. If two thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed, is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet, and the States-General of the Netherlands, did not an example at home render foreign precedents unnecessary.

To require a fixed proportion of the whole body would not, in all probability, contribute to the advantages of a numerous agency, better then merely to require a proportion of the attending members. The former, by making a determinate number at all times requisite to a resolution, diminishes the motives to punctual attendance. The latter, by making the capacity of the body to depend on a proportion which may be varied by the absence or presence of a single member, has the contrary effect. And as, by promoting punctuality, it tends to keep the body complete, there is great likelihood that its resolutions would generally be dictated by as great a number in this case as in the other; while there would be much fewer occasions of delay. It ought not to be forgotten that, under the existing Confederation, two members may, and usually do, represent a State; whence it happens that Congress, who now are solely invested with all the powers of the Union, rarely consist of a greater number of persons than would compose the intended Senate. If we add to this, that as the members vote by States, and that where there is only a single member present from a State, his vote is lost, it will justify a supposition that the active voices in the Senate, where the members are to vote individually, would rarely fall short in number of the active voices in the existing Congress. When, in addition to these considerations, we take into view the co-operation of the President, we shall not hesitate to infer that the people of America would have greater security against an improper use of the power of making treaties, under the new Constitution, than they now enjoy under the Confederation. And when we proceed still one step further, and look forward to the probable augmentation of the Senate, by the erection of new States, we shall not only perceive ample ground of confidence in the sufficiency of the members to whose agency that power will be intrusted, but we shall probably be led to conclude that a body more numerous than the Senate would be likely to become, would be very little fit for the proper discharge of the trust.

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FEDERALIST No. 76. The Appointing Power of the Executive

From the New York Packet. Tuesday, April 1, 1788.

HAMILTON

To the People of the State of New York:

THE President is “to nominate, and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution. But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, or in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies which may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”

It has been observed in a former paper, that “the true test of a good government is its aptitude and tendency to produce a good administration.” If the justness of this observation be admitted, the mode of appointing the officers of the United States contained in the foregoing clauses, must, when examined, be allowed to be entitled to particular commendation. It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union; and it will not need proof, that on this point must essentially depend the character of its administration.

It will be agreed on all hands, that the power of appointment, in ordinary cases, ought to be modified in one of three ways. It ought either to be vested in a single man, or in a select assembly of a moderate number; or in a single man, with the concurrence of such an assembly. The exercise of it by the people at large will be readily admitted to be impracticable; as waiving every other consideration, it would leave them little time to do anything else. When, therefore, mention is made in the subsequent reasonings of an assembly or body of men, what is said must be understood to relate to a select body or assembly, of the description already given. The people collectively, from their number and from their dispersed situation, cannot be regulated in their movements by that systematic spirit of cabal and intrigue, which will be urged as the chief objections to reposing the power in question in a body of men.

Those who have themselves reflected upon the subject, or who have attended to the observations made in other parts of these papers, in relation to the appointment of the President, will, I presume, agree to the position, that there would always be great probability of having the place supplied by a man of abilities, at least respectable. Premising this, I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment.

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and of affection. A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body. There is nothing so apt to agitate the passions of mankind as personal considerations whether they relate to ourselves or to others, who are to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party, will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested equivalent: “Give us the man we wish for this office, and you shall have the one you wish for that.” This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.

The truth of the principles here advanced seems to have been felt by the most intelligent of those who have found fault with the provision made, in this respect, by the convention. They contend that the President ought solely to have been authorized to make

the appointments under the federal government. But it is easy to show, that every advantage to be expected from such an arrangement would, in substance, be derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of appointment in the hands of that officer would be avoided. In the act of nomination, his judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.

But might not his nomination be overruled? I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended, that a man who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body, and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

To this reasoning it has been objected that the President, by the influence of the power of nomination, may secure the complaisance of the Senate to his views. This supposition of universal venalty in human nature is little less an error in political reasoning, than the supposition of universal rectitude. The institution of delegated power implies, that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence; and experience justifies the theory. It has been found to exist in the most corrupt periods of the most corrupt governments. The venalty of the British House of Commons has been long a topic of accusation against that body, in the country to which they belong as well as in this; and it cannot be doubted that the charge is, to a considerable extent, well founded. But it is as little to be doubted, that there is always a large proportion of the body, which consists of independent and public-spirited men, who have an influential weight in the councils of the nation. Hence it is (the present reign not excepted) that the sense of that body is often seen to control the inclinations of the monarch, both with regard to men and to measures. Though it might therefore be allowable to suppose that the Executive might occasionally influence some individuals in the Senate, yet the supposition, that he could in general purchase the integrity of the whole body, would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the Senate, to rest satisfied, not only that it will be impracticable to the Executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the Senate the only reliance. The Constitution has provided some important guards against the danger of executive influence upon the legislative body: it declares that “No senator or representative shall during the time for which he was elected, be appointed to any civil office under the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person, holding any office under the United States, shall be a member of either house during his continuance in office.”

FEDERALIST No. 77. The Appointing Power Continued and Other Powers of the Executive Considered.

From The Independent Journal. Wednesday, April 2, 1788.

HAMILTON

To the People of the State of New York:

IT HAS been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government.

To this union of the Senate with the President, in the article of appointments, it has in some cases been suggested that it would serve to give the President an undue influence over the Senate, and in others that it would have an opposite tendency—a strong proof that neither suggestion is true.

To state the first in its proper form, is to refute it. It amounts to this: the President would have an improper influence over the Senate, because the Senate would have the power of restraining him. This is an absurdity in terms. It cannot admit of a doubt that the entire power of appointment would enable him much more effectually to establish a dangerous empire over that body, than a mere power of nomination subject to their control.

Let us take a view of the converse of the proposition: “the Senate would influence the Executive.” As I have had occasion to remark in several other instances, the indistinctness of the objection forbids a precise answer. In what manner is this influence to be exerted? In relation to what objects? The power of influencing a person, in the sense in which it is here used, must imply a power of conferring a benefit upon him. How could the Senate confer a benefit upon the President by the manner of employing their right of negative upon his nominations? If it be said they might sometimes gratify him by an acquiescence in a favorite choice, when public motives might dictate a different conduct, I answer, that the instances in which the President could be personally interested in the result, would be too few to admit of his being materially affected by the compliances of the Senate. The POWER which can originate the disposition of honors and emoluments, is more likely to attract than to be attracted by the POWER which can merely obstruct their course. If by influencing the President be meant restraining him, this is precisely what must have been intended. And it has been shown that the restraint would be salutary, at the same time that it would not be such as to destroy a single advantage to be looked for from the uncontrolled agency of that Magistrate. The right of nomination would produce all the (good, without the ill.)(E1) (good of that of appointment, and would in a great measure avoid its evils.)(E1)

Upon a comparison of the plan for the appointment of the officers of the proposed government with that which is established by the constitution of this State, a decided preference must be given to the former. In that plan the power of nomination is unequivocally vested in the Executive. And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive. If an ill appointment should be made, the Executive for nominating, and the Senate for approving, would participate, though in different degrees, in the opprobrium and disgrace.

The reverse of all this characterizes the manner of appointment in this State. The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye,

proceed to the execution of the trust committed to them. It is known that the governor claims the right of nomination, upon the strength of some ambiguous expressions in the constitution; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed. The censure of a bad appointment, on account of the uncertainty of its author, and for want of a determinate object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost. The most that the public can know, is that the governor claims the right of nomination; that two out of the inconsiderable number of four men can too often be managed without much difficulty; that if some of the members of a particular council should happen to be of an uncomplying character, it is frequently not impossible to get rid of their opposition by regulating the times of meeting in such a manner as to render their attendance inconvenient; and that from whatever cause it may proceed, a great number of very improper appointments are from time to time made. Whether a governor of this State avails himself of the ascendant he must necessarily have, in this delicate and important part of the administration, to prefer to offices men who are best qualified for them, or whether he prostitutes that advantage to the advancement of persons whose chief merit is their implicit devotion to his will, and to the support of a despicable and dangerous system of personal influence, are questions which, unfortunately for the community, can only be the subjects of speculation and conjecture.

Every mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope. Their number, without an unwarrantable increase of expense, cannot be large enough to preclude a facility of combination. And as each member will have his friends and connections to provide for, the desire of mutual gratification will beget a scandalous bartering of votes and bargaining for places. The private attachments of one man might easily be satisfied; but to satisfy the private attachments of a dozen, or of twenty men, would occasion a monopoly of all the principal employments of the government in a few families, and would lead more directly to an aristocracy or an oligarchy than any measure that could be contrived. If, to avoid an accumulation of offices, there was to be a frequent change in the persons who were to compose the council, this would involve the mischiefs of a mutable administration in their full extent. Such a council would also be more liable to executive influence than the Senate, because they would be fewer in number, and would act less immediately under the public inspection. Such a council, in fine, as a substitute for the plan of the convention, would be productive of an increase of expense, a multiplication of the evils which spring from favoritism and intrigue in the distribution of public honors, a decrease of stability in the administration of the government, and a diminution of the security against an undue influence of the Executive. And yet such a council has been warmly contended for as an essential amendment in the proposed Constitution.

I could not with propriety conclude my observations on the subject of appointments without taking notice of a scheme for which there have appeared some, though but few advocates; I mean that of uniting the House of Representatives in the power of making them. I shall, however, do little more than mention it, as I cannot imagine that it is likely to gain the countenance of any considerable part of the community. A body so fluctuating and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the Executive and of the Senate, would be defeated by this union, and infinite delays and embarrassments would be occasioned. The example of most of the States in their local constitutions encourages us to reprobate the idea.

The only remaining powers of the Executive are comprehended in giving information to Congress of the state of the Union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and in commissioning all the officers of the United States.

Except some cavils about the power of convening either house of the legislature, and that of receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. It required, indeed, an insatiable avidity for censure to invent exceptions to the parts which have been excepted to. In regard to the power of convening either house of the legislature, I shall barely remark, that in respect to the Senate at least, we can readily discover a good reason for it. AS this body has a concurrent power with the Executive in the article of treaties, it might often be necessary to call it together with a view to this object, when it would be unnecessary and improper to convene the House of Representatives. As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient answer.

We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense—a due dependence on the people, a due responsibility? The answer to this question has

been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?

PUBLIUS

E1. These two alternate endings of this sentence appear in different editions.

Home

FEDERALIST No. 78. The Judiciary Department

From McLEAN'S Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power(1); that it can never attack with success either of the other two; and that

all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."(2) And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the

direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies,(3) in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to

the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

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1. The celebrated Montesquieu, speaking of them, says: “Of the three powers above mentioned, the judiciary is next to nothing.”—Spirit of Laws. Vol. I, page 186.

2. Idem, page 181.

3. Vide Protest of the Minority of the Convention of Pennsylvania, Martin’s Speech, etc.

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FEDERALIST No. 79. The Judiciary Continued

From MCLEAN’s Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

NEXT to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, a power over a man’s subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that permanent(1) salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of the United States “shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.”

This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions

as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. It will be observed that a difference has been made by the convention between the compensation of the President and of the judges, That of the former can neither be increased nor diminished; that of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.

The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

The constitution of New York, to avoid investigations that must forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond sixty. I believe there are few at present who do not disapprove of this provision. There is no station, in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it; and when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigor, and how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench.

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1. Vide Constitution of Massachusetts, Chapter 2, Section 1, Article 13.

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FEDERALIST No. 80. The Powers of the Judiciary

From McLEAN's Edition, New York. Wednesday, May 28, 1788.

HAMILTON

To the People of the State of New York:

TO JUDGE with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers

of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3d, to all those in which the United States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? The States, by the plan of the convention, are prohibited from doing a variety of things, some of which are incompatible with the interests of the Union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. There is no third course that I can imagine. The latter appears to have been thought by the convention preferable to the former, and, I presume, will be most agreeable to the States.

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations of a treaty or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other. So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.

A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together. But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will readily be conjectured that I allude to the fraudulent laws which have been passed in too many of the States. And though the proposed Constitution establishes particular guards against the repetition of those instances which have heretofore made their appearance, yet it is warrantable to apprehend that the spirit which

produced them will assume new shapes, that could not be foreseen nor specifically provided against. Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.

It may be esteemed the basis of the Union, that “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.” And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The fifth point will demand little animadversion. The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend “all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands and grants of different States; and between a State or the citizens thereof and foreign states, citizens, and subjects.” This constitutes the entire mass of the judicial authority of the Union. Let us now review it in detail. It is, then, to extend:

First. To all cases in law and equity, arising under the Constitution and the laws of the United States. This corresponds with the two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States. It has been asked, what is meant by “cases arising under the Constitution,” in contradiction from those “arising under the laws of the United States”? The difference has been already explained. All the restrictions upon the authority of the State legislatures furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the Constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emited, the controversies concerning it would be cases arising under the Constitution and not the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word “equity”. What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of fraud, accident, trust, or hardship, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States, may afford another example of the necessity of an equitable jurisdiction

in the federal courts. This reasoning may not be so palpable in those States where the formal and technical distinction between LAW and EQUITY is not maintained, as in this State, where it is exemplified by every day's practice.

The judiciary authority of the Union is to extend:

Second. To treaties made, or which shall be made, under the authority of the United States, and to all cases affecting ambassadors, other public ministers, and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form, altogether, the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more States; between a State and citizens of another State; between citizens of different States. These belong to the fourth of those classes, and partake, in some measure, of the nature of the last.

Sixth. To cases between the citizens of the same State, claiming lands under grants of different States. These fall within the last class, and are the only instances in which the proposed Constitution directly contemplates the cognizance of disputes between the citizens of the same State.

Seventh. To cases between a State and the citizens thereof, and foreign States, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes, and have been shown to be, in a peculiar manner, the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the Constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a wellinformed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.

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FEDERALIST No. 81. The Judiciary Continued, and the Distribution of the Judicial Authority.

From McLEAN's Edition, New York. Wednesday, May 28, 1788.

HAMILTON

To the People of the State of New York:

LET US now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is" (by the plan of the convention) "to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."(1)

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a

branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a PART of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible

degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts,(2) and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or authorize, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much “to constitute tribunals,” as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention. I should consider every thing calculated to give, in practice, an unrestrained course to appeals, as a source of public and private inconvenience.

I am not sure, but that it will be found highly expedient and useful, to divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union.

The Supreme Court is to be invested with original jurisdiction, only “in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party.” Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, “with such exceptions and under such regulations as the Congress shall make.”

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term “appellate,” which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one jury to another, is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word “appellate,” therefore, will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.(3) This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, “appellate jurisdiction, both as to law and fact,” do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and

in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States all causes are tried in this mode(4); and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniencies, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt that the supposed abolition of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, both subject to any exceptions and regulations which may be thought advisable; that this appellate jurisdiction does, in no case, abolish the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

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1. Article 3, Sec. 1.

2. This power has been absurdly represented as intended to abolish all the county courts in the several States, which are commonly called inferior courts. But the expressions of the Constitution are, to constitute “tribunals INFERIOR TO THE SUPREME COURT”; and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that county courts were in contemplation.

3. This word is composed of JUS and DICTIO, juris dictio or a speaking and pronouncing of the law.

4. I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

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FEDERALIST No. 82. The Judiciary Continued.

From McLEAN’s Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

THE erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. ‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.

Such questions, accordingly, have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will

they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly entitled to attention.

The principles established in a former paper(1) teach us that the States will retain all pre-existing authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression, I shall lay it down as a rule, that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

The only thing in the proposed Constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts, is contained in this passage: “THE JUDICIAL POWER of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish.” This might either be construed to signify, that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; or in other words, that the United States should exercise the judicial power with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals; and as the first would amount to an alienation of State power by implication, the last appears to me the most natural and the most defensible construction.

But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be peculiar to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final

determination in the courts of the Union. To confine, therefore, the general expressions giving appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the national legislature “to constitute tribunals inferior to the Supreme Court.”(2) It declares, in the next place, that “the JUDICIAL POWER of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall ordain and establish”; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them, are that they shall be “inferior to the Supreme Court,” and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union.

PUBLIUS

1. No. 31.

2. Sec. 8, Art. 1.

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FEDERALIST No. 83. The Judiciary Continued in Relation to Trial by Jury

From MCLEAN’s Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

THE objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated has been repeatedly adverted to and exposed, but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to civil causes, is represented as an abolition of the trial by jury, and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil, but even to criminal causes. To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the existence of matter, or to demonstrate any of those propositions which, by their own internal evidence, force conviction, when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation have been employed to countenance the surmise that a thing which is only not provided for, is entirely abolished. Every man of discernment must at once perceive the wide difference between silence and abolition. But as the inventors of this fallacy have attempted to support it by certain legal maxims of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature: “A specification of particulars is an exclusion of generals”; or, “The expression of one thing is the exclusion of another.” Hence, say they, as the Constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

The rules of legal interpretation are rules of common sense, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common-sense to suppose that a provision obliging the legislative power to commit the trial of criminal causes

to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases; but it is, of course, left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge the power of the legislature to exercise that mode if it should be thought proper. The pretense, therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretense destitute of all just foundation.

From these observations this conclusion results: that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims which have been quoted, is contrary to reason and common-sense, and therefore not admissible. Even if these maxims had a precise technical sense, corresponding with the idea of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Having now seen that the maxims relied upon will not bear the use made of them, let us endeavor to ascertain their proper use and true meaning. This will be best done by examples. The plan of the convention declares that the power of Congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

In like manner the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

These examples are sufficient to elucidate the maxims which have been mentioned, and to designate the manner in which they should be used. But that there may be no misapprehensions upon this subject, I shall add one case more, to demonstrate the proper use of these maxims, and the abuse which has been made of them.

Let us suppose that by the laws of this State a married woman was incapable of conveying her estate, and that the legislature, considering this as an evil, should enact that she might dispose of her property by deed executed in the presence of a magistrate. In such a case there can be no doubt but the specification would amount to an exclusion of any other mode of conveyance, because the woman having no previous power to alienate her property, the specification determines the particular mode which she is, for that purpose, to avail herself of. But let us further suppose that in a subsequent part of the same act it should be declared that no woman should dispose of any estate of a determinate value without the consent of three of her nearest relations, signified by their signing the deed; could it be inferred from this regulation that a married woman might not procure the approbation of her relations to a deed for conveying property of inferior value? The position is too absurd to merit a refutation, and yet this is precisely the position which those must establish who contend that the trial by juries in civil cases is abolished, because it is expressly provided for in cases of a criminal nature.

From these observations it must appear unquestionably true, that trial by jury is in no case abolished by the proposed Constitution, and it is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the State constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe. All land causes, except where claims under the grants of different States come into question, and all other controversies between the citizens of the same State, unless where they depend upon positive violations of the articles of union, by acts of the State legislatures, will belong exclusively to the jurisdiction of the State

tribunals. Add to this, that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature, in regard to the amount of taxes to be laid, to the objects upon which they are to be imposed, or to the rule by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers intrusted with the execution of the revenue laws.

As to the mode of collection in this State, under our own Constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burdensome than the original sum of the tax to be levied.

And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offenses against the government, for which the persons who commit them may be indicted and punished according to the circumstances of the case.

The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.

Notwithstanding, therefore, the doubts I have expressed, as to the essentiality of trial by jury in civil cases to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favor if it were possible to fix the limits within which it ought to be comprehended. There is, however, in all cases, great difficulty in this; and men not blinded by enthusiasm must be sensible that in a federal government, which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, that difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles which, we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

The great difference between the limits of the jury trial in different States is not generally understood; and as it must have considerable influence on the sentence we ought to pass upon the omission complained of in regard to this point, an explanation of it is necessary. In this State, our judicial establishments resemble, more nearly than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury.(1) In New Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State, and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common-law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut, they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty and, to a certain extent, equity jurisdiction. In cases of importance, their General Assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in practice further than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four Eastern States, the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal of course from one jury to another, till there have been two verdicts out of three on one side.

From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.

The propositions which have been made for supplying the omission have rather served to illustrate than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose—"Trial by jury shall be as heretofore"—and this I maintain would be senseless and nugatory. The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the Constitution must necessarily be construed to refer. Now it is evident that though trial by jury, with various limitations, is known in each State individually, yet in the United States, as such, it is at this time altogether unknown, because the present federal government has no judiciary power whatever; and consequently there is no proper antecedent or previous establishment to which the term heretofore could relate. It would therefore be destitute of a precise meaning, and inoperative from its uncertainty.

As, on the one hand, the form of the provision would not fulfil the intent of its proposers, so, on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if, in the State where the courts sat, that mode of trial would obtain in a similar case in the State courts; that is to say, admiralty causes should be tried in Connecticut by a jury, in New York without one. The capricious operation of so dissimilar a method of trial in the same

cases, under the same government, is of itself sufficient to indispose every wellregulated judgment towards it. Whether the cause should be tried with or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their inquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable.

It will add great weight to this remark, in relation to prize causes, to mention that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that, pursuant to such treaties, they are determinable in Great Britain, in the last resort, before the king himself, in his privy council, where the fact, as well as the law, undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the Constitution which would make the State systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions the propriety of which is not indisputable.

My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction, and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions(2) to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a special determination; while a separation of the one from the other has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

It is true that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence: which is the model that has been followed in several of the States. But it is equally true that the trial by jury has been unknown in every case in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appeared to be conclusive reasons against incorporating the systems of all the States, in the formation of the national judiciary, according to what may be conjectured to have been the attempt of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

It is in this form: “In civil actions between citizens of different States, every issue of fact, arising in actions at common law, may be tried by a jury if the parties, or either of them request it.”

This, at best, is a proposition confined to one description of causes; and the inference is fair, either that the Massachusetts convention considered that as the only class of federal causes, in which the trial by jury would be proper; or that if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: if we advert to the observations already made respecting the courts that subsist in the several States of the Union, and the different powers exercised by them, it will appear that there are no expressions more vague and indeterminate than those which have been employed to characterize that species of causes which it is intended shall be entitled to a trial by jury. In this State, the boundaries between actions at common law and actions of equitable jurisdiction, are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other States the boundaries are less precise. In some of them every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one State a cause would receive its determination from a jury, if the parties, or either of them, requested it; but in another State, a cause exactly similar to the other, must be decided without the intervention of a jury, because the State judicatories varied as to common-law jurisdiction.

It is obvious, therefore, that the Massachusetts proposition, upon this subject cannot operate as a general regulation, until some uniform plan, with respect to the limits of common-law and equitable jurisdictions, shall be adopted by the different States. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate with the several State institutions.

It may be asked, Why could not a reference have been made to the constitution of this State, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer that it is not very probable the other States would entertain the same opinion of our institutions as we do ourselves. It is natural to suppose that they are hitherto more attached to their own, and that each would struggle for the preference. If the plan of taking one State as a model for the whole had been thought of in the convention, it is to be presumed that the adoption of it in that body would have been rendered difficult by the predilection of each representation in favor of its own government; and it must be uncertain which of the States would have been taken as the model. It has been shown that many of them would be improper ones. And I leave it to conjecture, whether, under all circumstances, it is most likely that New York, or some other State, would have been preferred. But admit that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other States, at the partiality which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

To avoid the embarrassments of a definition of the cases which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers, that a provision might have been inserted for establishing it in all cases whatsoever. For this I believe, no precedent is to be found in any member of the Union; and the considerations which have been stated in discussing the proposition of the minority of Pennsylvania, must satisfy every sober mind that the establishment of the trial by jury in all cases would have been an unpardonable error in the plan.

In short, the more it is considered the more arduous will appear the task of fashioning a provision in such a form as not to express too little to answer the purpose, or too much to be advisable; or which might not have opened other sources of opposition to the great and essential object of introducing a firm national government.

I cannot but persuade myself, on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing in candid minds the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the convention; that even in far the greatest proportion of civil cases, and those in which the great body of the community is interested, that mode of trial will remain in its full force, as established in the State constitutions, untouched and unaffected by the plan of the convention; that it is in no case abolished(3) by that plan; and that there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a Constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. For my part, I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all

cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great Britain, and it is equally so in the State of Connecticut; and yet it may be safely affirmed that more numerous encroachments have been made upon the trial by jury in this State since the Revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut or Great Britain. It may be added that these encroachments have generally originated with the men who endeavor to persuade the people they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favorite career. The truth is that the general GENIUS of a government is all that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them; and the want of them will never be, with men of sound discernment, a decisive objection to any plan which exhibits the leading characters of a good government.

It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been always regarded as the most popular State in the Union, can boast of no constitutional provision for either.

PUBLIUS

1. It has been erroneously insinuated with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.

2. It is true that the principles by which that relief is governed are now reduced to a regular system; but it is not the less true that they are in the main applicable to SPECIAL circumstances, which form exceptions to general rules.

3. Vide No. 81, in which the supposition of its being abolished by the appellate jurisdiction in matters of fact being vested in the Supreme Court, is examined and refuted.

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FEDERALIST No. 84. Certain General and Miscellaneous Objections to the Constitution Considered and Answered.

From McLEAN's Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

IN THE course of the foregoing review of the Constitution, I have taken notice of, and endeavored to answer most of the objections which have appeared against it. There, however, remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of the number. And yet the opposers of the new system, in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter, they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favor of particular privileges and rights, which, in substance amount to the same thing; the other is, that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured.

To the first I answer, that the Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article 1, section 3, clause 7—"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Section 9, of the same article, clause 2—"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3—"No bill of attainder or ex-post-facto law shall be passed." Clause 7—"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Article 3, section 2, clause 3—"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." Section 3, of the same article—"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And clause 3, of the same section—"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of TITLES OF NOBILITY, to which we have no corresponding provision in our Constitution, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone,(1) in reference to the latter, are well worthy of recital: "To bereave a man of life, (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls "the BULWARK of the British Constitution."(2)

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.

To the second that is, to the pretended establishment of the common and state law by the Constitution, I answer, that they are expressly made subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of

those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend, that whatever has been said about it in that of any other State, amounts to nothing. What signifies a declaration, that “the liberty of the press shall be inviolably preserved”? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.(3) And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security, which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent, that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign from the substance of the thing.

Another objection which has been made, and which, from the frequency of its repetition, it is to be presumed is relied on, is of this nature: “It is improper (say the objectors) to confer such large powers, as are proposed, upon the national government, because the seat of that government must of necessity be too remote from many of the States to admit of a proper knowledge on the part of the constituent, of the conduct of the representative body.” This argument, if it proves any thing, proves that there ought to be no general government whatever. For the powers which, it seems to be agreed on all hands, ought to be vested in the Union, cannot be safely intrusted to a body which is not under every requisite control. But there are satisfactory reasons to show that the objection is in reality not well founded. There is in most of the arguments which relate to distance a palpable illusion of the imagination. What are the sources of information by which the people in Montgomery County must regulate their judgment of the conduct of their representatives in the State legislature? Of personal observation they can have no benefit. This is confined to the citizens on the

spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from correspondences with their representatives, and with other persons who reside at the place of their deliberations. This does not apply to Montgomery County only, but to all the counties at any considerable distance from the seat of government.

It is equally evident that the same sources of information would be open to the people in relation to the conduct of their representatives in the general government, and the impediments to a prompt communication which distance may be supposed to create, will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interests from another quarter, may be relied upon, if it were only from the rivalship of power. And we may conclude with the fullest assurance that the people, through that channel, will be better informed of the conduct of their national representatives, than they can be by any means they now possess of that of their State representatives.

It ought also to be remembered that the citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.

Among the many curious objections which have appeared against the proposed Constitution, the most extraordinary and the least colorable is derived from the want of some provision respecting the debts due to the United States. This has been represented as a tacit relinquishment of those debts, and as a wicked contrivance to screen public defaulters. The newspapers have teemed with the most inflammatory railings on this head; yet there is nothing clearer than that the suggestion is entirely void of foundation, the offspring of extreme ignorance or extreme dishonesty. In addition to the remarks I have made upon the subject in another place, I shall only observe that as it is a plain dictate of common-sense, so it is also an established doctrine of political law, that “States neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government.”(4)

The last objection of any consequence, which I at present recollect, turns upon the article of expense. If it were even true, that the adoption of the proposed government would occasion a considerable increase of expense, it would be an objection that ought to have no weight against the plan.

The great bulk of the citizens of America are with reason convinced, that Union is the basis of their political happiness. Men of sense of all parties now, with few exceptions, agree that it cannot be preserved under the present system, nor without radical alterations; that new and extensive powers ought to be granted to the national head, and that these require a different organization of the federal government—a single body being an unsafe depositary of such ample authorities. In conceding all this, the question of expense must be given up; for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are, in the first instance, to consist of only sixty-five persons, which is the same number of which Congress, under the existing Confederation, may be composed. It is true that this number is intended to be increased; but this is to keep pace with the progress of the population and resources of the country. It is evident that a less number would, even in the first instance, have been unsafe, and that a continuance of the present number would, in a more advanced stage of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expense to spring? One source indicated, is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government, are the same which will be required under the new. There are now a Secretary of War, a Secretary of Foreign Affairs, a Secretary for Domestic Affairs, a Board of Treasury, consisting of three persons, a Treasurer, assistants, clerks, etc. These officers are indispensable under any system, and will suffice under the new as well as the old. As to ambassadors and other ministers and agents in foreign countries, the proposed Constitution can make no other difference than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very

considerable addition to the number of federal officers; but it will not follow that this will occasion an increase of public expense. It will be in most cases nothing more than an exchange of State for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The States individually will stand in no need of any for this purpose. What difference can it make in point of expense to pay officers of the customs appointed by the State or by the United States? There is no good reason to suppose that either the number or the salaries of the latter will be greater than those of the former.

Where then are we to seek for those additional articles of expense which are to swell the account to the enormous size that has been represented to us? The chief item which occurs to me respects the support of the judges of the United States. I do not add the President, because there is now a president of Congress, whose expenses may not be far, if any thing, short of those which will be incurred on account of the President of the United States. The support of the judges will clearly be an extra expense, but to what extent will depend on the particular plan which may be adopted in regard to this matter. But upon no reasonable plan can it amount to a sum which will be an object of material consequence.

Let us now see what there is to counterbalance any extra expense that may attend the establishment of the proposed government. The first thing which presents itself is that a great part of the business which now keeps Congress sitting through the year will be transacted by the President. Even the management of foreign negotiations will naturally devolve upon him, according to general principles concerted with the Senate, and subject to their final concurrence. Hence it is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps half, for the former. The extra business of treaties and appointments may give this extra occupation to the Senate. From this circumstance we may infer that, until the House of Representatives shall be increased greatly beyond its present number, there will be a considerable saving of expense from the difference between the constant session of the present and the temporary session of the future Congress.

But there is another circumstance of great importance in the view of economy. The business of the United States has hitherto occupied the State legislatures, as well as Congress. The latter has made requisitions which the former have had to provide for. Hence it has happened that the sessions of the State legislatures have been protracted greatly beyond what was necessary for the execution of the mere local business of the States. More than half their time has been frequently employed in matters which related to the United States. Now the members who compose the legislatures of the several States amount to two thousand and upwards, which number has hitherto performed what under the new system will be done in the first instance by sixty-five persons, and probably at no future period by above a fourth or fifth of that number. The Congress under the proposed government will do all the business of the United States themselves, without the intervention of the State legislatures, who thenceforth will have only to attend to the affairs of their particular States, and will not have to sit in any proportion as long as they have heretofore done. This difference in the time of the sessions of the State legislatures will be clear gain, and will alone form an article of saving, which may be regarded as an equivalent for any additional objects of expense that may be occasioned by the adoption of the new system.

The result from these observations is that the sources of additional expense from the establishment of the proposed Constitution are much fewer than may have been imagined; that they are counterbalanced by considerable objects of saving; and that while it is questionable on which side the scale will preponderate, it is certain that a government less expensive would be incompetent to the purposes of the Union.

PUBLIUS

1. Vide Blackstone’s Commentaries, Vol. 1, p. 136.

2. Idem, Vol. 4, p. 438.

3. To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon the publications so high as to amount to a prohibition. I know not by what logic it could be maintained, that the declarations in the State constitutions, in favor of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the State legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, respecting the liberty of the press, will give it no greater security than it will have without them. The same invasions of it may be effected under the State constitutions which contain those declarations through the means of taxation, as under the proposed Constitution, which

has nothing of the kind. It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.

4. Vide Rutherford's Institutes, Vol. 2, Book II, Chapter X, Sections XIV and XV. Vide also Grotius, Book II, Chapter IX, Sections VIII and IX.

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FEDERALIST No. 85. Concluding Remarks

From MCLEAN's Edition, New York. Wednesday, May 28, 1788

HAMILTON

To the People of the State of New York:

ACCORDING to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion two points: "the analogy of the proposed government to your own State constitution," and "the additional security which its adoption will afford to republican government, to liberty, and to property." But these heads have been so fully anticipated and exhausted in the progress of the work, that it would now scarcely be possible to do any thing more than repeat, in a more dilated form, what has been heretofore said, which the advanced stage of the question, and the time already spent upon it, conspire to forbid.

It is remarkable, that the resemblance of the plan of the convention to the act which organizes the government of this State holds, not less with regard to many of the supposed defects, than to the real excellences of the former. Among the pretended defects are the re-eligibility of the Executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press. These and several others which have been noted in the course of our inquiries are as much chargeable on the existing constitution of this State, as on the one proposed for the Union; and a man must have slender pretensions to consistency, who can rail at the latter for imperfections which he finds no difficulty in excusing in the former. Nor indeed can there be a better proof of the insincerity and affectation of some of the zealous adversaries of the plan of the convention among us, who profess to be the devoted admirers of the government under which they live, than the fury with which they have attacked that plan, for matters in regard to which our own constitution is equally or perhaps more vulnerable.

The additional securities to republican government, to liberty and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States, who may acquire credit and influence enough, from leaders and favorites, to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Thus have I, fellow-citizens, executed the task I had assigned to myself; with what success, your conduct must determine. I trust at least you will admit that I have not failed in the assurance I gave you respecting the spirit with which my endeavors should be conducted. I have addressed myself purely to your judgments, and have studiously avoided those asperities which are too apt to disgrace political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the Constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant, not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual changes which have been rung upon the wealthy, the well-born, and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend; it is certain that I have frequently felt a struggle between sensibility and moderation; and if the former has in some instances prevailed, it must be my excuse that it has been neither often nor much.

Let us now pause and ask ourselves whether, in the course of these papers, the proposed Constitution has not been satisfactorily vindicated from the aspersions thrown upon it; and whether it has not been shown to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'T is one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party; let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation; and let him remember that a majority of America has already given its sanction to the plan which he is to approve or reject.

I shall not dissemble that I feel an entire confidence in the arguments which recommend the proposed system to your adoption, and that I am unable to discern any real force in those by which it has been opposed. I am persuaded that it is the best which our political situation, habits, and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan, that it has not a claim to absolute perfection, have afforded matter of no small triumph to its enemies. "Why," say they, "should we adopt an imperfect thing? Why not amend it and make it perfect before it is irrevocably established?" This may be plausible enough, but it is only plausible. In the first place I remark, that the extent of these concessions has been greatly exaggerated. They have been stated as amounting to an admission that the plan is radically defective, and that without material alterations the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an entire perversion of their sense. No advocate of the measure can be found, who will not declare as his sentiment, that the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such an one as promises every species of security which a reasonable people can desire.

I answer in the next place, that I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs, and to expose the Union to the jeopardy of successive experiments, in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense and wisdom, of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union, must as necessarily be a compromise of as many dissimilar interests and inclinations. How can perfection spring from such materials?

The reasons assigned in an excellent little pamphlet lately published in this city,(1) are unanswerable to show the utter improbability of assembling a new convention, under circumstances in any degree so favorable to a happy issue, as those in which the late convention met, deliberated, and concluded. I will not repeat the arguments there used, as I presume the production itself has had an extensive circulation. It is certainly well worthy the perusal of every friend to his country. There is, however, one point of light in which the subject of amendments still remains to be considered, and in which it has not yet been exhibited to public view. I cannot resolve to conclude without first taking a survey of it in this aspect.

It appears to me susceptible of absolute demonstration, that it will be far more easy to obtain subsequent than previous amendments to the Constitution. The moment an alteration is made in the present plan, it becomes, to the purpose of adoption, a new one, and must undergo a new decision of each State. To its complete establishment throughout the Union, it will therefore require the concurrence of thirteen States. If, on the contrary, the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine(2) in favor of subsequent amendment, rather than of the original adoption of an entire system.

This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question, may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all the parties to the compact; and hence, also, an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act. The degree of that multiplication must evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point—no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.

In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion constantly impose on the national rulers the necessity of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of a doubt, that the observation is futile. It is this that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be obliged “on the application of the legislatures of two thirds of the States (which at present amount to nine), to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof.” The words of this article are peremptory. The Congress “shall call a convention.” Nothing in this particular is left to the discretion of that body. And of consequence, all the declamation about the disinclination to a change vanishes in air. Nor however difficult it may be supposed to unite two thirds or three fourths of the State legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of a mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption, as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: “To balance a large state or society (says he), whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments.”(3) These judicious reflections contain a lesson of moderation to all the sincere lovers of the Union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the States from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude, but I acknowledge that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A NATION, without a NATIONAL GOVERNMENT, is, in my view, an awful spectacle. The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in so arduous an enterprise, upon seven out of the thirteen States, and after having passed over so considerable a part of the ground, to recommence the course. I dread the more the consequences of new attempts, because I know that POWERFUL INDIVIDUALS, in this and in other States, are enemies to a general national government in every possible shape.

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1.3: Marbury v. Madison

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U.S. 137 (1803)

[Marbury was appointed a justice of the peace, a minor judicial officer, in the District of Columbia, by President Adams—a few days before President Jeffer- son took office after defeating Adams in the election of 1800. Marbury's position was one of 42 positions created by the lame duck Congress (dominated by Adams' Federalist party). Ironically, his appointment was signed by Adams' Secretary of State, John Mar- shall, who also was appointed and sworn-in as the Chief Justice of the Supreme Court only days before Jefferson took office. Oddly, neither Adams nor Mar- shall delivered the commission to Marbury before they left office, creating the basic circumstances from which this dispute arose.]

Marshall, Chief Justice.

***

At the last term on the affidavits then read and

filed with the clerk, a rule was granted in this case, re- quiring the secretary of state to show cause why a man- damus should not issue, directing him to deliver to William Marbury his own commission as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present mo- tion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded…

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is . . . [h]as the applicant a right to the commission he demands?

His right originates in an act of Congress passed in February 1801, concerning the District of Columbia. After dividing the district into two counties, the 11th section of this law enacts, "that there shall be ap- pointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.["] It appears from the affidavits, that in compli- ance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been ap- pointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitu- tion declares, that "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and con- suls, and all other officers of the United States, whose appointments are not otherwise provided for."

The 3d section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States to be appointed by the president, by and with the consent of the senate, or by the president alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. . . .

[The Court then examined whether the technical requirements for appointment of Mr. Marbury had been completed in compliance with the requirements of the federal statute and the Constitution.]

Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independ- ent of the executive, the appointment was not revoca- ble, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the court not warranted by law, but viola- tive of a vested legal right.

This brings us to the second inquiry; which is . . . if he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protec- tion. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. . . .

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appella- tion, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. It behooves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself is, whether this can be arranged with that class of cases which come under the description of damnum absque injuria; a loss without an injury.

The description of cases never has been consid- ered, and it is believed never can be considered as comprehending offices of trust, of honour or of profit. The office of justice of peace in the District of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has re- ceived that attention and guardianship. It has been created by special act of congress, and has been se- cured, so far as the laws can give security to the per- son appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be consid- ered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be ques- tioned; but that every act of duty, to be performed in any of the great departments of government, consti- tutes such a case, is not to be admitted.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the ex- ercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the presi- dent is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to ap- point certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The sub- jects are political. They respect the nation, not individ- ual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .

[The Court then reasoned that once the appoint- ment was complete, the delivery of the appointment was not a political act.]

But when the legislature proceeds to impose on that officer other duties; when he is directed peremp- torily to perform certain acts; when the rights of in- dividuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only po- litically examinable. But where a specific duty is

assigned by law, and individual rights depend upon the perform- ance of that duty, it seems equally clear that the individ- ual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

….

That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether . . . [h]e is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2d. The power of this court.
3d. The nature of the writ.

….

[The Court then considered whether this was an appropriate case for a writ of mandamus.]

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, [w]hether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is pre- cisely within the letter of the description, and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconsti- tutional, and therefore absolutely incapable of confer- ring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such infe- rior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power, it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appel- late jurisdiction."

It has been insisted at the bar, that as the original grant of jurisdiction, to the Supreme and inferior courts, is general, and the clause, assigning original ju- risdiction to the Supreme Court, contains no negative or restrictive words; the power remains to the legisla- ture to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discre- tion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have de- fined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the con- stitution is intended to be without effect; and, there- fore, such construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such ex- ceptions as congress might make, is no restriction; unless the words be deemed exclusive of original juris- diction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction; of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construc- tion would render the clause inoperative, that is an

additional reason for rejecting such other construc- tion, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdic- tion, or to be necessary to enable them to exercise ap- pellate jurisdiction.

It has been stated at the bar that the appellate ju- risdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appel- late, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Al- though, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the de- livery of a paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. . . .

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitu- tion; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the con- stitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently re- peated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the gov- ernment, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those depart- ments.

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CHAPTER OVERVIEW

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2.1: Free Press- Near v. Minnesota 283 U.S. 697 (1931)

U.S. Supreme Court

Near v. Minnesota, 283 U.S. 697 (1931)

Near v. Minnesota

No. 91

Argued January 30, 1931

Decided June 1, 1931

283 U.S. 697

APPEAL FROM THE SUPREME COURT OF MINNESOTA

Syllabus

1. A Minnesota statute declares that one who engages "in the business of regularly and customarily producing, publishing," etc., "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty of a nuisance, and authorizes suits, in the name of the State, in which such periodicals may be abated and their publishers enjoined from future violations. In such a suit, malice may be inferred from the fact of publication. The defendant is permitted to prove, as a defense, that his publications were true and published "with good motives and for justifiable ends." Disobedience of an injunction is punishable as a contempt. *Held*unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State. Pp. 283 U. S. 704,283 U. S. 709, 283 U. S. 712, 283 U. S. 722.

2. Liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. P. 283 U. S. 707.

3. Liberty of the press is not an absolute right, and the State may punish its abuse. P. 283 U. S. 708.

4. In passing upon the constitutionality of the statute, the court has regard for substance, and not for form; the statute must be tested by its operation and effect. P. 283 U. S. 708.

5. Cutting through mere details of procedure, the operation and effect of the statute is that public authorities may bring a publisher before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter — in particular, that the matter consists of charges against public officials of official dereliction — and, unless the publisher is able and disposed to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship. P. 283 U. S. 713.

6. A statute authorizing such proceedings in restraint of publication is inconsistent with the conception of the liberty of the press as historically conceived and guaranteed. P. 283 U. S. 713.

7. The chief purpose of the guaranty is to prevent previous restraints upon publication. The libeler, however, remains criminally and civilly responsible for his libels. P. 283 U. S. 713.

8. There are undoubtedly limitations upon the immunity from previous restraint of the press, but they are not applicable in this case. P. 283 U. S. 715.

9. The liberty of the press has been especially cherished in this country as respects publications censuring public officials and charging official misconduct. P. 283 U. S. 716.

10. Public officers find their remedies for false accusations in actions for redress and punishment under the libel laws, and not in proceedings to restrain the publication of newspapers and periodicals. P. 283 U. S. 718.

11. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct. P. 283 U. S. 720.

12. Characterizing the publication of charges of official misconduct as a "business," and the business as a nuisance, does not avoid the constitutional guaranty; nor does it matter that the periodical is largely or chiefly devoted to such charges. P.283 U. S. 720.

13. The guaranty against previous restraint extends to publications charging official derelictions that amount to crimes. P. 283 U. S. 720.

14. Permitting the publisher to show in defense that the matter published is true and is published with good motives and for justifiable ends does not justify the statute. P. 283 U. S. 721.

15. Nor can it be sustained as a measure for preserving the public peace and preventing assaults and crime. Pp. 283 U. S. 721, 283 U. S. 722.

179 Minn. 40; 228 N.W. 326, reversed.

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APPEAL from a decree which sustained an injunction abating the publication of a periodical as malicious, scandalous and defamatory, and restraining future publication. The suit was based on a Minnesota statute. *See also* s.c., 174 Minn. 457, 219 N.W. 770.

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

Chapter 285 of the Session Laws of Minnesota for the year 1925 [Footnote 1] provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper,

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magazine or other periodical." Section one of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away"

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or"

"(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,"

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation."

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action."

Section two provides that, whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or, upon like failure or refusal of the latter, any citizen of the county may maintain an action in the district court of the county in the name of the State to enjoin

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perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section three, is to be " governed by the practice and procedure applicable to civil actions for injunctions," and, after trial, the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the

violation, and, “in and by such judgment, such nuisance may be wholly abated.” The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than $1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a ” malicious, scandalous and defamatory newspaper, magazine and periodical” known as ” The Saturday Press,” published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were “largely devoted to malicious, scandalous and defamatory articles” concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it

appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September

24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, “any future editions of said The Saturday Press” and

“any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff’s complaint herein or otherwise.”

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457, 219 N.W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution, but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled,

no further evidence was presented, and the plaintiff rested. The defendant then rested without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The District Court made findings of fact which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles" concerning the individuals named. The court further found that the defendants, through these publications,

"did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper,"

and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The Judgment perpetually enjoined the defendants

"from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law,"

and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40, 228 N.W. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment, and that the lower court had not been asked to modify it. The court added that it saw no reason

"for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,"

that the allegations of the complaint had been

found to be true, and, though this was an equitable action, defendants had not indicated a desire "to conduct their business in the usual and legitimate manner."

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 666; *Whitney v. California*, 274 U. S. 357, 274 U. S. 362, 274 U. S. 373; *Fiske v. Kansas*, 274 U. S. 380, 274 U. S. 382; *Stromberg v. California*, *ante*, p. 283 U. S. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership.*Railroad Commission Cases*, 116 U. S. 307, 116 U. S. 331; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 236 U. S. 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*, 157 U. S. 161, 157 U. S. 165), this Court has held that the power of the State stops short of interference with what are deemed

to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros. v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525, 261 U. S. 560,261 U. S. 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*,

supra; Stromberg v. California, supra. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case, and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions, it is enough to say that, in passing upon constitutional questions, the court has regard to substance, and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson v. Mayor,* 92 U. S. 259, 92 U. S. 268; *Bailey v. Alabama,* 219

U.S. 219, 219 U. S. 244; *United States v. Reynolds,* 235 U. S. 133, 235 U. S. 148, 235 U. S. 149; *St. Louis Southwestern R. Co. v. Arkansas,* 235 U. S. 350, 235 U. S. 362; *Mountain Timber Co. v. Washington,* 243 U. S. 219, 243 U. S. 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action, there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. [Footnote 2] The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and

for justifiable ends. It is apparent that, under the statute, the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words:

"There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked, nor to punish the wrongdoer. It is for the protection of the pubic welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers. [Footnote 3]

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in

addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from

"publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a

new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter — in particular, that the matter consists of charges against public officers of official dereliction — and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.

The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. [Footnote 4] The liberty deemed to be established was thus described by Blackstone:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an

undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

4 Bl.Com. 151, 152; *see* Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said,

"the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, a in Great Britain, but from legislative restraint also."

Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas 319, 1 U. S. 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding, ubi sup.;* 4 Bl.Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by

state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions", and that

"the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."

2 Cooley, Const.Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.*, pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado, supra; Toledo Newspaper Co. v. United States*, 247 U. S. 402, 247 U. S. 419. [Footnote 5] In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit by his publications the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too

broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:

"When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."

Schenck v. United States, 249 U. S. 47, 249 U. S. 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. [Footnote 6] On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not

"protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 221 U. S. 439."

Schenck v. United States, *supra.* These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity. [Footnote 7]

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial

period and with the efforts to secure freedom from oppressive administration. [Footnote 8] That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts:

"Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse."

In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights," it was said: [Footnote 9]

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs."

Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions: [Footnote 10]

"In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and

conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions. [Footnote 11]

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and

property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of

public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.

The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth.*Patterson v. Colorado, supra.*

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends

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to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.

"To prohibit the intent to excite those unfavorable sentiments against those who administer the Government is equivalent to a prohibition of the actual excitement of them, and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect, which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct. [Footnote 12]"

There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 89 N.J. Eq. 387, 388, 105 Atl. 72:

"If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited."

The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b)

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of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

[Footnote 1]

Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3.

[Footnote 2]

Mason's Minn.Stats. 10112, 10113; *State v. Shipman*, 83 Minn. 441, 445, 86 N.W. 431; *State v. Minor*, 163 Minn. 109, 110, 203 N.W. 596.

[Footnote 3]

It may also be observed that, in a prosecution for libel, the applicable Minnesota statute (Mason's Minn.Stats., 1927, §§ 10112, 10113) provides that the publication is justified "whenever the matter charged as libelous is true and was published with good motives and for justifiable ends," and also

"is excused when honestly made, in belief of its truth, and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of a person in respect to public affairs."

The clause last mentioned is not found in the statute in question.

[Footnote 4]

May, Constitutional History of England, vol. 2, chap. IX, p. 4; DeLolme, Commentaries on the Constitution of England, chap. IX, pp. 318, 319.

[Footnote 5]

See Hugonson's Case, 2 Atk. 469; *Respublica v. Oswald,* 1 Dallas 319; *Cooper v. People*,13 Colo. 337, 373, 22 Pac. 790; *Nebraska v. Rosewater,* 60 Nebr. 438, 83 N.W. 353; *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056; *People v. Wilson*, 64 Ill. 195; *Storey v. People*, 79 Ill. 45; *State v. Circuit Court*, 97 Wis. 1, 72 N.W.193.

[Footnote 6]

Chafee, Freedom of Speech, p. 10.

[Footnote 7]

See 29 Harvard Law Review, 640.

[Footnote 8]

See Duniway "The Development of Freedom of the Press in Massachusetts," p. 123; Bancroft's History of the United States, vol. 2, 261.

[Footnote 9]

Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108.

[Footnote 10]

Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

[Footnote 11]

Dailey v. Superior Court, 112 Cal. 94, 98, 44 Pac. 458; *Jones, Varnum & Co. v. Townsend's Admx.*, 21 Fla. 431, 450; *State ex rel. Liversey v. Judge*, 34 La. 741, 743; *Commonwealth v. Blanding*, 3 Pick, 304, 313; *Lindsay v. Montana Federation of Labor*,37 Mont. 264, 275, 277, 96 Pac. 127; *Howell v. Bee Publishing Co.*, 100 Neb. 39, 42, 158 N.W. 358; *New Yorker Staats-Zeitung v. Nolan*, 89 N.J.Eq. 387, 105 Atl. 72; *Brandreth v. Lane*, 8 Paige 24; *New York Juvenile Guardian Society v. Roosevelt*, 7 Daly 188; *Ulster Square Dealer v. Fowler,* 111 N.Y.Supp. 16; *Star Co. v. Brush*, 170 *id.* 987, 172 *id.* 320, 172 *id.* 851; *Dopp v. Doll*, 9 Ohio Dec.Rep. 428; *Respublica v. Oswald,* 1 Dall. 319, 1 U. S. 325; *Respublica v. Dennie*, 4 Yeates 267, 269; *Ex parte Neill*, 32 Tex.Cr. 275, 22 S.W. 923; *Mitchell v. Grand Lodge*, 56 Tex.Civ.App. 306, 309, 121 S.W. 178; *Sweeney v. Baker,* 13 W.Va. 158, 182; *Citizens Light, Heat & Power Co. v. Montgomery Light & Water Co.*, 171 Fed. 553, 556; *Willis v. O'Connell*, 231 Fed. 1004, 1010; *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 485.

[Footnote 12]

Madison, *op. cit.* p. 549.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized, and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

Confessedly, the Federal Constitution, prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech or press against state action. *Barron v. Baltimore,* 7 Pet. 243, 32 U. S. 250. *Fox v. Ohio,* 5 How. 410, 46 U. S. 434. *Smith v. Maryland,* 18 How. 71, 59 U. S. 76. *Withers v. Buckley,* 20 How. 84,61 U. S. 89-91. Up to that time, the right was safeguarded solely by the constitutions and laws of the States, and, it may be added, they operated adequately to protect it. This Court was not called on until 1925 to decide whether the "liberty" protected by the Fourteenth Amendment includes the right of free speech and press. That question has been finally answered

in the affirmative. *Cf. Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462. *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 259 U. S. 538, 259 U. S. 543. *See Gitlow v. New York*,268 U. S. 652. *Fiske v. Kansas*, 274 U. S. 380. *Stromberg v. California*, *ante*, p. 283 U. S. 359.

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition, slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice. [Footnote 2/1]

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The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to

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the inquiry whether, having regard to the point properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law.

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This Court should not reverse the judgment below upon the ground that, in some other case, the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment. *Castillo v. McConnico*, 168 U. S. 674, 168 U. S. 680. *Williams v. Mississippi*, 170 U. S. 213, 170 U. S. 225. *Yazoo & Miss. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 226 U. S. 219-220. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 232 U. S. 544-546.

This record requires the Court to consider the statute as applied to the business of publishing articles that are, in fact, malicious, scandalous and defamatory.

The statute provides that any person who "shall be engaged in the business of regularly or customarily producing, publishing or circulating" a newspaper, magazine or other periodical that is (a) "obscene, lewd and lascivious" or (b) "malicious, scandalous and defamatory"

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is guilty of a nuisance, and may be enjoined as provided in the Act. It will be observed that the qualifying words are used conjunctively. In actions brought under (b) "there shall be available the defense that the truth was published with good motives and for justifiable ends."

The complaint charges that defendants were engaged in the business of regularly and customarily publishing "malicious, scandalous and defamatory newspapers" known as the Saturday Press, and nine editions dated respectively on each Saturday commencing September 25 and ending November 19, 1927, were made a part of the complaint. These are all that were published.

On appeal from the order of the district court overruling defendants' demurrer to the complaint, the state supreme court said (174 Minn. 457, 461, 219 N.W. 770):

"The constituent elements of the declared nuisance are the customary and regular dissemination by means of a newspaper which finds its way into families, reaching the young as well as the mature, of a selection of scandalous and defamatory articles treated in such a way as to excite attention and interest so as to command circulation. . . . The statute is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends. . . . In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. . . . It was never the intention of the constitution to afford protection

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to a publication devoted to scandal and defamation. . . . Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous and defamatory printed matter."

The case was remanded to the district court.

Near's answer made no allegations to excuse or justify the business or the articles complained of. It formally denied that the publications were malicious, scandalous or defamatory, admitted that they were made as alleged, and attacked the statute as unconstitutional. At the trial, the plaintiff introduced evidence unquestionably sufficient to support the complaint. The defendant offered none. The court found the facts as alleged in the complaint, and, specifically, that each edition "was chiefly devoted to malicious, scandalous and defamatory articles" and that the last edition was chiefly devoted to malicious, scandalous and defamatory articles concerning Leach (mayor of Minneapolis), Davis (representative of the law enforcement league of citizens), Brunskill (chief of police), Olson (county attorney), the Jewish race, and members of the grand jury then serving in that court; that defendants, in and through the several publications,

"did thereby engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper."

Defendant Near again appealed to the supreme court. In its opinion (179 Minn. 40, 228 N.W. 326), the court said:

"No claim is advanced that the method and character of the operation of the newspaper in question was not a nuisance if the statute is constitutional. It was regularly and customarily devoted largely to malicious, scandalous and defamatory matter. . . . The record presents the same questions, upon which we have already passed. "

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Defendant concedes that the editions of the newspaper complained of are "defamatory *per se*," and he says:

"It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. . . . The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance*, though he is subject to responsibility therefor *afterwards*."

The record, when the substance of the articles is regarded, requires that concession here. And this Court is required to pass on the validity of the state law on that basis.

No question was raised below, and there is none here, concerning the relevancy or weight of evidence, burden of proof, justification or other matters of defense, the scope of the judgment or proceedings to enforce it, or the character of the publications that may be made notwithstanding the injunction.

There is no basis for the suggestion that defendants may not interpose any defense or introduce any evidence that would be open to them in a libel case, or that malice may not be negatived by showing that the publication was made in good faith in belief of its truth, or that, at the time and under the circumstances, it was justified as a fair comment on public affairs or upon the conduct of public officers in respect of their duties as such. *See* Mason's Minnesota Statutes, §§ 10112, 10113.

The scope of the judgment is not reviewable here. The opinion of the state supreme court shows that it was not reviewable there, because defendants' assignments of error in that court did not go to the form of the judgment, and because the lower court had not been asked to modify the judgment.

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The Act was passed in the exertion of the State's power of police, and this court is, by well established rule, required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 220 U. S. 79. *Gitlow v. New York, supra*, 268 U. S. 668-669. *Corporation Commission v. Lowe*, 281 U. S. 431, 281 U. S. 438. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 282 U. S. 257-258.

The publications themselves disclose the need and propriety of the legislation. They show:

In 1913 one Guilford, originally a defendant in this suit, commenced the publication of a scandal sheet called the Twin City Reporter; in 1916, Near joined him in the enterprise, later bought him out and engaged the services of one Bevans. In 1919, Bevans acquired Near's interest, and has since, alone or with others, continued the publication. Defendants admit that they published some reprehensible articles in the Twin City Reporter, deny that they personally used it for blackmailing purposes, admit that, by reason of their connection with the paper their reputation did become tainted, and state that Bevans, while so associated with Near, did use the paper for blackmailing purposes. And Near says it was for that reason he sold his interest to Bevans.

In a number of the editions, defendants charge that, ever since Near sold his interest to Bevans in 1919, the Twin City Reporter has been used for blackmail, to dominate public gambling and other criminal activities, and as well to exert a kind of control over public officers and the government of the city.

The articles in question also state that, when defendants announced their intention to publish the Saturday Press, they were threatened, and that, soon after the first publication,

Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence, and was not unprepared to repel it. There is much more of like significance.

The long criminal career of the Twin City Reporter — if it is, in fact, as described by defendants — and the arming and shooting arising out of the publication of the Saturday Press, serve to illustrate the kind of conditions, in respect of the business of publishing malicious, scandalous and defamatory periodicals, by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

It is of the greatest importance that the States shall be untrammeled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.

In his work on the Constitution (5th ed.), Justice Story, expounding the First Amendment, which declares "Congress shall make no law abridging the freedom of speech or of the press," said (§ 1880):

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent;

might prejudice all a man's civil, and political, and private rights, and might stir up sedition, rebellion, and treason even against the government itself in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law, and assassination and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, *that every man shall be at liberty to publish what is true, with good motives and for justifiable ends.* And, with this reasonable limitation, it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form."

(Italicizing added.)

The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the previous restraints referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152):

"To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution [of 1688], is to subject all freedom

of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. [Footnote 2/2]"

Story gives the history alluded to by Blackstone (§ 1882):

"The art of printing, soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books, and during the Commonwealth (such is human frailty and the love of power even in republics), they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree of 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force, but it was

so strongly resisted by Parliament that it expired in 1694, and has never since been revived."

It is plain that Blackstone taught that, under the common law liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published. And, as above shown, Story defined freedom of the press guaranteed by the First Amendment to mean that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends." His statement concerned the definite declaration of the First Amendment. It is not suggested that the freedom of press included in the liberty protected by the Fourteenth Amendment, which was adopted after Story's definition, is greater than that protected against congressional action. *And see* 2 Cooley's Constitutional Limitations, 8th ed., p. 886. 2 Kent's Commentaries (14th ed.) Lect. XXIV, p. 17.

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case, there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. The controlling words are

"All persons guilty of such nuisance may be enjoined, as hereinafter

provided. . . . Whenever any such nuisance is committed . . . , an action in the name of the State"

may be brought

"to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, *from further committing, conducting or maintaining any such nuisance.* . . . The court may make its order and judgment permanently enjoining . . . defendants found guilty . . . from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. . . ."

There is nothing in the statute [Footnote 2/3] purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous* restraint upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.

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The opinion seems to concede that, under clause (a) of the Minnesota law, the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined, it is hard to understand why the one resulting from a regular business of malicious defamation may not.

It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious

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assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion. The judgment should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

[Footnote 2/1]

The following articles appear in the last edition published, dated November 19, 1927:

"*FACTS NOT THEORIES*"

"'I am a bosom friend of Mr. Olson,' snorted a gentleman of Yiddish blood, 'and I want to protest against your article,' and blah, blah, blah, ad infinitum, ad nauseam."

"I am not taking orders from men of Barnett's faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis."

"It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have 'pulled' practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett's ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett's place of 'business' that the '13 dollar Jew' found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that, for five hundred dollars, they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand — had bought and paid for him."

"It is Jewish men and women — pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today."

"Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW."

"Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a 'bosom friend' of Mr. Olson."

"I find in the mail at least twice per week letters from gentlemen of Jewish faith who advise me against 'launching an attack on the Jewish people.' These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:"

“When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting businessmen; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity that I refuse to back up a single step from that ‘issue’ — if they choose to make it so.”

“If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call ‘Jews,’ they can easily do so BY THEMSELVES CLEANING HOUSE.”

“I’m not out to cleanse Israel of the filth that clings to Israel’s skirts. I’m out to ‘hew to the line, let the chips fly where they may.'”

“I simply state a fact when I say that ninety percent of the crimes committed against society in this city are committed by Jew gangsters.”

“It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:”

“It is Jew, Jew, Jew, as long as one cares to comb over the records.”

“I am launching no attack against the Jewish people As A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.”

“Either Mr. Guilford or myself stands ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews ant to battle.”

“Both of us have some mighty loyal friends among the Jewish people, but not one of them comes whining to ask that we ‘lay off’ criticism of Jewish gangsters, and none of them who comes carping to us of their ‘bosom friendship’ for any public official now under our journalistic guns.”

“*GIIL’s [Guilford’s] CHATTERBOX”*

“I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead, and won a bed for myself in St. Barnabas Hospital for six weeks. . . .”

“Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis’ law enforcement league or the K.K.K. hammers the eagle’s beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem.”

“All of which has nothing to do with the present whereabouts of Big Mose Barnett. Methinks he headed the local delegation to the new ‘Palestine for Jews only.’ He went ahead of the boys so he could do a little fixing with the Yiddish chief of police and get his twenty-five percent of the gambling rake-off. Boys will be boys, and ‘ganefs’ will be ganefs.”

GRAND JURIES AND DITTO

“There are grand juries, and there are grand juries. The last one was a real grand jury. It acted. The present one is like the scion who is labelled ‘Junior.’ That means not so good. There are a few mighty good folks on it — there are some who smell bad. One petty peanut politician whose graft was almost pitiful in its size when he was a public official has already shot his mouth off in several places. He is establishing his alibi in advance for what he intends to keep from taking place.”

“But George, we won’t bother you. [Meaning a grand juror.] We are aware that the gambling syndicate was waiting for your body to convene before the big crap game opened again. The Yids had your dimensions, apparently, and we always go by the judgment of a dog in appraising people.”

“We will call for a special grand jury and a special prosecutor within a short time, as soon as half of the staff can navigate to advantage, and then we’ll show you what a real grand jury can do. Up to the present, we have been merely tapping on the window. Very soon, we shall start smashing glass.”

[Footnote 2/2]

May, Constitutional History of England, c. IX. Duniway, Free dom of the Press in Massachusetts, cc. I and II. Cooley, Constitutional Limitations (8th ed.) Vol. II, pp. 880-881. Pound, Equitable Relief against Defamation, 29 Harv.L.Rev. 640, 650 *et seq.* Madison, Letters and Other Writings (1865 ed.) Vol. IV, pp. 542, 543. *Respublica v. Oswald,* 1 Dall. 319, 1 U. S. 325. Rawle, A View of the Constitution (2d ed. 1829) p. 124. Paterson, Liberty of the Press, c. III.

[Footnote 2/3]

"§ 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away"

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or"

"(b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical,"

"is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided."

"* * * *"

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report [resort] to issues or editions of periodicals taking place more than three months before the commencement of the action."

"§ 2. Whenever any such nuisance is committed or is kept, maintained, or exists, as above provided for, the County Attorney of any county where any such periodical is published or circulated . . . may commence and maintain in the District Court of said county, an action in the name of the State of Minnesota . . . to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, from further committing, conducting, or maintaining any such nuisance. . . ."

"§ 3. The action may be brought to trial and tried as in the case of other actions in such District Court, and shall be governed by the practice and procedure applicable to civil actions for injunctions."

"After trial, the court may make its order and judgment permanently enjoining any and all defendants found guilty of violating this Act from further committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated."

"The court may, as in other cases of contempt, at any time punish, by fine of not more than $1,000, or by imprisonment in the county jail for not more than twelve months, any person or persons violating any injunction, temporary or permanent, made or issued pursuant to this Act."

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2.2: Free Press- New York Times Co. v. United States 403 U.S. 713 (1971)

U.S. Supreme Court

New York Times Co. v. United States, 403 U.S. 713 (1971)

New York Times Co. v. United States

No. 1873

Argued June 26, 1971

Decided June 30, 1971*

403 U.S. 713

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Syllabus

The United States, which brought these actions to enjoin publication in the New York Times and in the Washington Post of certain classified material, has not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

No. 1873, 44 F.2d 544, reversed and remanded; No. 1885, ___ U.S.App.D.C. ___, 446 F.2d 1327, affirmed.

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PER CURIAM

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." *Post*, pp. 942, 943.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 372 U. S. 70 (1963); *see also Near v. Minnesota*, 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 402 U. S. 419 (1971). The District Court for the Southern District of New York, in the *New York Times* case, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, in the *Washington Post*case, held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

* Together with No. 1885, *United States v. Washington Post Co. et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed, and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe

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that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for

the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view, it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers, and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. [Footnote 1] They especially feared that the

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new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments, *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.* [Footnote 2]"

(Emphasis added.) The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men

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that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only

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say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law,' and I would seek to persuade the Court that that is true. . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States. [Footnote 3]"

And the Government argues in its brief that, in spite of the First Amendment,

"[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief. [Footnote 4]"

In other words, we are asked to hold that, despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead, it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. [Footnote 5] *See* concurring opinion of MR. JUSTICE DOUGLAS,

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post at 403 U. S. 721-722. To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes — great man and great Chief Justice that he was — when the Court held a man could not be punished for attending a meeting run by Communists.

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free

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assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [Footnote 6]"

[Footnote 1]

In introducing the Bill of Rights in the House of Representatives, Madison said:

"[B]ut I believe that the great mass of the people who opposed [the Constitution] disliked it because it did not contain effectual provisions against the encroachments on particular rights. . . ."

1 Annals of Cong. 433. Congressman Goodhue added:

"[I]t is the wish of many of our constituents that something should be added to the Constitution to secure in a stronger manner their liberties from the inroads of power."

Id. at 426.

[Footnote 2]

The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

"The people shall not be restrained from peaceably assembling and consulting for their common good, nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."

1 Annals of Cong. 434.

[Footnote 3]

Tr. of Oral Arg. 76.

[Footnote 4]

Brief for the United States 13-14.

[Footnote 5]

Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said:

"If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."

1 Annals of Cong. 439.

[Footnote 6]

De Jonge v. Oregon, 299 U. S. 353, 299 U. S. 365.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court, I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that "Congress shall male no law . . . abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press. [Footnote 2/1]

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U.S.C. § 793(e) provides that

"[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined

not more than $10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight, "publish" is specifically mentioned: § 794(b) applies to

"Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense installations.

Section 798, relating to cryptography, applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . or *publishes*" the described material. [Footnote 2/2] (Emphasis added.)

Thus, it is apparent that Congress was capable of, and did, distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the

enemy."

55 Cong.Rec. 1763. During the debates in the Senate, the First Amendment was specifically cited, and that provision was defeated. 55 Cong.Rec. 2167.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. § 793 states in § 1(b) that:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."

64 Stat. 987. Thus, Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." *See Hirabayashi v. United States*, 320 U. S. 81, 320 U. S. 93. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide, therefore, what leveling effect the war power of Congress might have.

These disclosures [Footnote 2/3] may have a serious impact. But that is no basis for sanctioning a previous restraint on

the press. As stated by Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 719-720:

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 402 U. S. 419, "[a]ny prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which, in this case, is alleged to be national security.

Near v. Minnesota, 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression

of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be.*See* T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions, there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 269-270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case, and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota.*

[Footnote 2/1]

See Beauharnais v. Illinois, 343 U. S. 250, 343 U. S. 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth v. United States*, 354 U. S. 476,354 U. S. 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates v. United States*, 354 U. S. 298, 354 U. S. 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 293(concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison v. Louisiana*, 379 U. S. 64, 379 U. S. 80 (my concurring opinion which MR. JUSTICE BLACK joined).

[Footnote 2/2]

These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

[Footnote 2/3]

There are numerous sets of this material in existence, and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start, then, with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining

orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences

may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U. S. 47,249 U. S. 52 (1919), during which times

"[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Near v. Minnesota, 283 U. S. 697, 283 U. S. 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota*, *supra*, at 283 U. S. 713. Thus, only governmental allegation and proof that publication must inevitably, directly,

and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient, for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And, therefore, every restraint issued in this case, whatever its form, has violated the First Amendment — and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

* *Freedman v. Maryland*, 380 U. S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth v. United States*, 354 U. S. 476, 354 U. S. 481 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression, and not the ideas expressed.

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

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative [Footnote 3/1] and Judicial [Footnote 3/2] branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a

President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry — in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And, within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense, the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. [Footnote 3/3] If the Constitution gives the Executive

a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then, under the Constitution, the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But, be that as it may, it is clear to me that it is the constitutional duty of the Executive — as a matter of sovereign prerogative, and not as a matter of law as the courts know law — through the promulgation and enforcement of executive regulations, to protect

the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law, as well as its applicability to the facts proved.

But in the cases before us, we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

[Footnote 3/1]

The President's power to make treaties and to appoint ambassadors is, of course, limited by the requirement of Art. II, § 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

[Footnote 3/2]

See Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U. S. 103; *Hirabayashi v. United States*, 320 U. S. 81; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304; *cf. Mora v. McNamara*, 128 U.S.App.D.C. 297, 387 F.2d 862, *cert. denied*, 389 U. S. 934.

[Footnote 3/3]

"It is quite apparent that, if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty — a refusal the wisdom of which was recognized by the House itself, and has never since been doubted. . . ."

United States v. Curtiss-Wright Corp., 299 U. S. 304, 299 U. S. 320.

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

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints

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enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. [Footnote 4/1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

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The Government's position is simply stated: the responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; [Footnote 4/2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information. At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today, where we hold that the United States has not met its burden, the material remains sealed in court records and it is

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properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests, and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States, and to deny relief on its good faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun, and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful, at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them, or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment, but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in

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1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense. [Footnote 4/3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the

people through some man." 55 Cong.Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper

"should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing."

Id. at 2009. [Footnote 4/4]

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 [Footnote 4/5] makes it a crime to publish certain photographs or drawings of military installations. Section 798, [Footnote 4/6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems

or communication intelligence activities of the United States, as well as any information obtained from communication intelligence operations. [Footnote 4/7] If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States, and must face the consequences if they

publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793(e) [Footnote 4/8] makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because preexisting law provided no

penalty for the unauthorized possessor unless demand for the documents was made. [Footnote 4/9]

"The dangers surrounding the unauthorized possession of such items are self-evident,

and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand."

S.Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States, and their import has been made known at least to counsel for the newspapers involved. In *Gorin v. United States*, 312 U. S. 19, 312 U. S. 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous Court to have "a well understood connotation" — a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness" — and to be "sufficiently definite to apprise the public of prohibited activities"

and to be consonant with due process. 312 U.S. at 312 U. S. 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States. [Footnote 4/10]

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 343 U. S. 585-586 (1952); *see also id.* at 343 U. S. 593-628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the

responsible, as well as the irresponsible, press. I am not, of course, saying that either of these newspapers has yet committed a crime, or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

[Footnote 4/1]

The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease and desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. *See* 29 U.S.C. § 160(c). Similarly, the Federal Trade Commission is empowered to impose cease and desist orders against unfair methods of competition. 15 U.S.C. § 45(b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U. S. 575, 395 U. S. 616-620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. *See Westermann Co. v. Dispatch Co.*, 249 U. S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press, and, when the press is enjoined under the copyright laws, the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

[Footnote 4/2]

The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times*litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

[Footnote 4/3]

"Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment. . . ."

55 Cong.Rec. 2100.

[Footnote 4/4]

Senator Ashurst also urged that

"'freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason."

55 Cong.Rec. 2005.

[Footnote 4/5]

Title 18 U.S.C. § 797 provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[Footnote 4/6]

In relevant part 18 U.S.C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information — "

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or"

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or"

"(3) concerning the communication intelligence activities of the United States or any foreign government; or"

"(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes — "

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[Footnote 4/7]

The purport of 18 U.S.C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that

"[t]his bill makes it a crime to reveal the methods, techniques, and materiel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking."

H.R.Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.* at 2. Existing legislation was deemed inadequate.

"At present, two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers."

Ibid. Section 798 obviously was intended to cover publications by nonemployees of the Government, and to ease the Government's burden in obtaining convictions.*See* H.R.Rep. No. 1895, *supra*, at 2-5. The identical Senate Report, not cited in parallel in the text of this footnote, is S.Rep. No. 111, 81st Cong., 1st Sess. (1949).

[Footnote 4/8]

Section 793(e) of 18 U.S.C. provides that:

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U.S.C. § 793(g), added in 1950 (*see* 64 Stat. 1004; S.Rep. No. 239, pt. 1, 81st Cong., 2d Sess., 9 (1950)), provides that,

"[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

[Footnote 4/9]

The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was, in turn, Title I of the Internal Security Act of 1950. *See* 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows: "

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense,' and not the other items enumerated in the subsection.*The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection."

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized."

S.Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 8-9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that, in prosecuting for communicating or withholding a "document," as contrasted with similar action with respect to "information," the Government need not prove an intent to injure the United States or to benefit a foreign nation, but only willful and knowing conduct. The District Court relied on *Gorin v. United States*, 312 U. S. 19 (1941). But that case arose under other parts of the predecessor to § 793, *see* 312 U.S. at 312 U. S. 21-22 — parts that imposed different intent standards not repeated in § 793(d) or § 793(e). *Cf.* 18 U.S.C. §§ 793(a), (b), and (c). Also, from the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

[Footnote 4/10]

Also relevant is 18 U.S.C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, of any information with respect to the movements of military forces,

"or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy. . . ."

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether, in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper

from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.' " Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases, there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec.Order 10501 (1953), to classify documents and information. *See, e.g.*, 18 U.S.C. § 798; 50 U.S.C. § 783. [Footnote 5/1] Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether, in these particular cases, the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. *See In re Debs*, 158 U. S. 564, 158 U. S. 584 (1895). The Government argues that, in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103 (1948); *Hirabayashi v. United States*, 320 U. S. 81,320 U. S. 93 (1943); *United States v. Curtiss*

Wright Corp., 299 U. S. 304 (1936). [Footnote 5/2] And, in some situations, it may be that, under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if, when the Executive Branch has adequate authority granted by Congress to protect "national security," it can choose, instead, to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the

moment do not justify a basic departure from the principles of our system of government.

In these cases, we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has, on several occasions, given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U.S.C. Title 18, entitled Espionage and Censorship. [Footnote 5/3] In that chapter,

Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

Thus, it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already exiting power of the Government to act. *See Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). It is a

traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime. *See* Z. Chafee & E. Re, Equity 935-954 (5th ed.1967); 1 H. Joyce, Injunctions §§ 580a (1909). Here, there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed, or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage, this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good faith prosecution could have been instituted under any statute could, however, be determined.

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At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U.S.C. § 793(e) that whoever,

"having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U.S.C. § 793(e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793(e). He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history, and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. *But see* 103 Cong.Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. *See* my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful, it is not for this Court

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to redecide those issues — to overrule Congress. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579 (1952).

On at least two occasions, Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917, during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

"During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same."

55 Cong.Rec. 1763. Congress rejected this proposal after war against Germany had been declared, even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead,

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the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957, the United States Commission on Government Security found that

"[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons."

In response to this problem, the Commission proposed that

"Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified."

Report of Commission on Government Security 619-620 (1957). After substantial floor discussion on the proposal, it was rejected. *See* 103 Cong.Rec. 10447-10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case, this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official, nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should

be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

[Footnote 5/1]

See <l=|403 u.s.="" 713fn5="" 3|="">n.3, *infra.*</l=|403>

[Footnote 5/2]

But see Kent v. Dulles, 357 U. S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*,343 U. S. 579 (1952).

[Footnote 5/3]

There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U.S.C. §§ 2161 through 2166, relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U.S.C. § 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U.S.C. § 2274, subsection (a), provides penalties for a person who

"communicates, transmits, or discloses [restricted data] . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation. . . ."

Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation. . . ." Other sections of Title 42 of the United States Code dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U.S.C. §§ 2276, 2277. Title 50 U.S.C.App. § 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and, indeed, Congress, in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U.S.C.App. § 1152(6). Title 50 U.S.C. § 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to

communicate material which has been "classified" by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression that, from the time of *Near v. Minnesota*, 283 U. S. 697 (1931), until recently in *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances — a view I respect, but reject — can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed, and I need not restate them. The prompt

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setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases, and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota.* There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably, such exceptions may be lurking in these cases and, would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication. [Footnote 6/1]

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It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper, and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time, and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not, in fact, jeopardized, much of the material could no doubt have been declassified,

since it spans a period ending in 1968. With such an approach — one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press — the newspapers and Government might well have narrowed

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the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary. To me, it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought — perhaps naively — was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issue. If the action of the judges up to now has been correct, that result is sheer happenstance. [Footnote 6/2]

Our grant of the writ of certiorari before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly, they pointed out that they had been working literally “around the clock,” and simply were unable to review the documents that give rise to these cases and

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were not familiar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN, but I am not prepared to reach the merits. [Footnote 6/3]

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the *status quo* in the *Post* case. I would direct that the District Court, on remand, give priority to the *Times* case to the exclusion of all other business of that court, but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes, but, when judges are pressured, as in these cases, the result is a parody of the judicial function.

[Footnote 6/1]

As noted elsewhere, the Times conducted its analysis of the 47 volumes of Government documents over a period of several months, and did so with a degree of security that a government might envy. Such security was essential, of course, to protect the enterprise from others. Meanwhile, the Times has copyrighted its material, and there were strong intimations in the oral argument that the Times contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically, this would afford it a protection, analogous to prior restraint, against all others — a protection the Times denies the Government of the United States.

[Footnote 6/2]

Interestingly, the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

[Footnote 6/3]

With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co. v. United States*, 193 U. S. 197, 193 U. S. 400-401 (1904):

"Great cases, like hard cases, make bad law. For great cases are called great not by reason of their

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real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. *Compare*

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In re Debs, 158 U. S. 564 (1895), *with Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute — the Espionage Act, 18 U.S.C. § 793(e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. *See Near v. Minnesota*, 283 U. S. 697, 283 U. S. 716 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that, regardless of the contents of the documents, harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession, and that the newspapers received them with knowledge that they had been feloniously acquired. *Cf. Liberty Lobby, Inc. v. Pearson*, 129 U.S.App.D.C. 74, 390 F.2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of —

a. The strong First Amendment policy against prior restraints on publication;

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b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues — as important as any that have arisen during my time on the Court — should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though, in different circumstances, I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that, because of the time elements the Government had not been given an adequate opportunity to present its case

to the District Court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation, the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand — a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the *Times* litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”

10 Annals of Cong. 613 (1800). From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. *See United States v. Curtiss-Wright Corp.*, 299 U. S. 304,299 U. S. 319-321 (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy;

and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.”

1 J. Richardson, Messages and Papers of the Presidents 194-195 (1896).

The power to evaluate the “pernicious influence” of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President’s foreign relations power. Constitutional considerations forbid “a complete abandonment of judicial control.” *Cf. United States v. Reynolds*, 345 U. S. 1,345 U. S. 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned — here, the Secretary of State or the Secretary of Defense — after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. *See id.* at 345 U. S. 8 and n. 20; *Duncan v. Cammell, Laird Co.*, [1942] A.C. 624, 638 (House of Lords).

But, in my judgment, the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions

are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U. S. 103, 333 U. S. 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground, and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And, for the reasons stated above, I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the

restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

* The hearing in the *Post* case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p.m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18, and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting en banc, on June 22. Each court rendered its decision on the following afternoon.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

At this point, the focus is on only the comparatively few documents specified by the Government as critical. So far as the other material — vast in amount — is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago, Mr. Justice Holmes, dissenting in a celebrated case, observed:

"Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure. . . ."

Northen Securities Co. v. United States, 193 U. S. 197, 193 U. S. 400-401 (1904). The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession. Once it had begun publication

of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent, and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court — within a period of less than three weeks from inception until today — have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case, the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the District Court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's

vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs, and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. *See, for example, Near v. Minnesota*, 283 U. S. 697, 283 U. S. 708 (1931), and *Schenck v. United States*, 249 U. S. 47, 249 U. S. 52(1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck*,

"It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

249 U.S. at 249 U. S. 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the

orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that, if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation, and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the *Post* and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean

"the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate. . . ."

I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that, from this examination, I fear that Judge Wilkey's statements have possible foundation. I therefore share

his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom

"the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,"

to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

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2.3: Free Press- Simon and Schuster, Inc. v. Members of N. Y. State Crime Victims Bd. 502 U.S. 105 (1991)

OCTOBER TERM, 1991

SIMON & SCHUSTER, INC. *v.* MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD ET AL.

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

No. 90-1059. Argued October 15, 1991-Decided December 10,1991

Among other things, New York's "Son of Sam" law provides that an "entity" contracting with a person "accused or convicted of a crime" for the production of a book or other work describing the crime must pay to respondent Crime Victims Board any moneys owed to that person under the contract; requires the Board to deposit such funds in an escrow account for payment to any victim who, within five years, obtains a civil judgment against the accused or convicted person and to the criminal's other creditors; and defines "person convicted of a crime" to include "any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted." After it discovered that petitioner publisher had signed an agreement with an author who had contracted with admitted organized crime figure Henry Hill for the production of a book about Hill's life, the Board, *inter alia*, determined that petitioner had violated the Son of Sam law and ordered it to turn over all money payable to Hill. Petitioner then brought suit under 42 U. S. C. § 1983, seeking a declaration that the law violates the First Amendment and an injunction barring the law's enforcement. The District Court found the law to be consistent with the Amendment, and the Court of Appeals affirmed.

Held: The Son of Sam law is inconsistent with the First Amendment.

Pp. 115-123.

(a) Whether the First Amendment "speaker" is considered to be Hill, whose income the New York law places in escrow because of the story he has told, or petitioner, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the law singles out speech on a particular subject for a financial burden that it places on no other speech and no other income and, thus, is presumptively inconsistent with the Amendment. *Leathers* v. *Medlock*, 499 U. S. 439, 447; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230. The fact that the law escrows speechderived income, rather than taxing a percentage of it outright as did the law invalidated in *Arkansas Writers' Project*, cannot serve as the basis for disparate treatment under the Amendment, since both forms of financial burden operate as disincentives to speak. Moreover, the

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Board's assertion that discriminatory financial treatment is suspect only when the legislature intends to suppress certain ideas is incorrect, since this Court has long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights under the Amendment. Furthermore, the Board's claim that the law is permissible under the Amendment because it focuses generally on an "entity" rather than specifically on the *media* falters, first, on semantic grounds, since any entity that enters into a contract with a convicted person to transmit that person's speech becomes by definition a medium of communication, and, second, on constitutional grounds, since the governmental power to impose content-based financial disincentives on speech does not vary with the identity of the speaker. Accordingly, in order to justify the differential treatment imposed by the law, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Id.*, at 231. Pp. 115-118.

(b) The State has a compelling interest in compensating victims from the fruits of crime. Cf. *Caplin* & *Drysdale, Chartered* v. *United States*, 491 U. S. 617, 629. However, contrary to the Board's assertion, the State has little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. The Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of criminals' "storytelling" than from any of their other assets, nor offer any justification for a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims. Cf., *e. g.*, *Arkansas Writers' Project*, *supra*, at 231. Like the

governmental entities in the latter and similar cases, the Board has taken the *effect* of the statute and posited that effect as the State's interest. Pp. 118-121.

(c) The New York law is not narrowly tailored to achieve the State's objective of compensating victims from the profits of crime. The law is significantly overinclusive, since it applies to works on *any* subject provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally, and since its broad definition of "person convicted of a crime" enables the Board to escrow the income of an author who admits in his work to having committed a crime, whether or not he was ever actually accused or convicted. These two provisions combine to encompass a wide range of existing and potential works that do not enable a criminal to profit from his crime while a victim remains uncompensated. Pp. 121-123.

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2.4: Free Press- In Re- Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005)

U.S. Court of Appeals for the District of Columbia Circuit – 397 F.3d 964 (D.C. Cir. 2005)

Argued December 8, 2004
Decided February 15, 2005

Appeals from the United States District Court for the District of Columbia (No. 04mc00407) (No. 04mc00460) (No. 04mc00461).

Floyd Abrams argued the cause for appellants. With him on the briefs was Joel Kurtzberg. Donald J. Mulvihill entered an appearance.

Reid Alan Cox was on the brief for amicus curiae Center for Individual Freedom in support of appellants.

Theodore J. Boutrous, Jr. and Thomas H. Dupree, Jr. were on the brief for amici curiae Magazine Publishers of America, Inc., et al. in support of appellants.

James P. Fleissner, Assistant U.S. Attorney, argued the cause and filed the brief for appellee.

Before: SENTELLE, HENDERSON and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Concurring opinion filed by Circuit Judge SENTELLE.

Concurring opinion filed by Circuit Judge HENDERSON.

Opinion concurring in the judgment filed by Circuit Judge TATEL.

SENTELLE, Circuit Judge.

An investigative reporter for the New York Times; the White House correspondent for the weekly news magazine Time; and Time, Inc., the publisher of Time, appeal from orders of the District Court for the District of Columbia finding all three appellants in civil contempt for refusing to give evidence in response to grand jury subpoenas served by Special Counsel Patrick J. Fitzgerald. Appellants assert that the information concealed by them, specifically the identity of confidential sources, is protected by a reporter's privilege arising from the First Amendment, or failing that, by federal common law privilege. The District Court held that neither the First Amendment nor the federal common law provides protection for journalists' confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court. We further conclude that other assignments of error raised by appellants are without merit. We therefore affirm the decision of the District Court.

According to the briefs and record before us, the controversy giving rise to this litigation began with a political and news media controversy over a sixteen-word sentence in the State of the Union Address of President George W. Bush on January 28, 2003. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The ensuing public controversy focused not on the British source of the alleged information, but rather on the accuracy of the proposition that Saddam Hussein had sought uranium, a key ingredient in the development of nuclear weaponry, from Africa. Many publications on the subject followed. On July 6, 2003, the New York Times published an op-ed piece by former Ambassador Joseph Wilson, in which he claimed to have been sent to Niger in 2002 by the Central Intelligence Agency ("CIA") in response to inquiries from Vice President Cheney to investigate whether Iraq had been seeking to purchase uranium from Niger. Wilson claimed that he had conducted the requested investigation and reported on his return that there was no credible evidence that any such effort had been made.

On July 14, 2003, columnist Robert Novak published a column in the Chicago Sun-Times in which he asserted that the decision to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge," and, most significant to the present litigation, that "two senior administration officials" told him that Wilson's selection was at the suggestion of Wilson's wife, Valerie Plame, whom Novak described as a CIA "operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI.

SUN-TIMES, July 14, 2003, *at* 31. After Novak's column was published, various media accounts reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's selection for the mission to Niger. One such article, published by Time.com on July 17, 2003, was authored in part by appellant Matthew Cooper. That article stated that:

Some government officials have noted to Time in interviews… that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction… [and] have suggested that she was involved in the husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore….

Matthew Cooper et al., *A War on Wilson?*, TIME.COM, *at http:// www.time.com/time/nation/article/0.8599.465270.00.html* (Dec. 13, 2004). Other media accounts reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media*, WASH. POST, Sept. 28, 2003, at Al. The Department of Justice undertook an investigation into whether government employees had violated federal law by the unauthorized disclosure of the identity of a CIA agent. *See, e.g.*, 50 U.S.C. § 421 (criminalizing, *inter alia*, disclosure of the identity of a covert agent by anyone having had authorized access to classified information). As the investigation proceeded, in December of 2003, the Attorney General recused himself from participation and delegated his full authority in the investigation to the Deputy Attorney General as Acting Attorney General. The Deputy, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel and delegated full authority concerning the investigation to him. As part of the ongoing investigation, a grand jury investigation began in January of 2004.

In cooperation with Special Counsel Fitzgerald, the grand jury conducted an extensive investigation. On May 21, 2004, a grand jury subpoena was issued to appellant Matthew Cooper, seeking testimony and documents related to two specific articles dated July 17, 2003, and July 21, 2003, to which Cooper had contributed. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel. Instead, Cooper moved to quash the subpoena on June 3, 2004. On July 6, 2004, the Chief Judge of the United States District Court for the District of Columbia denied Cooper's motion in open court, and confirmed the denial with reasoning set forth in a written order issued on July 20, 2004.

A further grand jury subpoena was issued to Time, Inc., seeking the same documents requested in the subpoena to Cooper. Time also moved to quash its subpoena. On August 6, 2004, the District Court denied Time's motion. Both Cooper and Time refused to comply with the subpoenas despite the District Court's denial of their motions to quash. The District Court thereafter found that Cooper and Time had refused to comply with the subpoenas without just cause and held them in civil contempt of court. After both Cooper and Time had filed appeals, and further negotiations between Special Counsel and the two had proceeded, Cooper agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release. Cooper and Time fulfilled their obligations under the agreement, the Special Counsel moved to vacate the District Court's contempt order, and the notices of appeal were voluntarily dismissed.

On September 13, 2004, the grand jury issued a further subpoena to Cooper seeking " [a]ny and all documents … [relating to] conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame, a/k/a Valerie Wilson, a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." An August 2, 2004 subpoena to Time requested " [a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled `A War on Wilson?' and the July 21, 2003 Time Magazine article entitled, `A Question of Trust.'" Cooper and Time again moved to quash the subpoenas, and on October 7, 2004, the District Court denied the motion. The two refused to comply with the subpoenas, and on October 13, 2004, the District Court held that their refusal was without just cause and held both in contempt.

In the meantime, on August 12 and August 14, grand jury subpoenas were issued to Judith Miller, seeking documents and testimony related to conversations between her and a specified government official "occurring from on or about July 6, 2003, to on or about July 13, 2003, … concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium." Miller refused to comply with the subpoenas and moved to quash them. The District Court denied Miller's motion to quash. Thereafter, the court found that Miller had refused to comply without just cause and held her in civil contempt of court also. She also has appealed.

The appellants have proceeded with common counsel and common briefing in a consolidated proceeding before this court. They assert four theories for reversal. Their first claim is that the First Amendment affords journalists a constitutional right to conceal their confidential sources even against the subpoenas of grand juries. Secondly, they claim that reporters enjoy an evidentiary privilege under the common law to conceal confidential sources. Adjunct to this claim, while denying that the privilege is less than absolute, they argue that if the privilege is in fact qualified, the United States has not overcome the privilege. Thirdly, appellants argue that their due process rights were violated by the Special Counsel's ex parte and in camera submission of evidence to the court to establish that the United States had overcome any qualified privilege. Finally, they argue that the Special Counsel failed to comply with Department of Justice guidelines for the issuance of subpoenas to journalists, and that the failure to comply is an independent ground for reversal of their contempt conviction. Finding no grounds for relief under the First Amendment, due process clause, or Department of Justice guidelines, and persuaded that any common law privilege that exists would be overcome in this case, we affirm the judgment of the District Court for the reasons set out more fully below.

In his opinion below, the Chief District Judge held that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection." *In Re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). Appellants argue that "this proposition of law is flatly contrary to the great weight of authority in this and other circuits." Appellants are wrong. The governing authority in this case, as the District Court correctly held, comes not from this or any other circuit, but the Supreme Court of the United States. In *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar.

Like the present case, *Branzburg* was a consolidated proceeding involving multiple contempt proceedings against news media defendants. The named petitioner, Branzburg, had been held in contempt in two related proceedings, arising from one extended task of investigative journalism. The first arose from an article published by his employer, a daily newspaper, describing his observation of two Kentucky residents synthesizing hashish from marijuana as part of a profitable illegal drug operation. The article included a photograph "of hands working above a laboratory table on … a substance identified … as hashish." 408 U.S. at 667, 92 S. Ct. 2646. A Kentucky grand jury subpoenaed the journalist who "refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana." *Id.* at 668, 92 S. Ct. 2646. Branzburg claimed privilege both under the First Amendment of the United States Constitution and various state statutory and constitutional provisions. He was held in contempt and the proceeding eventually made its way to the Supreme Court.

The second case involving petitioner Branzburg arose out of a later article published by the same newspaper describing the use of drugs in Frankfort, Kentucky. According to the article, this publication was the product of two weeks spent interviewing drug users in the area. The article further reported that its author had seen some of his sources smoking marijuana. The article related numerous conversations with and observations of unnamed drug users. Branzburg was again subpoenaed to appear before a Kentucky grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," *id.* at 669, 92 S. Ct. 2646 (internal quotation marks omitted). Branzburg moved to quash the subpoena. The motion was denied. The journalist sought the protection of the Kentucky Court of Appeals by way of mandamus and prohibition, claiming "that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given him in confidence, his effectiveness as a reporter would be greatly damaged." *Id.* at 670, 92 S. Ct. 2646. The Kentucky courts rejected Branzburg's claim of a First Amendment privilege. Again, he petitioned for certiorari in the Supreme Court.

The consolidated petitions in *Branzburg* also included *In re Pappas*. Petitioner Pappas was a television newsman-photographer for a Massachusetts television station. On July 30, 1970, during a time of civil unrest in New Bedford, Massachusetts, he gained entrance to the headquarters of the Black Panther Party, upon his agreement not to disclose anything he saw or heard inside the headquarters. Subsequently, he was subpoenaed to appear before a Massachusetts grand jury. Although he appeared and answered other questions, he refused to answer any questions about what had taken place inside the Black Panther headquarters, "claiming that the First Amendment afforded him a privilege to protect confidential informants and their information." *Id.* at 673, 92 S. Ct. 2646. The Massachusetts trial court denied his motion to quash made on First Amendment and other grounds and ruled that the journalist "had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed." *Id.* Like Branzburg, Pappas petitioned for certiorari to the United States Supreme Court.

In the final petition consolidated in the *Branzburg* proceedings, the Court considered the petition for certiorari of the United States from a decision of the Ninth Circuit Court of Appeals, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), in which the circuit

had recognized a qualified testimonial privilege for newsmen arising from the First Amendment and allowing a reporter claiming protection under the privilege to refuse to testify before a grand jury investigating allegations of violations of numerous criminal statutes by the Black Panther Party in California. The reporter in *Caldwell* had engaged in investigative journalism directed toward the Black Panthers at a time when they were suspected of such crimes as making threats against the President of the United States and a possible conspiracy to assassinate the President, as well as interstate travel to incite rioting and the commission of mail frauds and swindles. He claimed to have obtained information from confidential informants.

As can be seen from the account of the underlying facts in *Branzburg*, there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today. Each of the reporters in *Branzburg*claimed to have received communications from sources in confidence, just as the journalists before us claimed to have done. At least one of the petitioners in *Branzburg* had witnessed the commission of crimes. On the record before us, there is at least sufficient allegation to warrant grand jury inquiry that one or both journalists received information concerning the identity of a covert operative of the United States from government employees acting in violation of the law by making the disclosure. Each petitioner in *Branzburg* and each journalist before us claimed or claims the protection of a First Amendment reporter's privilege. The Supreme Court in no uncertain terms rejected the existence of such a privilege. As we said at the outset of this discussion, the Supreme Court has already decided the First Amendment issue before us today.

In rejecting the claim of privilege, the Supreme Court made its reasoning transparent and forceful. The High Court recognized that "the grand jury's authority to subpoena witnesses is not only historic … but essential to its task." 408 U.S. at 688, 92 S. Ct. 2646 (citation omitted). The grand juries and the courts operate under the "longstanding principle that `the public has a right to every man's evidence,' except for those persons protected by constitutional, common law, or statutory privilege." *Id.* (citations and internal punctuation omitted). The Court then noted that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination." *Id.* at 689-90, 92 S. Ct. 2646. The Court then expressly declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690, 92 S. Ct. 2646. In language as relevant to the alleged illegal disclosure of the identity of covert agents as it was to the alleged illegal processing of hashish, the Court stated that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about a crime than to do something about it." *Id.* at 692, 92 S. Ct. 2646.

Lest there be any mistake as to the breadth of the rejection of the claimed First Amendment privilege, the High Court went on to recognize that "there remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." *Id.* at 693, 92 S. Ct. 2646. As to this category of informants, the Court was equally adamant in rejecting the claim of First Amendment privilege:

[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695, 92 S. Ct. 2646.

The *Branzburg* Court further supported the rejection of this claimed privilege by the commonsense observation that "it is obvious that agreements to conceal information relevant to the commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696, 92 S. Ct. 2646. While the Court recognized the right of the press to abide by its agreements not to publish information that it has, the Court stated unequivocally that "the right to withhold news is not equivalent to a First Amendment exemption from an ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function." *Id.* at 697, 92 S. Ct. 2646.

We have pressed appellants for some distinction between the facts before the Supreme Court in *Branzburg* and those before us today. They have offered none, nor have we independently found any. Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.

Despite the absolute and unreversed answer to the question of constitutional privilege by the Supreme Court in *Branzburg*, appellants nonetheless persist in arguing that the District Court erred in concluding that journalists subpoenaed to reveal their

confidential sources before federal grand juries enjoy no First Amendment protection. They base this argument on the concurring opinion of Justice Powell in *Branzburg* and a case from this circuit, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). These authorities, either separately or together, provide no support for the existence of such a privilege protecting reporters subpoenaed to a grand jury. Appellants' argument concerning Justice Powell's concurrence begins with the fact that the decision of the Supreme Court was reached by a 5-4 divided Court. Thus, each of the justices joining in the result was essential to the result. Therefore, appellants argue, it is the opinion of the least encompassing justice which determines the precedent set by the decision rather than the decision which appellants style a "plurality" opinion authored by Justice White. In support of this proposition, they advance an argument that first admits that when the opinion of an individual justice is not needed for a majority his separate opinion is not a gloss giving authoritative definition to the majority opinion in which he did not join, but rather is no more than his separate thoughts, and "the meaning of a majority opinion is to be found within the opinion itself." *McKoy v. North Carolina*, 494 U.S. 433, 462 n. 3, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Blackmun, J., concurring). But, appellants argue, when the individual justice is needed to constitute the majority, "the opinion is not a majority except to the extent that it agrees with his views. What he writes is not a `gloss' but the least common denominator." That is to say, the separate opinion "cannot add to what the majority opinion holds, binding the other four justices to say what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority…." *Id.* at 462 n. 3 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

Without attempting to resolve any dispute or difference that may exist between Justice Blackmun and the three dissenting justices in *McKoy*, even if we accept Justice Scalia's analysis at full value, it does not help appellants in this case. Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority. He wrote separately "to emphasize" what seemed to him "to be the limited nature of the Court's holding." 408 U.S. at 709, 92 S. Ct. 2646 (Powell, J., concurring). Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.

Nonetheless, appellants urge that Justice Powell must have been contemplating the creation or recognition of some further sort of First Amendment privilege for reporters asserting confidential sources, else why would he have bothered writing? To that, the United States replies that by its terms Justice Powell's opinion recognizes only that

if the newsman is called upon to give information bearing only on a remote and tenuous relationship to the subject investigation, of if he has some other reason to believe that his testimony implicates confidential source relationships *without a legitimate need of law enforcement*, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710, 92 S. Ct. 2646 (emphasis added).

Therefore, the United States contends, Justice Powell, who expressed no disagreement with the majority about the existence of a constitutional privilege, only emphasized that there would be First Amendment protection in cases of bad faith investigations. Appellants counter that Justice Powell could not have meant what the United States argues, as this would have given reporters no more protection than other citizens. However, they never make it clear why they are convinced that Justice Powell must have intended to give reporters more protection than other citizens. The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest. *Cf. Branzburg* at 690, 92 S. Ct. 2646 ("the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.").

In any event, whatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case. As we noted above, there is no factual difference between *Branzburg*and the present case. If Justice Powell in any way meant to afford more protection than was afforded by the rest of the majority, that protection cannot possibly extend to appellants as *Branzburg* is directly on point and reached a result in which Justice Powell joined, rejecting the applicability of constitutional privilege.

Zerilli cannot possibly help appellants, although they assert that *Zerilli*, citing Justice Powell's "deciding vote" in *Branzburg*, recognized, at least in dicta, a reporter's privilege in civil cases and held that *Branzburg* was not controlling as to that issue. Indeed, the *Zerilli* Court expressly distinguished its case from *Branzburg*. "Although *Branzburg* may limit the scope of a reporter's First

Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective law enforcement is absent, that case is not controlling." 656 F.2d at 705. *Zerilli* has no force in the present case. Even if *Zerilli* states the law applicable to civil cases, this is not a civil case. *Zerilli* could not subtract from the Supreme Court's holding in *Branzburg*. *Zerilli*, along with several other lower court decisions cited by appellants, may recognize or at least suggest the possibility of privileges under various circumstances. None of them can change the law applicable to grand juries as set forth in *Branzburg*. As the Supreme Court has told us:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). The Supreme Court has not overruled *Branzburg*.

Appellants argue that even if there is no First Amendment privilege protecting their confidential source information, we should recognize a privilege under federal common law, arguing that regardless of whether a federal common law privilege protecting reporters existed in 1972 when *Branzburg* was decided, in the intervening years much has changed. While appellants argue for an absolute privilege under the common law, they wisely recognize the possibility that a court not recognizing such an absolute privilege might nonetheless find a qualified privilege. They therefore also argue that if there is a qualified privilege, then the government has not overcome that qualified privilege. The Court is not of one mind on the existence of a common law privilege. Judge Sentelle would hold that there is no such common law privilege for reasons set forth in a separate opinion. Judge Tatel would hold that there is such a common law privilege. Judge Henderson believes that we need not, and therefore should not, reach that question. However, all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing. All further believe, for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome. Therefore, the common law privilege, even if one exists, does not warrant reversal.

While appellants insist that their privilege is absolute, they assert a secondary line of argument that if their privilege is conditional, then their due process rights have been violated by the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions in support of the enforcement of the subpoenas. This argument is without merit. As appellants themselves admit in their brief, this circuit has recognized that "a district court can ensure that [grand jury] secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings." *In re Grand Jury*, 121 F.3d 729, 757 (D.C. Cir. 1997). Indeed, the rule of grand jury secrecy is so well established that we have noted that " [t]here is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm." *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (collecting authorities).

As the Supreme Court has reminded us on occasion, "the grand jury is an institution separate from the courts." *United States v. Williams*, 504 U.S. 36, 47, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992). The function of that separate institution is to "serv [e] as a kind of buffer or referee between the government and the people." *Id.* The function of the grand jury "depends on `maintaining the secrecy of the grand jury proceedings in the federal courts.'" *In re Sealed Case*, 199 F.3d at 526 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958)). The authorities collected in *In re Sealed Case* recite the broad variety of circumstances in which the courts have upheld this grand jury secrecy, a secrecy that has been the persistent rule for grand jury proceedings for at least four hundred years. *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218 n. 9, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.").

In the *Douglas Oil* decision, the Supreme Court catalogs multiple reasons for preserving the ancient secrecy of the grand jury:

(1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

In re North (Omnibus Order), 16 F.3d 1234, 1242 (D.C. Cir., Spec.Div., 1994) (quoting *Douglas Oil Co.*, 441 U.S. at 218-19, 99 S. Ct. 1667).

Appellants have offered nothing to take the present grand jury investigation outside the general rule, let alone elevate their objections to constitutional due process status. Indeed, appellants' argument is principally built around a case from another circuit never authoritative here, no longer authoritative in the circuit of its origin, and distinguishable on its facts from the beginning. In *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972), the court ruled that a defendant who had been held in contempt for refusing to furnish finger and palm print exemplars to a federal grand jury was deprived of her due process rights when the district court refused to let her inspect an ex parte government affidavit upon which the court had determined that the grand jury's request was reasonable. The Ninth Circuit itself has since declared that "to the extent that our decision in *United States v. Dinsio*… may be considered to support the witness in his refusal to cooperate, it has been superseded by *United States v. Mara* [410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973)], and *United States v. Dionisio*, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973)." *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975). The Ninth Circuit went on to say "nothing in the law of this circuit now requires a court to interrupt a grand jury while a recalcitrant witness produces a series of mini trials challenging the reasonableness of the government's efforts to obtain fingerprint, voice, or handwriting exemplars or the relevance of such exemplars to the government's case." *Id.*

Similarly, *Dinsio* was never the law of this circuit, just as it is no longer the law of the Ninth Circuit, and nothing in the law of the District of Columbia Circuit requires or has ever required a district court to interrupt the grand jury while a recalcitrant witness enjoys a series of mini trials over his access to materials cloaked by grand jury secrecy.

Assuming for the sake of this case that the general rule of grand jury secrecy is not sufficient to justify the District Court's use of *in camera* and *ex parte* proceedings, we further note that we have approved the use of such a procedure in other cases raising privilege claims. In *In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998), a case, like this one, involving the use of *in camera* and *ex parte* proceedings in the context of a Rule 6(e) motion by the government, we upheld their use, and in so doing, relied, at least in part, on precedent established in privilege analysis. We observed there that "courts often use *in camera, ex parte* proceedings to determine the propriety of a crime fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *Id.* at 1075 (citing *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253, 117 S. Ct. 2412, 138 L. Ed. 2d 177 (1997)). Having previously noted the propriety of the procedures to protect the well-established attorney-client privilege, we are persuaded that a similar protection of grand jury secrecy is appropriate to protect whatever privilege, if any, may exist between a reporter and a confidential source.

We affirm the District Court's ruling on the maintenance of the seal of grand jury secrecy.

In their final argument for reversal of the District Court's contempt finding, appellants contend that the Special Counsel did not comply with the Department of Justice guidelines for issuing subpoenas to news media and that such failure provides an independent basis for reversal. The District Court expressed its doubt that the DOJ guidelines were enforceable, but found that even if they were, Special Counsel had fully complied with the guidelines. Because we conclude that the guidelines create no enforceable right, we need not reach the question of the Special Counsel's compliance.

The guidelines in question are set forth in 28 C.F.R. § 50.10 and the United States Attorney's Manual, § 9-2.161. Those guidelines provide that subpoenas for testimony by news media must be approved by the Attorney General, a requirement not pertinent in the present case as the Special Counsel had received delegation of all the Attorney General's authority, and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation-particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." 28 C.F.R. § 50.10(f) (1).

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain the desired information from alternative sources. *Id.* at §§ 50.10(b), 50.10(f) (3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. *Id.* at § 50.10(f) (6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." *Id.* at § 50.10(f) (4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media. *Id.* at § 50.10(c).

However, as the District Court correctly observed, the guidelines expressly state that they do "not create or recognize any legally enforceable right in any person." *Id.* at § 50.10(n). This reservation has been upheld by several federal appellate and district courts. *See In re Special Proceedings*, 373 F.3d 37, 44 n. 3 (1st Cir. 2004) (noting that DOJ guidelines state that they do not create legally enforceable rights); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (D.Ark.1996) (declining to quash subpoena based on failure to comply with DOJ regulations, on ground that regulations, by their own terms, confer no rights on media witnesses). *See also In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994) (holding that special prosecutor's failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash). The guidelines, not required by any constitutional or statutory provision, *see In re Special Proceedings*, 373 F.3d at 44 n. 3, exist to guide the Department's exercise of its discretion in determining whether and when to seek the issuance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel. *See In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify) (citing *United States v. Caceres*, 440 U.S. 741, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979) (exclusionary rule not applicable to evidence obtained in violation of internal IRS regulations governing electronic surveillance)); *In re Grand Jury Proceedings No. 92-4*, 42 F.3d at 880 (following *In re Shain*, 978 F.2d at 854).

Appellants rely on *Morton v. Ruiz*, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). In that case, the Supreme Court stated that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* at 235, 94 S. Ct. 1055.

Ruiz, however, is distinguishable. Regulations considered by the Court in that case required the publication of directives that "inform the public of privileges and benefits available and of eligibility requirements." *Id.* (quotation marks omitted). The Supreme Court found that the publication requirement was intended to benefit potential beneficiaries and therefore invalidated a Bureau of Indian Affairs attempt to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement. This reasoning has no applicability to the guidelines before us.

It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive's exercise of that function. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464-65, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996). Federal prosecutors have "broad discretion to enforce the Nation's criminal laws." *Id.* at 464, 116 S. Ct. 1480 (internal punctuation and citations omitted). The prosecutor's discretion arises from their designation "as the President's delegates to help him discharge his constitutional responsibility to `take care that the laws be faithfully executed.'" *Id.* (quoting U.S. CONST. art. II, § 3). Given the nature of the guidelines themselves, and the function they govern, we conclude that the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors. We therefore need not reach the question of the Special Counsel's compliance with the guidelines, and again we affirm the decision of the District Court.

For the reasons set forth above, the judgment of the District Court is affirmed.

SENTELLE, Circuit Judge, concurring.

As noted in the opinion of the court, I write separately to express my differing basis for affirming the District Court on the common law privilege issue. I would hold that reporters refusing to testify before grand juries as to their "confidential sources" enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens. While I understand, and do not actually disagree with, the conclusion of my colleagues that any such privilege enjoyed by the reporters has been overcome by the showing of the United States, and that we therefore need not determine whether such privilege exists, I find this ordering of issues a bit disturbing. To me, the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it. While I understand Judge Henderson's theory that she cannot

support a privilege afforded by the common law which would not be overcome by the quantum of proof offered by the government, I think it more logical to not reach the quantum question in the absence of a determination as to the existence of the privilege than to proceed the other way around.[1] That said, I fully join the conclusion that we should affirm the District Court's decision to hold the appellants in contempt, unswayed by their claim of protection of common law privilege. I write separately only to explain my reasons for rejecting the theory that such a privilege is known to the common law.

I base my rejection of the common law privilege theory on foundations of precedent, policy, and separation of powers. As to precedent, I find *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), to be as dispositive of the question of common law privilege as it is of a First Amendment privilege. While *Branzburg* generally is cited for its constitutional implications, the *Branzburg* Court repeatedly discussed the privilege question in common law terms as well as constitutional. Indeed, the majority opinion by Justice White includes the phrase "common law" no fewer than eight times. More significant than the fact that the Court frequently spoke of the common law is what the Court had to say about it: "at common law, courts consistently refuse to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Id.* at 685, 92 S. Ct. 2646 (collecting cases).

At page 688, 92 S. Ct. 2646, the Court continued, "although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that `the public … has a right to every man's evidence,' except for those persons protected by a constitutional, *common law*, or statutory privilege … is particularly applicable to grand jury proceedings." (emphasis added) (citations omitted). Significantly, the Court made this statement in the course of holding the journalists litigating before it unprotected by privilege against contempt citations. Granted, the Court expressly held that it was not about to create a new "constitutional" privilege. But in the same paragraph with that rejection it expressly discusses the possible protection of common law and in the end reaches a result that leaves the reporters unprotected. I think it therefore indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment. Especially is this so when we consider that it makes little sense to assume that the Court first reached out to take a constitutional question it would not have needed to answer had there been such a common law privilege, and then proceeded to answer that question in such a fashion as to reach a result upholding contempt citations and reversing vacation of such citations.[2]

Because the Supreme Court rejected the common law privilege, I think it would be at least presumptuous if not overreaching for us to now adopt the privilege. As the opinion of the court notes, "the Supreme Court has told us:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Maj. Op. at 972 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).

The Supreme Court has rejected a common law privilege for reporters subpoenaed to give evidence to grand juries. In my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*.Although the appellants argue that other changes in the law since *Branzburg*should lead to an opposite result, I think that argument should appropriately be made to the Supreme Court, not the lower courts.[3]

Even if appellants are correct that we would have the power to adopt such a privilege in the face of the *Branzburg* precedent, I nonetheless would not accept that invitation. Appellants' argument for our authority to adopt the new privilege begins with the Federal Rules of Evidence. Rule 501, enacted by Congress in the Federal Rules of Evidence in 1975, three years after *Branzburg*, rejected an enumeration of specific federal privileges and provided that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Although the rules became effective after *Branzburg*, Rule 501 does not effect any change in the authority of federal courts to adopt evidentiary privileges. Before the enactment of the Federal Rules of Evidence, the authority of the federal courts to adopt common law privileges was governed by case law. The relevant case law provided for precisely the same authority as Congress enacted in the rules. Indeed, the language of the rule is drawn directly from case law governing at the time of *Branzburg*. The Supreme Court expressly held in *Wolfle v. United States*, 291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (1934), that

the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules enforced at the time of the admission into the union of the particular state where the trial takes place, but are *governed by*

common law principles as interpreted and applied by the federal courts in the light of reason and experience.

291 U.S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617 (1934) (citing *Funk v. United States*, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933)) (emphasis added). Given the venerable origins of the language used in Rule 501, it cannot be said that the courts have more power to adopt privileges today than at the time of *Branzburg.* The power is precisely the same. Thus, the enactment of Rule 501 cannot by itself work any change in the law which should empower us to depart from the Supreme Court's clear precedent in *Branzburg.*

Appellants persist, however, that the state of the common law has changed sufficiently to warrant a new approach. By appellants' count, at the time of the *Branzburg* decision, only seventeen states had enacted what appellants refer to as "shield laws" to protect journalists from forced disclosure of confidential sources or newsgathering materials, while today, thirty-one states (plus the District of Columbia) have such statutes.[4] Nonetheless, I think it remains the prerogative of the Supreme Court rather than inferior federal tribunals to determine whether these changes are sufficient to warrant an overruling of the Court's rejection of such a common law privilege in *Branzburg.*

Furthermore, even if we are authorized to make that decision, reasons of policy and separation of powers counsel against our exercising that authority. While I concede that the adoption of the "shield" by legislation rather than judicial fiat does not prevent the change being considered by the courts in assessing the common law, I find the adoption of the privilege by the legislatures of the states instructive as to how the federal government should proceed, if at all, to adopt the privilege. The statutes differ greatly as to the scope of the privilege, and as to the identity of persons entitled to the protection of the privilege. We have alluded in the majority opinion to the differing decisions of courts as to civil, criminal, and grand jury proceedings. There is also a more fundamental policy question involved in the crafting of such a privilege.

The Supreme Court itself in *Branzburg* noted the difficult and vexing nature of this question, observing that applying such privilege would make it

necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. at 704, 92 S. Ct. 2646. The Supreme Court went on to observe that "freedom of the press is a `fundamental personal right … not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets…. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452, 58 S. Ct. 666, 82 L. Ed. 949 (1938)). Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

The state legislatures have dealt with this vexing question of entitlement to the privilege in a variety of ways. Some are quite restrictive. Alabama limits its protection to "person [s] engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity." ALA. CODE § 12-21-142. Alaska's statutes protect only the "reporter," a category limited to "person [s] regularly engaged in the business of collecting or writing news for publication or presentation to the public, through a news organization." ALASKA STAT. § 09.25.300. The statutory privilege in Arizona protects "a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper or radio or television station…." Ariz. Rev. Stat. § 12-2237. Arkansas's legislature has declared the privilege applicable to "any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station…." Ark. Code Ann. § 16-85-510. Delaware is perhaps the most specific, protecting a "reporter," which

means any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

DEL. CODE ANN. tit. 10 § 4320. Presumably, states such as these would provide the privilege only to the "established" press.

Others are quite inclusive. The Nebraska legislature, for example, has declared:

(1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited, directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed.

NEB. REV. STAT. § 20-144. To that end, it protects any "medium of communication" which term "shall include, *but not be limited to*, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." *Id.* at § 20-145(2) (emphasis added).

In defining the persons protected by that privilege, Nebraska tells us that "Person shall mean any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country." *Id.* at 20-145(7). Presumably, then, Nebraska, perhaps more in keeping with the spirit of the recent revolutionaries who gave us the First Amendment, protects the pamphleteer at the rented printer, and the blogger at the PC, as well as the giant corporation with its New York publishing house.

The variety of legislative choices among the states only serves to heighten the concern expressed by the majority in *Branzburg*. *See* 408 U.S. at 704, 92 S. Ct. 2646. This concern is reinforced by examination of the *Jaffee* decision, upon which appellants rely. In *Jaffee*, the Supreme Court extended a federal privilege "to confidential communications made to licensed social workers in the course of psychotherapy." 518 U.S. at 15, 116 S. Ct. 1923. There is little definitional problem with the application of this privilege. The court need only ask: Does this "social worker" have a license? If the answer is "yes," then the privilege applies; if it's "no," the privilege does not. If the courts extend the privilege only to a defined group of reporters, are we in danger of creating a "licensed" or "established" press? If we do so, have we run afoul of the breadth of the freedom of the press, that "fundamental personal right" for which the Court in *Branzburg* expressed its concern? 408 U.S. at 704, 92 S. Ct. 2646. Conversely, if we extend that privilege to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?

Nor does the identity of the protected persons constitute the only difficult policy decision. *Branzburg* enumerates several concerns. For example, does "the public interest and possible future news about crime from undisclosed, unverified sources … take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future"? *Id.* at 695, 92 S. Ct. 2646. Do "agreements to conceal information relevant to the commission of crime avail little to recommend them from the standpoint of public policy"? *Id.* at 696, 92 S. Ct. 2646. What are we to do with the historic common law recognition of "a duty to raise the `hue and cry' and report felonies to the authorities"? *Id.* (*see also*authorities collected in *id.* at 696 n. 34, 92 S. Ct. 2646). Should we be creating immunity from prosecution for "misprision" of a felony-that is, the concealment of a felony? *Id.* at 696, 92 S. Ct. 2646.

Should the privilege be absolute or limited? If limited, how limited? Without attempting to catalog, I note that the state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication? Here, I think the experience of the states is most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts.

For all the reasons set forth above, I would hold that there is no common law privilege protecting reporters or any other news media personnel, no matter how defined, from the reach of grand jury subpoenas on claim of confidentiality.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring.

I write separately to emphasize that adherence to the principle of judicial restraint — patience in judicial decision-making —would produce a better result in II.B of the majority opinion. Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

In our circuit it is a venerable practice, and one frequently observed, to assume *arguendo* the answer to one question — *e.g.*, whether to recognize a federal common-law reporter's privilege — in order to resolve a given case by answering another and equally dispositive one — *e.g.*, whether *any* privilege would protect these reporters.[1] Although both of my colleagues question the logic of this approach here, it is a mode of decision-making they themselves have often used.[2] In this case, however, they employ two divergent forms of "wide-angle adjudication." *See* Harry T. Edwards, *The Role of the Judge in Modern Society: Some Reflections on Current Practices in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 414 (1983-84). Judge Sentelle would hold that a reporter enjoys no federal common-law privilege to refuse to provide a bona fide grand jury with relevant documents and testimony while Judge Tatel would fix the contours of a qualified reporter's privilege by using a novel multi-factor balancing test only to conclude that it helps these reporters not at all.[3]

While I am convinced that we need not, and therefore should not, go further than to conclude, as did the district court, *see* Appendix 35-36, 275, that the Special Counsel's showing decides the case, I feel compelled to comment briefly on my colleagues' opposing conclusions if only to make clear why I think it unwise to advance either of them. I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question we now avoid. *Branzburg v. Hayes* addressed only "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the *First Amendment*" and "h [e]ld that *it* does not." 408 U.S. 665, 667, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) (emphases added). The boundaries of constitutional law and common law do not necessarily coincide, however, and while we are unquestionably bound by *Branzburg's* rejection of a reporter's privilege rooted in the First Amendment, we are not bound by *Branzburg's* commentary on the state of the common law in 1972. Federal Rule of Evidence 501, which came into being nearly three years after *Branzburg*, authorizes federal courts to develop testimonial privileges "in the light of reason and experience," allowing for the often evolving state of the commonlaw. *See* FED. R. EVID. 501; *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."); *see id.* ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges."). Judge Sentelle's view also discounts the fact that, even as they rejected a reporter's First Amendment right to withhold testimony from a bona fide grand jury, both the *Branzburg* majority opinion as well as Justice Powell's separate concurrence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government.[4]

At the same time, I am far less eager a federal common-law pioneer than Judge Tatel as I find less comfort than he in riding *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), into the testimonial privilege frontier. Just as Rule 501 imposes no "freeze" on the development of the common law, *see Univ. of Penn. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990); *Trammel*, 445 U.S. at 47, 100 S. Ct. 906, it likewise does not authorize federal courts to mint testimonial privileges for any group — including the "journalistic class," as Judge Sentelle dubs it, Maj. Op. at 972 — that demands one. The Supreme Court has warned that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *see Branzburg*, 408 U.S. at 690, 92 S. Ct. 2646; *see also Jaffee*, 518 U.S. at 21, 116 S. Ct. 1923 (Scalia, J., dissenting). Accordingly, we should proceed as cautiously as possible "when erecting barriers between us and the truth," *id.*, recognizing that the Legislature remains the more appropriate institution to reconcile the competing interests — prosecuting criminal acts versus constricting the flow of information to the public — that inform any reporter's privilege to withhold relevant information from a bona fide grand jury. *See Univ. of Penn.*, 493 U.S. at 189, 110 S. Ct. 577.

Because *Jaffee* sits rather awkwardly within a jurisprudence marked by a fairly uniform disinclination to announce new privileges[5] or even expand existing ones,[6] and even though it enjoyed the support of an overwhelming majority, I am hesitant to apply its

methodology to a case that does not require us to do so. While it would not be the first of its kind, *see Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) ("*Lemon* test"); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S. Ct. 2301, 2327 n. 1, 159 L. Ed. 2d 98 (2004) ("We have selectively invoked particular tests, such as the `*Lemon* test,' with predictable outcomes." (internal citation omitted)) (Thomas, J., concurring in judgment), the type of multi-factor balancing test Judge Tatel proposes seems, at least to me, to lack analytical rigor because its application to this case is foreordained. Indeed, I am not convinced that a balancing test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof is either useful or appropriate. While Judge Tatel makes the centerpiece of his test the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," *see* Tatel Op. at 998, this court (in the civil context),[7] the United States Department of Justice[8] and the lone district court that has recognized a federal common-law reporter's privilege in the grand jury context[9] have declined to consider either of these factors in deciding whether to recognize a reporter's exemption from compulsory process.[10] There is a good reason for this: I suspect that balancing "harm" against "news value" may prove unproductive because in most of the projected scenarios — leaks of information involving, for example, military operations, national security, policy choices or political adversaries — the two interests overlap. Furthermore, *Branzburg* warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes. *See* 408 U.S. at 706, 92 S. Ct. 2646 ("By requiring testimony from a reporter in investigations involving some crimes but not in others, [the courts] would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths."). And any evaluation of the importance of newsgathering keyed to its perceived "benefit" to the public, Tatel Op. at 997; *see id.* at 1001 ("beneficial newsgathering"), seems antithetical to our nation's abiding commitment to the uninhibited trade in ideas. *See, e.g., Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 790-91, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("The constitutional right of free expression is … designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."); *McConnell v. FEC*, 251 F. Supp. 2d 176, 360 (D.D.C. 2003) (" [T]he First Amendment delegates to the populace at large the responsibility of conducting an `uninhibited, robust, and wide-open' debate." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964))); *cf. Gertz v. Welch, Inc.*, 418 U.S. 323, 346, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Moreover, to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice. On this score, Judge Tatel levels the identical charge against my approach, *see* Tatel Op. at 990, but I fail to see how declining to decide whether a reporter's privilege exists or to define its contours could confine a future panel.

For the foregoing reasons, I am convinced that the court would chart the best course by charting the narrowest one and, accordingly, concur only in the judgment with respect to II.B of the majority opinion. In all other respects, I fully concur.

TATEL, Circuit Judge, concurring in the judgment.

This case involves a clash between two truth-seeking institutions: the grand jury and the press. On the one hand, the grand jury, a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, *see United States v. Calandra*, 414 U.S. 338, 342-43, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), holds "broad powers" to collect evidence through judicially enforceable subpoenas. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423-24, 103 S. Ct. 3133, 77 L. Ed. 2d 743 (1983). "Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424, 103 S. Ct. 3133. On the other hand, the press, shielded by the First Amendment, "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). Using language we have quoted with approval, *see Carey v. Hume*, 492 F.2d 631, 634-35 (D.C. Cir. 1974), the Second Circuit aptly described this conflict between press freedom and the rule of law: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

Because I agree that the balance in this case, which involves the alleged exposure of a covert agent, favors compelling the reporters' testimony, I join the judgment of the court. I write separately, however, because I find *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), more ambiguous than do my colleagues and because I believe that the consensus of forty-nine states plus the District of Columbia — and even the Department of Justice — would require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.

Although I join the court's rejection of appellants' First Amendment argument, I am uncertain that *Branzburg* offers "no support" for a constitutional reporter privilege in the grand jury context. *See* majority op. at 970-71. To be sure, *Branzburg* upheld the enforcement of subpoenas seeking confidential source information, including notes and testimony about interviews and observations at a militant group's headquarters. *See* 408 U.S. at 672-77, 92 S. Ct. 2646. Yet even the *Branzburg*majority declared that "news gathering is not without its First Amendment protections," *id.* at 707, 92 S. Ct. 2646, a phrase we have interpreted (albeit in dictum) to "indicate [ ] that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). *Branzburg*'s caveat, placed in a discussion of " [o]fficial harassment of the press" and "grand jury investigations … instituted or conducted other than in good faith," *Branzburg*, 408 U.S. at 707-08, 92 S. Ct. 2646, seems to refer only to journalists' power to quash "unreasonable or oppressive" subpoenas, *see* Fed. R. Crim. P. 17(c) (2). But given that any witness — journalist or otherwise — may challenge such a subpoena, the majority must have meant, at the very least, that the First Amendment demands a broader notion of "harassment" for journalists than for other witnesses. Reinforcing that view, the majority added, "We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708, 92 S. Ct. 2646. That prediction, too, would appear meaningless if no First Amendment safeguards existed for subpoenaed reporters.

Then there is Justice Powell's "enigmatic concurring opinion." *Id.* at 725, 92 S. Ct. 2686 (Stewart, J., dissenting). Though providing the majority's essential fifth vote, he wrote separately to outline a "case-by-case" approach, *see id.* at 710, 92 S. Ct. 2686 (Powell, J., concurring), that fits uncomfortably, to say the least, with the majority's categorical rejection of the reporters' claims. Emphasizing "the limited nature of the Court's holding," *id.* at 709, 92 S. Ct. 2686, he wrote:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710, 92 S. Ct. 2686. "In short," Justice Powell concluded, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* Even more than the majority opinion, this language places limits on grand jury authority to demand information about source identities — though, again, the precise extent of those limits seems unclear.

Given *Branzburg*'s internal confusion and the "obvious First Amendment problems" involved in " [c]ompelling a reporter to disclose the identity of a confidential source," *Zerilli*, 656 F.2d at 710, it is hardly surprising that lower courts have, as Chief Judge Hogan put it, "chipped away at the holding of *Branzburg*," finding constitutional protections for reporters in "various factual scenarios different than those presented in *Branzburg*." *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). We ourselves have affirmed the denial of a criminal defense subpoena on grounds that the defendant "failed to carry his burden" of "demonstrat [ing] that the reporters' qualified privilege should be overcome." *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000). In civil litigation, moreover, we have held that the First Amendment requires courts to "look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." *Carey*, 492 F.2d at 636; *see also Zerilli*, 656 F.2d at 707 (affirming the denial of a motion to compel discovery because "in this case the First Amendment interest in protecting a news reporter's sources outweighs the interest in compelled disclosure"). Other circuits have reached similar conclusions. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1180-81 (1st Cir. 1988) (acknowledging First Amendment limits on criminal defense subpoenas directed at news organizations); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983) (extending a First Amendment reporter privilege developed in civil cases to a criminal defense subpoena); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 593-99 (1st Cir. 1980) (describing First Amendment limits on discovery of reporters' sources in civil litigation); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (indicating that a qualified newsgathering privilege "is no longer in doubt"); *but see In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987) (rejecting claims of First Amendment privilege in grand jury proceedings).

In this case, however, our hands are tied for two independent reasons. First, although this circuit has limited *Branzburg* in other contexts, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, with respect to criminal investigations we have twice construed that decision broadly. In *Reporters Committee for Freedom of the Press v. AT & T*, 593 F.2d 1030 (D.C. Cir. 1978), which addressed a First Amendment challenge regarding access to journalists' phone records and describing *Branzburg* as foreclosing "case-by-case consideration," we declared, "Good faith investigation interests *always* override a journalist's interest in protecting his source." *Id.* at 1049 (emphasis added). Echoing this broad view, we have also described *Branzburg* as "squarely reject [ing]" a claim to "general immunity, qualified or otherwise, from grand jury questioning." *See In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977). In this circuit, then, absent any indication of bad faith, I see no grounds for a First Amendment challenge to the subpoenas at issue here.

Second, although *Branzburg* involved militants and drug dealers rather than government leakers, the factual parallels between that case and this one preclude us from quashing the subpoenas on constitutional grounds. *See* majority op. at 969. If, as *Branzburg* concludes, the First Amendment permits compulsion of reporters' testimony about individuals manufacturing drugs or plotting against the government, *see* 408 U.S. at 667-69, 675-77, 92 S. Ct. 2646, all information the government could have obtained from an undercover investigation of its own, the case for a constitutional privilege appears weak indeed with respect to leaks, which in all likelihood will be extremely difficult to prove without the reporter's aid. Thus, if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court.

But *Branzburg* is not the end of the story. In 1975 — three years after *Branzburg* —Congress enacted Rule 501 of the Federal Rules of Evidence, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted … in the light of reason and experience." Fed.R.Evid. 501; *see also* Pub. L. No. 93-595, 88 Stat. 1926 (1975). Given *Branzburg*'s instruction that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, 92 S. Ct. 2646, Rule 501's delegation of congressional authority requires that we look anew at the "necess [ity] and desirab [ility]" of the reporter privilege — though from a common law perspective.

Under Rule 501, that common lawmaking obligation exists whether or not, absent the rule's delegation, Congress would be "the more appropriate institution to reconcile the competing interests… that inform any reporter's privilege to withhold relevant information from a bona fide grand jury." Sep. op. at 983-84 (Henderson, J., concurring) (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990)); *but see* sep. op. at 978-79 (Sentelle, J., concurring) (observing that even before Rule 501, case law provided federal courts with "precisely the same authority" to recognize common law privileges) (citing *Wolfle v. United States*, 291 U.S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617 (1934)); *Univ. of Pa.*, 493 U.S. at 189, 110 S. Ct. 577 (declining to recognize a privilege "where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself"). As the Supreme Court has explained, "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n. 25, 104 S. Ct. 1488, 79 L. Ed. 2d 814 (1984). Thus, subject of course to congressional override, we must assess the arguments for and against the claimed privilege, just as the Supreme Court has done in cases recognizing common law privileges since 1975. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (psychotherapist-patient); *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) (attorney-client); *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (confidential marital communications).

In this case, just as *Jaffee v. Redmond* recognized a common law psychotherapist privilege based on "the uniform judgment of the States," 518 U.S. at 14, 116 S. Ct. 1923, I believe that "reason and experience" dictate a privilege for reporters' confidential sources — albeit a qualified one. Guided by *Jaffee*'s reasoning, I reach this conclusion by considering first whether "reason and experience" justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case.

Before undertaking that analysis, I think it helpful to explain why, in my view, we should not, as would Judge Henderson, short-circuit *Jaffee's* framework and decide whether the special counsel may overcome the reporter privilege without ever reaching the issue of whether the privilege in fact exists. *See* sep. op. at 982 (Henderson, J., concurring). Unless we conclude, as does Judge Sentelle, *see* sep. op. at 977 (Sentelle, J., concurring), and as did the district court, *see In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 18-19 (D.D.C. 2004), that no privilege exists, we cannot resolve this case without adopting *some* standard. Judge Henderson criticizes my approach, but she never indicates what standard she would apply, except to state that "the Special

Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect." *See* sep. op. at 982 (Henderson, J., concurring). To reach even that conclusion, however, one must explain why federal common law cannot support any higher "hurdle," such as an absolute privilege for source identities, which exists in the District of Columbia and several states, *see, e.g.*, D.C.Code Ann. §§ 16-4702, 16-4703(b); 42 Pa. Cons.Stat. § 5942; Ala.Code § 12-21-142, or a privilege that applies unless non-disclosure "will cause a miscarriage of justice," N.D. Cent.Code § 31-01-06.2; *see also* Minn.Stat. § 595.024; N.M. Stat. Ann. § 38-6-7. Without ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And without selecting some other test based on *Jaffee* and Rule 501, how could one know that no such alternatives are plausible?

Because the *Jaffee* analysis is thus essential to resolving this case (assuming a privilege exists), our frequent practice of avoiding non-essential issues is inapplicable. To be sure, declining to resolve waived issues, *see, e.g., Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998), disposing of procedurally defective claims without reaching the merits, *see, e.g., Jackson v. District of Columbia*, 254 F.3d 262, 264, 270-71 (D.C. Cir. 2001); *cf. Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891 (D.C. Cir. 1996) (assuming deferential review because even under that standard agency action was unreasonable), and expressing no view on one element of a claim because another element is clearly defective, *see, e.g., Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989), may well represent "patience in judicial decision-making," sep. op. at 982 (Henderson, J., concurring). Patience, however, cannot justify "declining … to define [the disputed privilege's] contours," *see id.* at 986, for that is the dispositive issue in this case.

Accordingly, given that we must apply some test to the government's showing, if we simply assume the privilege exists but our assumption is wrong, then we will have reached out to establish a framework for a non-existent claim — an undertaking hardly consistent with principles of judicial restraint. Indeed, our decision would establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary. Therefore, I think it imperative to decide as a threshold matter whether the privilege exists, turning only afterwards to the privilege's specific contours.

In this case, moreover, the issue of the privilege's existence is fully briefed, and resolving it definitively will provide critical guidance in similar situations in the future. This is not the only case to raise reporter privilege issues in D.C. federal courts in recent years. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). And given the many leaks that no doubt occur in this city every day, it would be naive to suppose that it will be the last. For the sake of reporters and sources whom such litigation may ensnare, we should take this opportunity to clarify the rules governing their relationship.

Thus, I agree with Judge Sentelle that "the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it." Sep. op. at 977 (Sentelle, J., concurring). Without resolving the first question, we cannot and should not decide the second.

Under *Jaffee*, the common law analysis starts with the interests that call for recognizing a privilege. *See* 518 U.S. at 11, 116 S. Ct. 1923. If, as the Supreme Court held there, " [t]he mental health of our citizenry is a public good of transcendent importance," *id.* — one that trumps the "fundamental maxim that the public has a right to every man's evidence," *id.* at 9, 116 S. Ct. 1923 (internal quotation marks and ellipsis omitted) — then surely press freedom is no less important, given journalism's vital role in our democracy. Indeed, while the *Jaffee* dissenters questioned psychotherapy's "indispensable role in the maintenance of the citizenry's mental health," *see id.* at 22, 116 S. Ct. 1923 (Scalia, J., dissenting), the First Amendment's express protection for "freedom … of the press" forecloses any debate about that institution's "important role in the discussion of public affairs," *Mills v. Alabama*, 384 U.S. 214, 219, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (quoting *Mills*, 384 U.S. at 218-19, 86 S. Ct. 1434).

Like psychotherapists, as well as attorneys and spouses, all of whom enjoy privileges under Rule 501, *see, e.g., Jaffee*, 518 U.S. at 18, 116 S. Ct. 1923 (psychotherapists); *Upjohn Co.*, 449 U.S. at 389, 101 S. Ct. 677 (attorneys); *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (spouses), reporters "depend [ ] upon an atmosphere of confidence and trust," *Jaffee*, 518 U.S. at 10, 116 S. Ct. 1923. If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely

impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner first-hand information about the criminal underworld. Such valuable endeavors would be all but impossible, for just as mental patients who fear "embarrassment or disgrace," *id.*, will "surely be chilled" in seeking therapy, *id.* at 12, 116 S. Ct. 1923, so will sources who fear identification avoid revealing information that could get them in trouble.

Because of these chilling effects, " [w]ithout a privilege, much of the desirable evidence to which litigants … seek access … is unlikely to come into being." *Id.*Consequently, as with other privileges, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* At the same time, although suppression of some leaks is surely desirable (a point to which I shall return), the public harm that would flow from undermining all source relationships would be immense. For example, appellant Judith Miller tells us that her Pulitzer Prize-winning articles on Osama bin Laden's terrorist network relied on "information received from confidential sources at the highest levels of our government." (Miller Aff. ¶ 10, Appellant's App. at 169.) Likewise, appellant Matthew Cooper maintains that his reports for "*Time*'s four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House" would have been impossible without confidentiality. (Cooper Aff. ¶ 21, Appellant's App. at 286.) Insofar as such stories exemplify the press's role "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve," *Mills*, 384 U.S. at 219, 86 S. Ct. 1434, "reason and experience" support protecting newsgathering methods crucial to their genesis. Acknowledging as much in *Zerilli*, we emphasized that " [c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability" and weaken "a vital source of information," leaving citizens "far less able to make informed political, social, and economic choices." 656 F.2d at 711.

It is true, as the special counsel observes, that apart from affidavits and citations to two articles in their reply brief, the reporters present no empirical evidence that denial of the privilege "will have a significant impact on the free flow of information protected by the First Amendment." Appellee's Br. at 47. But the Supreme Court has never required proponents of a privilege to adduce scientific studies demonstrating the privilege's benefits. Rather, as the *Jaffee* dissenters pointed out, the empirical question — " [h]ow likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation?" — was one " [t]he Court [did] not attempt to answer." 518 U.S. at 22-23, 116 S. Ct. 1923 (Scalia, J., dissenting). Instead, following the wise precept that common sense need not be "the mere handmaiden of social science data or expert testimonials," *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), *Jaffee* relied on the traditional common law process: it examined the logical prerequisites of the confidential relationship, taking into account the policy and experience of parallel jurisdictions. *See Jaffee*, 518 U.S. at 10, 116 S. Ct. 1923 (reasoning that given the need for "frank and complete disclosure of facts, emotions, memories, and fears" in psychotherapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

Likewise, in *Trammel v. United States*, while justifying the privilege against adverse spousal testimony in terms of "marital harmony," 445 U.S. at 44-45, 53, 100 S. Ct. 906, the Court allowed waiver by the testifying spouse based not on divorce statistics or psychological studies, but rather on the commonsense supposition that " [w]hen one spouse is willing to testify against the other in a criminal proceeding — whatever the motivation — their relationship is almost certainly in disrepair," *id.* at 52, 100 S. Ct. 906. And in *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998), though finding the "empirical information… scant and inconclusive," *id.* at 410, 118 S. Ct. 2081, the Court held that the attorney-client privilege survives the client's death because " [k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel," *id.* at 407, 118 S. Ct. 2081 — a proposition the Court supported with neither evidence nor even citation. Given these decisions, the equally commonsense proposition that reporters' sources will be more candid when promised confidentiality requires no empirical support.

In any event, the special counsel's confidence that exposing sources will have no effect on newsgathering is unjustified. Citing the "`symbiotic' relationships between journalists and public officials," the special counsel presumes that leaks will go on with or without the privilege. Appellee's Br. at 47 (quoting *Branzburg*, 408 U.S. at 694, 92 S. Ct. 2646); *see also* sep. op. at 983 n. 3 (Henderson, J., concurring). Not only does this contradict the Justice Department's own guidelines, which expressly recognize that revealing confidential sources can "impair the news gathering function," 28 C.F.R. § 50.10, but the available evidence suggests the special counsel is wrong. As anyone with even a passing interest in news knows, reporters routinely rely on sources speaking on

condition of anonymity — a strong indication that leakers demand such protection. Besides, for all the reasons that lead me to conclude that a privilege exists, reporters and their editors, attorneys, and sources probably believe the same, making it speculative indeed for the special counsel to suppose that dashing that expectation of confidentiality would have no effect on newsgathering.

Turning next, as did *Jaffee*, to the consensus among states, I find support for the privilege at least as strong for journalists as for psychotherapists. Just as in *Jaffee*, where "the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege" favored an exercise of federal common lawmaking, *see* 518 U.S. at 12, 116 S. Ct. 1923, so here undisputed evidence that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources confirms that "`reason and experience' support recognition of the privilege," *id.* at 13, 116 S. Ct. 1923. Indeed, given these state laws, " [d]enial of the federal privilege … would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. *See id.*

Making the case for a privilege here even stronger than in *Jaffee*, federal authorities also favor recognizing a privilege for reporters' confidential sources. As noted earlier, we ourselves have limited discovery of reporters' sources in both civil and criminal litigation, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, as have other federal courts, *see, e.g., Bruno & Stillman*, 633 F.2d at 593-99; *Burke*, 700 F.2d at 76-77; *Silkwood*, 563 F.2d at 436-37, including some acting on the basis of Rule 501, *see, e.g., Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a qualified common law privilege in civil litigation); *but see In re Grand Jury Proceedings*, 5 F.3d 397, 398 (9th Cir. 1993) (holding that no "scholar's privilege" exists under the First Amendment or common law). In addition, the Justice Department guidelines (though privately unenforceable, for reasons the court explains, *see* majority op. at 974-76) establish a federal policy of protecting "news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." 28 C.F.R. § 50.10. Denial of the privilege, then, would not only buck the clear policy of virtually all states, but would also contradict regulations binding on the federal government's own lawyers.

Resisting this consensus, the special counsel asserts that *Branzburg* already performed the analysis required by Rule 501, thus "resolv [ing] the common law argument." Appellee's Br. at 35; *see also* sep. op. at 977-78 (Sentelle, J., concurring). *Branzburg* did no such thing. As the *Branzburg* majority's very first sentence makes plain, the "issue" in that case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press *guaranteed by the First Amendment*," 408 U.S. at 667, 92 S. Ct. 2646 (emphasis added), not whether it abridged the common law. Later emphasizing the same point, the majority stated, "Petitioners Branzburg and Pappas and respondent Caldwell press *First Amendment claims.*" *Id.* at 679, 92 S. Ct. 2646 (emphasis added); *see also* sep. op. at 978 (Henderson, J., concurring). Indeed, having examined the briefs and lower court opinions, I see no evidence that the parties ever even argued for a separate common law privilege. To be sure, the majority declared that "the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *id.* at 685, 92 S. Ct. 2646, but that point served only to reinforce the majority's constitutional holding.

Nor does *Branzburg* support the concurrence's constitutional avoidance theory. *See*sep. op. at 977 (Sentelle, J., concurring). Although the *Branzburg* majority could have avoided the First Amendment claim by recognizing a common law privilege, given that the majority opinion neither did so nor even raised that possibility, *Branzburg*'s holding hardly forecloses the common law argument presented here. Quite the contrary, *Branzburg* acknowledged that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, 92 S. Ct. 2646, a power Congress delegated to the federal courts through Rule 501. Thus, if anything, the view that *Branzburg* disposed of the common law privilege gets it backwards. Insofar as *Branzburg* relied on the "great weight of authority" to discern the First Amendment's meaning, *see id.* at 686, 92 S. Ct. 2646, the shift in favor of the privilege since that time — from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection — could provide a basis for rethinking *Branzburg*. *Cf. Atkins v. Virginia*, 536 U.S. 304, 306-07, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (overturning prior understanding of Eighth Amendment "cruel and unusual punishment" based on a "consensus" among "the American public, legislators, scholars, and judges" regarding execution of the mentally retarded). Although that is something only the Supreme Court can do, this point underscores the error in seeing *Branzburg* as dispositive.

Given that the common law issue thus remains open, this court must assess the reporters' claim in light of "reason and experience" today. As *Branzburg* itself observes in describing Congress's powers, privilege rules may require "refashion [ing]… as experience

from time to time may dictate." 408 U.S. at 706, 92 S. Ct. 2646. Bestowing that refashioning power on the federal courts, Rule 501 evidences an "affirmative intention not to freeze the law of privilege," but rather "to leave the door open to change." *Trammel*, 445 U.S. at 47, 100 S. Ct. 906. Consistent with that intent, the Court in *Trammel* modified the privilege against adverse spousal testimony recognized just twenty-two years earlier in *Hawkins v. United States*, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958), allowing the testifying spouse to waive the privilege, *see Trammel*, 445 U.S. at 53, 100 S. Ct. 906, even though *Hawkins* had held just the opposite, *see Hawkins*, 358 U.S. at 77-78, 79 S. Ct. 136. Had the Supreme Court addressed a common law claim in *Branzburg*, lower courts might lack authority to reconsider that case's result notwithstanding the subsequent growth in support for the privilege. *But cf. Trammel*, 445 U.S. at 43, 100 S. Ct. 906 (affirming court of appeals decision limiting *Hawkins*). Absent such a definitive ruling, however, and despite *Branzburg*'s observation about the "great weight of authority" thirty-three years ago, *see* 408 U.S. at 686, 92 S. Ct. 2646, we must approach the issue with the same open-mindedness demonstrated by *Trammel.*

For much the same reason, the omission of a reporter privilege from the Judicial Conference Advisory Committee's draft rules submitted to Congress in 1972 (and ultimately replaced by Rule 501) need not dictate the outcome here. True, as the special counsel points out, the Supreme Court in *United States v. Gillock*, 445 U.S. 360, 367-68, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980), declined to recognize a privilege not appearing in the Advisory Committee draft. As that decision acknowledges, however, the draft rules merely reflected what was "thought to be … indelibly ensconced in our common law" at the time. *See id.* Accordingly, when the *Jaffee* Court considered whether the psychotherapist privilege extended to social workers, it relied not on the 1972 draft, which covered only licensed psychotherapists, but rather on the reasons for the privilege and the state laws in effect when *Jaffee* was decided. *See Jaffee*, 518 U.S. at 15-17 & n. 16, 116 S. Ct. 1923. Likewise, here, the dramatic growth in support for the reporter privilege supercedes the Advisory Committee's decades-old choice to omit the privilege from its draft.

Equally inconsequential is the adoption of the reporter privilege in thirty-one states through legislation, rather than judicial action. *See* sep. op. at 978-79 (Sentelle, J., concurring). As the *Jaffee* dissent pointed out, a far greater proportion of states — indeed, *every* state — established the psychotherapist privilege by statute, *see Jaffee*, 518 U.S. at 25-26, 116 S. Ct. 1923 (Scalia, J., dissenting), yet the majority considered that fact "of no consequence," *id.* at 13-14, 116 S. Ct. 1923. Nor does it matter that unconventional forms of journalism — freelance writers and internet "bloggers," for example — may raise definitional conundrums down the road. *See* sep. op. at 978-81 (Sentelle, J., concurring); *but see* Eugene Volokh, Opinion, *You Can Blog, But You Can't Hide*, N.Y. Times, Dec. 2, 2004, at A39 (" [T]he rules should be the same for old media and new, professional and amateur. Any journalist's privilege should extend to every journalist."). As *Jaffee* makes clear, " [a] rule," such as Rule 501, "that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18, 116 S. Ct. 1923. After all, "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 516, 530, 4 S. Ct. 111, 28 L. Ed. 232 (1884). Here, whereas any meaningful reporter privilege must undoubtedly encompass appellants Cooper and Miller, full-time journalists for *Time* magazine and the *New York Times*, respectively, future opinions can elaborate more refined contours of the privilege — a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections.

In sum, "reason and experience," as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources. To disregard this modern consensus in favor of decades-old views, as the special counsel urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and "freeze the law of privilege" contrary to Congress's wishes, *see Trammel*, 445 U.S. at 47, 100 S. Ct. 906.

The next step, according to *Jaffee*, is to determine what principles govern the privilege's application in this case. *See Jaffee*, 518 U.S. at 15-16, 116 S. Ct. 1923 (deciding first that a psychotherapist privilege exists and only then addressing whether the privilege applies to social workers). Pointing out that many jurisdictions recognize only qualified protection for reporters, the special counsel argues that the uniform judgment of states must support application of the privilege in the precise context at issue — defiance of grand jury subpoenas — before federal courts may recognize it. That view, however, belonged to the *Jaffee*dissent, not the seven-justice majority. Although the dissenters noted an "enormous degree of disagreement among the States as to the scope of the privilege," 518 U.S. at 33, 116 S. Ct. 1923 (Scalia, J., dissenting), particularly as to which professions it covered, *see id.* at 27, 116 S. Ct. 1923 (Scalia, J., dissenting), the Court extended the privilege to licensed social workers because " [t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker," *id.* at 16-17, 116 S. Ct. 1923. Likewise, *Jaffee* rejected a proposed balancing test not because other jurisdictions had done

so, but because " [m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *See id.* at 17-18, 116 S. Ct. 1923.

Here, even assuming that some jurisdictions categorically exclude grand jury subpoenas — a proposition for which the special counsel cites no authority — the interests protected by the privilege militate against such a limited approach. Although the public interest in law enforcement may well be at its apex when the government is investigating crime, news stories of paramount First Amendment importance, such as reports about government corruption or wrongdoing, may involve sources who "would surely be chilled," *Jaffee*, 518 U.S. at 12, 116 S. Ct. 1923, if they thought grand juries could discover their identities from reporters in whom they confide. Furthermore, the special counsel's proposal is quite anomalous, considering that neither the attorney-client, nor the spousal, nor even the psychotherapist privilege gives way to the grand jury's truth-seeking function. *See, e.g., Swidler & Berlin*, 524 U.S. at 403, 118 S. Ct. 2081 (attorney-client); *Blau v. United States*, 340 U.S. 332, 333, 71 S. Ct. 301, 95 L. Ed. 306 (1951) (spousal); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (allowing grand jury testimony not because no psychotherapist privilege exists in that context, but rather because a "crime-fraud exception" applies to the privilege).

As to the scope of the privilege, however, I agree with the special counsel that protection for source identities cannot be absolute. Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several CIA operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n. 7, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981). Other leaks — the design for a top secret nuclear weapon, for example, or plans for an imminent military strike — could be even more damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. Just as attorney-client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships. For example, assuming Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super-secret satellite program inspire another example (though I know nothing about the dispute's details and express no view as to its merits). *See, e.g.*, Dan Eggen & Walter Pincus, *Justice Reviews Request for Probe of Satellite Reports*, Wash. Post, Dec. 16, 2004, at A3; Douglas Jehl, *New Spy Plan Said to Involve Satellite System*, N.Y. Times, Dec. 12, 2004, at A1. Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties. In contrast to the nuclear weapon and military strike examples mentioned above, cases like these appear to involve a balance of harm and news value that strongly favors protecting newsgathering methods.

Given these contrasting examples, much as our civil cases balance "the public interest in protecting the reporter's sources against the private interest in compelling disclosure," *Zerilli*, 656 F.2d at 712; *see also Carey*, 492 F.2d at 634-36, so must the reporter privilege account for the varying interests at stake in different source relationships. In other words, to quote the Justice Department subpoena guidelines, "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

Citing our reporter privilege cases — *Zerilli*, *Carey*, and *Ahn* — the special counsel urges us to rely on two factors deemed "central" in those decisions and emphasized in the Justice Department guidelines: first, the requesting party's need for the evidence, and second, that party's exhaustion of alternative sources. *See Zerilli*, 656 F.2d at 712-14; *Ahn*, 231 F.3d at 37; *Carey*, 492 F.2d at 636-37, 638; 28 C.F.R. § 50.10(b), (f) (1). While both these considerations are obviously essential to minimizing the burden on newsgathering, they can serve as exclusive measures in the privilege analysis only where there exist means of proof other than compelling the reporter's testimony. When prosecuting crimes other than leaks (murder or embezzlement, say) the government, at least theoretically, can learn what reporters know by replicating their investigative efforts, e.g., speaking to the same witnesses and examining the same documents. Accordingly, if a truly exhaustive investigation has failed to prove a crime that the government reasonably believes has occurred, compelled disclosure of a reporter's source may be justified notwithstanding the attendant

burdens on newsgathering. As the special counsel acknowledged at oral argument, however, when the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public. The reason for this is obvious: Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.

In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good, such as in the nuclear weapon and military strike examples, while preventing discovery when no public interest supports it, as would appear to be the case with Miller's Osama bin Laden articles. Though flexible, these standards (contrary to the special counsel's claim) are hardly unmanageable. Indeed, the Supreme Court employs a similar requirement of "legitimate news interest," meaning "value and concern to the public at the time of publication," in assessing restrictions on government employee speech. *See City of San Diego v. Roe*, ___ U.S. ___, 125 S. Ct. 521, 526, 160 L. Ed. 2d 410 (2004) (per curiam). Nor is this analysis "novel," *see* sep. op. at 983 (Henderson, J., concurring), considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines.

Though recognizing that leaks with "national security implications" raise different concerns from "information in the nature of `whistleblowing,'" Appellee's Br. at 44, 48, the special counsel insists that the prosecutor, not the court, should assess factors other than need and exhaustion. Under this theory, balancing the two remaining concerns, the harmfulness of the leaked information and the damage to newsgathering that might flow from enforcing the disputed subpoenas, would be a matter of prosecutorial discretion. In my view, the special counsel's position distorts the roles of judge and prosecutor in evidentiary disputes.

Although courts certainly defer to executive judgments about which crimes merit prosecution — a judgment that is, after all, a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996) — nonetheless the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness — a central concern of the balancing test — once prosecutors commit to pursuing a case they naturally seek all useful evidence. Consistent with that adversarial role, the Federal Rules of Evidence assign to courts the function of neutral arbiter: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court." Fed.R.Evid. 104(a) (emphasis added). Accordingly, just as courts determine the admissibility of hearsay or the balance between probative value and unfair prejudice under Rule 403, so with respect to this issue must courts weigh factors bearing on the privilege.

Moreover, in addition to these principles applicable to the judicial role in any evidentiary dispute, the dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value. Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value. Of course, in this case a special counsel was appointed to exercise independent judgment. Yet independent prosecutors, too, may skew their assessments of the public interests implicated when a reporter is subpoenaed. After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey. *Cf. Morrison v. Olson*, 487 U.S. 654, 727-28, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) (Scalia, J., dissenting) (noting "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation" and observing that "the primary check against prosecutorial abuse is a political one"). To be clear: I do not impugn the motives of this special counsel. Indeed, as I conclude below, his pursuit of the reporters' testimony appears reasonable. Nevertheless, these considerations — the special counsel's political independence, his lack of a docket, and the concomitant risk of overzealousness — weigh against his claim to deference in balancing harm against news value.

Paralleling the special counsel's argument about executive discretion, my concurring colleague suggests that my approach pays insufficient deference to Congress. *See* sep. op. at 986 (Henderson, J., concurring). "*Branzburg*," she writes, "warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes." *See id.* Although it is true that *Branzburg* cautioned against second-guessing the "legislative judgment … of what conduct is liable to criminal prosecution," 408 U.S. at 706, 92 S. Ct. 2646, it did so in a passage rejecting a test of governmental need that apparently "distinguish [ed] between the value of enforcing different criminal laws," deeming some statutes "compelling" and others unimportant. *See id.* at 702, 705-06, 92 S. Ct. 2646. The approach I propose entails no such judgment about the value of the statute under which the government is proceeding. Rather, my approach focuses on whether evidence the government believes it needs, i.e., a reporter's testimony about a particular source, is privileged. To be sure, insofar as the reporter's testimony is critical in a particular case, privileging the evidence may render that case unprovable. But that risk accompanies any privilege or indeed any rule of evidentiary exclusion. Had Congress believed that judicial decisions excluding evidence interfered with its "legislative judgment" regarding underlying crimes, it would hardly have authorized recognition of common law privileges by enacting Rule 501.

Furthermore, and perhaps even more important, *Branzburg* addressed only a First Amendment privilege claim. *See supra* at 993-94. In that case, therefore, because Congress cannot overturn constitutionally based decisions, recognizing the asserted privilege would have permanently foreclosed punishment of any crimes dependent on proof subject to the privilege. The qualified privilege I would recognize, however, rests on Rule 501, not the Constitution. If Congress believes that this approach overrides its judgment about what conduct should be criminal, it may simply overturn the privilege and authorize use of the evidence.

Next, the special counsel argues that waivers signed by suspected sources represent an "additional factor" favoring compulsion of the reporters' testimony. Appellee's Br. at 46. As the reporters point out, however, numerous cases (including persuasive district court decisions from this circuit) indicate that only reporters, not sources, may waive the privilege. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198-99 (D.D.C. 1978). For the contrary proposition, the special counsel cites *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), but that case involved a criminal defendant's effort to obtain non-confidential records from the biographers of a government witness, not waiver of confidentiality by a previously unidentified source. *See id.* at 531, 533-34. Nor does *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002), help the special counsel. While that decision indicated that "`the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure,'" *id.* at 120 (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)), it quashed the subpoena at issue, reasoning that "the privilege for journalists shields both confidential and nonconfidential information from compelled disclosure," *id.*

As this case law recognizes, a source's waiver is irrelevant to the reasons for the privilege. Because the government could demand waivers — perhaps even before any leak occurs — as a condition of employment, a privilege subject to waiver may, again, amount to no privilege at all, even in those leak cases where protecting the confidential source is most compelling. Moreover, although the attorney-client and psychotherapist privileges are waivable by clients and patients, respectively, *see, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (attorney-client); *Jaffee*, 518 U.S. at 15 n. 14, 116 S. Ct. 1923 (psychotherapist), that is because those privileges exist to prevent disclosure of sensitive matters related to legal and psychological counseling, *see, e.g., Swidler & Berlin*, 524 U.S. at 407-08, 118 S. Ct. 2081; *Jaffee*, 518 U.S. at 10-11, 116 S. Ct. 1923, a rationale that vanishes when the source authorizes disclosure. In contrast, the reporter privilege safeguards public dissemination of information — the *reporter's* enterprise, not the source's.

Consistent with that purpose, the privilege belongs to the reporter. Not only are journalists best able to judge the imperatives of newsgathering, but while the source's interest is limited to the particular case, the reporter's interest aligns with the public, for journalists must cultivate relationships with other sources who might keep mum if waiving confidentiality at the government's behest could lead to their exposure. Indeed, as compared to counseling-related privileges, the privilege against spousal testimony represents a better analogy. Just as under *Trammel*'s waiver theory testifying spouses, regardless of the other spouse's wishes, may judge for themselves whether their testimony will undermine "marital harmony," *see Trammel*, 445 U.S. at 44-45, 52-53, 100 S. Ct. 906, so should journalists — the experts in newsgathering — base the decision to testify on their own assessment of the consequences, unconstrained by their source's waiver (provided other requirements of the privilege are met).

For their part, appellants insist that a qualified privilege fails to provide the certainty their work requires because sources are unlikely to disclose information without an advance guarantee of secrecy. In particular, they argue that journalists cannot balance a

leak's harm against its news value until they know what information the source will reveal, by which time it is too late to prevent disclosure. True enough, but journalists are not the ones who must perform the balancing; sources are. Indeed, the point of the qualified privilege is to create disincentives for the source — disincentives that not only promote the public interest, but may also protect journalists from exploitation by government officials seeking publication of damaging secrets for partisan advantage. Like other recipients of potentially privileged communications — say, attorneys or psychotherapists — the reporter can at most alert the source to the limits of confidentiality, leaving the judgment of what to say to the source. While the resulting deterrent effect may cost the press some leads, little harm will result, for if the disincentives work as they should, the information sources refrain from revealing will lack significant news value in the first place.

In any event, although *Jaffee* said that " [m]aking the promise of confidentiality contingent upon a trial judge's later evaluation … [will] eviscerate the effectiveness of the privilege," 518 U.S. at 17, 116 S. Ct. 1923, the clash of fundamental interests at stake when the government seeks discovery of a reporter's sources precludes a categorical approach. *See Zerilli*, 656 F.2d at 712 n. 46 (rejecting arguments for greater "specificity" as to the scope of the First Amendment privilege in civil litigation). And as we explained in *Zerilli*, the "deterrence effect" on beneficial newsgathering will be small if courts make clear that the privilege is "overridden only in rare circumstances." *See id.* at 712 & n. 46.

In short, the question in this case is whether Miller's and Cooper's sources released information more harmful than newsworthy. If so, then the public interest in punishing the wrongdoers — and deterring future leaks — outweighs any burden on newsgathering, and no privilege covers the communication (provided, of course, that the special counsel demonstrates necessity and exhaustion of alternative evidentiary sources).

Applying this standard to the facts of this case, and considering first only the public record, I have no doubt that the leak at issue was a serious matter. Authorized "to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, [his] investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses," *see*Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois (Feb. 6, 2004), the special counsel is attempting to discover the origins of press reports describing Valerie Plame as a CIA operative monitoring weapons of mass destruction. *See* majority op. at 966-67. These reports appeared after Plame's husband, former Ambassador Joseph Wilson, wrote in a *New York Times* op-ed column that his findings on an official mission to Niger in 2002 cast doubt on President Bush's assertion in his January 2003 State of the Union address that Iraq "recently sought significant quantities of uranium from Africa." *See id.* at 966.

An alleged covert agent, Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago. *See, e.g.*, Richard Leiby & Dana Priest, *The Spy Next Door; Valerie Wilson, Ideal Mom, Was Also the Ideal Cover*, Wash. Post, Oct. 8, 2003, at A1. Her exposure, therefore, not only may have jeopardized any covert activities of her own, but also may have endangered friends and associates from whom she might have gathered information in the past. Acting to criminalize such exposure of secret agents, *see* 50 U.S.C. § 421, Congress has identified that behavior's "intolerable" consequences: " [t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure." S.Rep. No. 97-201, at 10-11 (1981), *reprinted in* 1982 U.S.C.C.A.N. 145, 154-55.

The leak of Plame's apparent employment, moreover, had marginal news value. To be sure, insofar as Plame's CIA relationship may have helped explain her husband's selection for the Niger trip, that information could bear on her husband's credibility and thus contribute to public debate over the president's "sixteen words." Compared to the damage of undermining covert intelligence-gathering, however, this slight news value cannot, in my view, justify privileging the leaker's identity.

Turning now to the classified material, I agree with the special counsel that ex parte review presents no due process difficulty. To be sure, grand jury secrecy is not absolute. As Rule 6(e) itself provides, courts may "authorize disclosure … of a grand jury matter … preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e) (3) (E). In addition, as the reporters point out, even apart from *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1972), now superceded by *United States v. Mara*, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973), *see* majority op. at 974 (citing *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975)), the Second and Ninth Circuits have held that due process requires an "uninhibited adversary hearing" in civil contempt proceedings, *see United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (internal quotation marks omitted); *In the Matter of Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (internal quotation marks omitted), including "the right to confront all the government's evidence, both

documentary and testimonial, unless particular and compelling reasons peculiar to the grand jury function require some curtailment of [that] right," *Kitchen*, 706 F.2d at 1272.

In this circuit, however, we have approved the use of "*in camera*, *ex parte*proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam). Just as due process poses no barrier to forcing an attorney to testify based on the court's examination of evidence, unseen by the lawyer, that the client sought legal advice in pursuit of a crime, neither does it preclude compulsion of a reporter's testimony based on a comparable review of evidence, likewise unseen by the reporter, that a source engaged in a harmful leak. In fact, appellants' protests notwithstanding, ex parte review protects their interests, as it allows the government to present — and the court to demand — a far more extensive showing than would otherwise be possible given the need for grand jury secrecy discussed in the court's opinion, *see*majority op. at 973-74.

That said, without benefit of the adversarial process, we must take care to ensure that the special counsel has met his burden of demonstrating that the information is both critical and unobtainable from any other source. Having carefully scrutinized his voluminous classified filings, I believe that he has.

With respect to Miller, * * * * * [REDACTED] * * * * *

Regarding Cooper, * * * * * [REDACTED] * * * * *

In sum, based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony. Thus, considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas.

One last point. In concluding that no privilege applies in this case, I have assigned no importance to the fact that neither Cooper nor Miller, perhaps recognizing the irresponsible (and quite possibly illegal) nature of the leaks at issue, revealed Plame's employment, though Cooper wrote about it after Novak's column appeared. Contrary to the reporters' view, this apparent self-restraint spares Miller and Cooper no obligation to testify. Narrowly drawn limitations on the public's right to evidence, testimonial privileges apply "only where necessary to achieve [their] purpose," *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976), and in this case the privilege's purpose is to promote dissemination of useful information. It thus makes no difference how these reporters responded to the information they received, any more than it matters whether an attorney drops a client who seeks criminal advice (communication subject to the crime-fraud exception) or a psychotherapist seeks to dissuade homicidal plans revealed during counseling (information *Jaffee* suggested would not be privileged, *see* 518 U.S. at 18 n. 19, 116 S. Ct. 1923). In all such cases, because the communication is unworthy of protection, recipients' reactions are irrelevant to whether their testimony may be compelled in an investigation of the source.

Indeed, Cooper's own *Time*.com article illustrates this point. True, his story revealed a suspicious confluence of leaks, contributing to the outcry that led to this investigation. Yet the article had that effect precisely because the leaked information — Plame's covert status — lacked significant news value. In essence, seeking protection for sources whose nefariousness he himself exposed, Cooper asks us to protect criminal leaks so that he can write about the crime. The greater public interest lies in preventing the leak to begin with. Had Cooper based his report on leaks *about* the leaks — say, from a whistleblower who revealed the plot against Wilson — the situation would be different. Because in that case the source would not have revealed the name of a covert agent, but instead revealed the fact that others had done so, the balance of news value and harm would shift in favor of protecting the whistleblower. Yet it appears Cooper relied on the Plame leaks themselves, drawing the inference of sinister motive on his own. Accordingly, his story itself makes the case for punishing the leakers. While requiring Cooper to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires.

I conclude, as I began, with the tensions at work in this case. Here, two reporters and a news magazine, informants to the public, seek to keep a grand jury uninformed. Representing two equally fundamental principles — rule of law and free speech — the special counsel and the reporters both aim to facilitate fully informed and accurate decision-making by those they serve: the grand jury and the electorate. To this court falls the task of balancing the two sides' concerns.

As James Madison explained, " [A] people who mean to be their own Governors must arm themselves with the power which knowledge gives." *See In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910)). Consistent with that maxim, " [a] free press is

indispensable to the workings of our democratic society," *Associated Press v. United States*, 326 U.S. 1, 28, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945) (Frankfurter, J., concurring), and because confidential sources are essential to the workings of the press — a practical reality that virtually all states and the federal government now acknowledge — I believe that "reason and experience" compel recognition of a privilege for reporters' sources. That said, because " [l]iberty can only be exercised in a system of law which safeguards order," *Cox v. Louisiana*, 379 U.S. 559, 574, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), the privilege must give way to imperatives of law enforcement in exceptional cases.

Were the leak at issue in this case less harmful to national security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence, I might have supported the motion to quash. Because identifying appellants' sources instead appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony.

1See Opinion of Judge Tatel at pp. 988-91

2By way of comparison, under the constitutional avoidance doctrine, the Supreme Court counsels courts "to adopt constructions of statutes to `avoid decision of constitutional questions,' not to deliberately create constitutional questions."*See, e.g.*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 180, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003); *United States v. 37 Photographs*, 402 U.S. 363, 373, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971), *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 407, 29 S. Ct. 527, 53 L. Ed. 836 (1909); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring).

3I wish to make it plain that I do not fault the appellants for making the argument, understanding that they must if they wish to preserve it for Supreme Court review. Nonetheless, I think it is only the High Court and not this one that may act upon that argument

4The fact that the adoption has been by legislation rather than court decision does not deprive the change in law of common law force. As the Supreme Court has noted, "the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one [,]" and further has told us that "it is of no consequence that recognition of the privilege in the vast majority of the states is the product of legislative action rather than judicial decision."*Jaffee v. Redmond*, 518 U.S. 1, 12-13, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996).

1*See, e.g.*, *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) (because appellant failed to show sufficient need for attorney interview notes, court "save [d] for another day" "difficult matters" of determining "degree of selection necessary to transform facts into opinions and the standard of review we should employ of a district court determination" regarding discovery of attorney work product); *Littlewolf v. Lujan*, 877 F.2d 1058, 1065 (D.C. Cir. 1989) ("find [ing] it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act" because " [e]ven if we assume *arguendo* that the six-month limitations period is unreasonably short and that, as a consequence, the Act effectively `takes' the Band members' property rights, we conclude that the statute provides the Indians with just compensation"); *cf. Michel v. INS*, 206 F.3d 253, 260 n. 4 (2d Cir. 2000) ("Where … no harm results from our failing to answer a question, we believe that the `doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'" (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) (Stevens, J., concurring in judgment))).

2*See, e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002) (Sentelle, J.) (assuming union organizer's activity constituted "concerted activity" under 29 U.S.C. § 157 but holding it was not protected under statute); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (Tatel, J.) ("continu [ing]" assumption that Religious Freedom Restoration Act applies to federal government and holding prisoners failed to exhaust administrative remedies); *Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (Tatel, J.) (assuming without deciding retaliation violates 42 U.S.C. § 1981 and remanding claim for trial); *Massachusetts. v. United States Dep't of Transp.*, 93 F.3d 890, 892 (D.C. Cir. 1996) (Sentelle, J.) ("We need not determine whether an agency's interpretation of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case, as the agency's determination here cannot be upheld with or without deference.").

Judge Tatel distinguishes these cases by concluding that their analysis cannot be used to avoid the "dispositive" issue in this case. Tatel Op. at 990. There are, however, only three ways of answering the question whether these reporters' confidential source information is protected by a federal common-law privilege: (1) there is no privilege, (2) there is an absolute privilege and (3) there is a qualified privilege. None of us, including the reporters in their brief, would choose door number two, *see* Tatel Op. at 996; Appellants' Br. at 42, and only one of us heads for door number one, *see* Sentelle Op. at 976-77. That leaves door number three. But in choosing this route, the critical question is not definitional, as Judge Tatel sees it, *see* Tatel Op. at 990, but quantitative: Is the Special Counsel's evidentiary proffer *sufficient* to overcome *any* qualified privilege that may exist? Because we agree that the answer is "yes," there is no need for us to go any further. Granted, the circumstances of the cited cases differ but they use the same analysis. Moreover, its application here is consistent with the tried and true principle that " [w]here … no harm results from our failing to answer a question, … the `doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on

the best and narrowest ground available.'" *Michel*, 206 F.3d at 260 n. 4 (quoting *Air Courier Conference of Am.*, 498 U.S. at 531, 111 S. Ct. 913 (Stevens, J. concurring in judgment)); *see supra* note 2.

3Judge Tatel maintains that " [f]or the sake of reporters and sources," we must establish the contours of a privilege in order to "clarify the rules governing their relationship." Tatel Op. at 991. But the press's collection of information, including from confidential sources, seems to me near impervious to regulation: " [E]xperience teaches us more than sufficiently that men have nothing less in their power than their tongue…." BENEDICT DE SPINOZA, ETHICS 168 (G.H.R. Parkinson ed. & trans., Oxford Univ. Press 2000);*cf.* STANLEY WALKER, CITY EDITOR 44 (Johns Hopkins Univ. Press 1999) (1934) ("Women, wampum, and wrongdoing are always news."). As the *Branzburg* Court recognized, "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena." 408 U.S. 665, 694, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

4*See Branzburg*, 408 U.S. at 708, 92 S. Ct. 2646 (" [N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."); *id.* at 710, 92 S. Ct. 2646 ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.") (Powell, J., concurring); *see also In re Grand Jury*, 955 F.2d 229, 234 (4th Cir. 1992) (noting *Branzburg*'s observation that First Amendment protects reporter in grand jury proceedings initiated or conducted in bad faith presents a "paradox" because "district courts can control prosecutorial abuse in any setting, not just in cases involving the First Amendment").

5*See Univ. of Penn.*, 493 U.S. 182, 110 S. Ct. 577, 107 L. Ed. 2d 571 (rejecting privilege protecting academic peer-review materials); *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980) (rejecting privilege protecting "legislative acts"); *see also Jaffee*, 518 U.S. at 18-36, 116 S. Ct. 1923 (Scalia, J., dissenting).

6*See United States v. Zolin*, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989) (permitting *in camera* review of materials to establish applicability of crime-fraud exception to attorney-client privilege); *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (witness spouse's voluntary testimony not covered by spousal privilege); *see also Jaffee*, 518 U.S. at 18-36, 116 S. Ct. 1923 (Scalia, J., dissenting).

7*Zerilli v. Smith*, 656 F.2d 705, 713-714 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631, 636-38 (D.C. Cir. 1974); *cf. United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (affirming district court's conclusion that reporter's privilege was not overcome because his testimony was not "`essential or crucial'" to defendant's case or relevant to determination of guilt or innocence).

8*See* 28 C.F.R. § 50.10. As Judge Tatel points out, *see* Tatel Op. at 997, the Justice Department regulations aim to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," *see id.*§ 50.10(a), but the regulations do not balance the two interests. They establish instead that, in requesting authorization to subpoena a member of the press, the government should: reasonably believe that, in a criminal case, the information sought is essential "to a successful investigation — particularly with reference to directly establishing guilt or innocence," *see id.* § 50.10(f) (1); attempt unsuccessfully to obtain the information from "alternative nonmedia sources," *see id.* § 50.10(f) (3); seek only to verify, "except under exigent circumstances," published information and "such surrounding circumstances as relate to the accuracy of the published information," *see id.* § 50.10(f) (4); treat " [e]ven" requests for publicly disclosed information "with care to avoid claims of harassment," *see id.* § 50.10(f) (5); and, "wherever possible," seek material information on a limited subject matter and for a limited time period, avoid requiring the production of large quantities of unpublished material and "give reasonable and timely notice of the demand for documents," *see id.* § 50.10(f) (6).

9*See In re Williams*, 766 F. Supp. 358, 368-70 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (order without treatment of merits).

10Judge Tatel insists that his test is not "novel …, considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines." *See* Tatel Op. at 998. But the central factors of his test — the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," Tatel Op. at 997-98 — find no support that I can detect in those cases. *See* 28 C.F.R. § 50.10; *Zerilli*, 656 F.2d at 713-714; *Carey*, 492 F.2d at 636-38.

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2.5: Free Press- Beard v. Banks 548 U.S. 521 (2006)

OCTOBER TERM, 2005
BEARD V. BANKS

SUPREME COURT OF THE UNITED STATES

BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS *v.* BANKS, individually and on behalf of all others similarly situated

certiorari to the united states court of appeals for the third circuit

No. 04–1739. Argued March 27, 2006—Decided June 28, 2006

Pennsylvania houses its 40 most dangerous and recalcitrant inmates in a Long Term Segregation Unit (LTSU). Inmates begin in level 2, which has the most severe restrictions, but may graduate to the less restrictive level 1. Plaintiff-respondent Banks, a level 2 inmate, filed this federal-court action against defendant-petitioner, the Secretary of the Department of Corrections, alleging that a level 2 policy (Policy) forbidding inmates any access to newspapers, magazines, and photographs violates the First Amendment. During discovery, Banks deposed Deputy Prison Superintendent Dickson and the parties introduced prison policy manuals and related documents into the record. The Secretary then filed a summary judgment motion, along with a statement of undisputed facts and the deposition. Rather than filing an opposition to the motion, Banks filed a cross-motion for summary judgment, relying on the undisputed facts, including those in the deposition. Based on this record, the District Court granted the Secretary's motion and denied Banks'. Reversing the Secretary's summary judgment award, the Third Circuit held that the prison regulation could not be supported as a matter of law.

Held: The judgment is reversed, and the case is remanded.

399 F. 3d 134, reversed and remanded.

Justice Breyer, joined by The Chief Justice, Justice Kennedy, and Justice Souter, concluded that, based on the record before this Court, prison officials have set forth adequate legal support for the Policy, and Banks has failed to show specific facts that could warrant a determination in his favor. Pp. 5–13.

(a) *Turner* v. *Safley*, 482 U. S. 78, and *Overton* v. *Bazzetta*, 539 U. S. 126, contain the basic substantive legal standards covering this case. While imprisonment does not automatically deprive a prisoner of constitutional protections, *Turner*, 482 U. S., at 93, the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere, *id.*, at 84–85. As *Overton*, *supra*, at 132, pointed out, courts also owe "substantial deference to the professional judgment of prison administrators." Under *Turner*, restrictive prison regulations are permissible if they are "reasonably related to legitimate penological interests." 482 U. S., at 89. Because this case is here on the Secretary's summary judgment motion, the Court examines the record to determine whether he has demonstrated "the absence of a genuine issue of material fact" and his entitlement to judgment as a matter of law. See, *e.g.*, Fed . Rule Civ. Proc. 56. If he has, the Court determines whether Banks has "by affidavits or as otherwise provided" in Rule 56, "set forth specific facts showing … a genuine issue for trial," Rule 56(e). Inferences about disputed facts must be drawn in Banks' favor, but deference must be accorded prison authorities' views with respect to matters of professional judgment. Pp. 5–6.

(b) The Secretary rested his motion primarily on the undisputed facts statement and Dickson's affidavit. The first of his justifications for the Policy—the need to motivate better behavior on the part of particularly difficult prisoners—sufficiently satisfies *Turner*'s requirements. The statement and affidavit set forth a " 'valid, rational connection ' " between the Policy and " 'legitimate penological interests,' " 482 U. S., at 89, 95. Dickson noted that prison authorities are limited in what they can and cannot deny or give a level 2 inmate, who has already been deprived of most privileges, and that the officials believe that the specified items are legitimate as incentives for inmate growth. The undisputed facts statement added that the Policy encourages progress and discourages backsliding by level 1 inmates. These statements point to evidence that the regulations serve the function identified. The articulated connections between newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones. Thus, this factor supports the Policy's "reasonableness." The second, third, and fourth *Turner* factors—whether there are "alternative means of exercising the right that remain open to prison inmates," *id.*, at 90; the "impact" that accommodating "the asserted constitutional right [will] have on guards and other inmates, and on the allocation of prison resources," *ibid.*; and whether there are "ready alternatives" for furthering the

governmental interest, *ibid.*—add little to the first factor's logical rationale here. That two of these three factors seem to favor the Policy therefore does not help the Secretary. The real task in this case is not balancing the *Turner* factors but determining whether the Secretary's summary judgment material shows not just a logical relation but a *reasonable* relation. Given the deference courts must show to prison officials' professional judgment, the material presented here is sufficient. *Overton* provides significant support for this conclusion. In both cases, the deprivations (family visits in *Overton* and access to newspapers, magazines, and photographs here) have an important constitutional dimension; prison officials have imposed the deprivation only upon those with serious prison-behavior problems; and those officials, relying on their professional judgment, reached an experience-based conclusion that the policies help to further legitimate prison objectives. Unless there is more, the Secretary's supporting material brings the Policy within *Turner*'s scope. Pp. 6–10.

(c) Although summary judgment rules gave Banks an opportunity to respond to these materials, he did not do so in the manner the rules provide. Instead, he filed a cross-motion for summary judgment, arguing that the Policy fell of its own weight. Neither the cases he cites nor the statistics he notes support his argument. In reaching a contrary conclusion, the Third Circuit placed too high an evidentiary burden on the Secretary and offered too little deference to the prison officials' judgment. Such deference does not make it impossible for those attacking prison policies to succeed. A prisoner may be able to marshal substantial evidence, for example through depositions, that a policy is not reasonable or that there is a genuine issue of material fact for trial. And, as *Overton* noted, if faced with a *de facto* permanent ban involving a severe restriction, this Court might reach a different conclusion. Pp. 10–13.

Justice Thomas, joined by Justice Scalia, concluded that, using the framework set forth in Justice Thomas' concurrence in *Overton* v. *Bazzetta*, 539 U. S. 126, 138, Pennsylvania's prison regulations are permissible. That framework provides the least perilous approach for resolving challenges to prison regulations and is the approach most faithful to the Constitution. "Sentencing a criminal to a term of imprisonment may … carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated." *Id.*, at 140, n. A term of imprisonment in Pennsylvania includes such an implied delegation. Inmates are subject to Department of Corrections rules and disciplinary rulings, and the challenged regulations fall with the Department's discretion. This conclusion is supported by the plurality's *Turner* v. *Safley*, 482 U. S. 78, analysis. The "history of incarceration as punishment [also] supports the view that the sentenc[e] … terminated" respondent's unfettered right to magazines, newspapers, and photographs. *Overton*, 539 U. S., at 142. While Pennsylvania "is free to alter its definition of incarceration to include the retention" of unfettered access to such materials, it appears that the Commonwealth instead sentenced respondent against the backdrop of its traditional conception of imprisonment, which affords no such privileges. *Id.*, at 144–145. Pp. 1–7.

Breyer, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Kennedy and Souter, JJ., joined. Thomas, J., filed an opinion concurring in the judgment, in which Scalia, J., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined. Ginsburg, J., filed a dissenting opinion. Alito, J., took no part in the consideration or decision of the case.

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2.6: Free Press- Pell v. Procunier 417 U.S. 817 (1974)

U.S. Supreme Court

Pell v. Procunier, 417 U.S. 817 (1974)

Pell v. Procunier

No. 73-918

Argued April 117, 1974

Decided June 24, 1974*

417 U.S. 817

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Four California prison inmates and three professional journalists brought this suit in the District Court challenging the constitutionality of a regulation, § 415.071, of the California Department of Corrections Manual, which provides that "[p]ress and other media interviews with specific individual inmates will not be permitted." That provision was promulgated following a violent prison episode that the correction authorities attributed at least in part to the former policy of free face-to-face prisoner-press interviews, which had resulted in a relatively small number of inmates gaining disproportionate notoriety and influence among their fellow inmates. The District Court granted the inmate appellees' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists unconstitutionally infringed the inmates' First and Fourteenth Amendment freedoms. The court granted a motion to dismiss with respect to the claims of the media appellants, holding that their rights were not infringed, in view of their otherwise available rights to enter state institutions and interview inmates at random and the even broader access afforded prisoners by the court's ruling with respect to the inmate appellees. The prison officials (in No. 73-754) and the journalists (in No. 73-918) have appealed.

Held:

1. In light of the alternative channels of communication that are open to the inmate appellees, § 415.071 does not constitute a violation of their rights of free speech. Pp. 417 U. S. 821-828.

(a) A prison inmate retains those First Amendment rights that are not inconsistent with his status as prisoner or with the legitimate penological objectives of the corrections system, and here the restrictions on inmates' free speech rights must be balanced against the State's legitimate interest in confining prisoners

to deter crime, to protect society by quarantining criminal offenders for a period during which rehabilitative procedures can be applied, and to maintain the internal security of penal institutions. Pp. 417 U. S. 822-824.

(b) Alternative means of communication remain open to the inmates; they can correspond by mail with persons (including media representatives), *Procunier v. Martinez*, 416 U. S. 396; they have rights of visitation with family, clergy, attorneys, and friends of prior acquaintance; and they have unrestricted opportunity to communicate with the press or public through their prison visitors. Pp. 417 U. S. 824-828.

2. The rights of the media appellants under the First and Fourteenth Amendments are not infringed by § 415.071, which does not deny the press access to information available to the general public. Newsmen, under California policy, are free to visit both maximum security and minimum security sections of California penal institutions and to speak with inmates whom they may encounter, and (unlike members of the general public) are also free to interview inmates selected at random. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."*Branzburg v. Hayes*, 408 U. S. 665, 408 U. S. 684. Pp. 417 U. S. 829-835.

364 F.Supp. 196, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined and in Part I of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p.

417 U. S. 835. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 417 U. S. 836.

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases are here on cross-appeals from the judgment of a three-judge District Court in the Northern District of California. The plaintiffs in the District Court were four California prison inmates — Booker T. Hillery, Jr., John Larry Spain, Bobby Bly, and Michael Shane Guile — and three professional journalists — Eve Pell, Betty Segal, and Paul Jacobs. The defendants were Raymond K. Procunier, Director of the California Department of Corrections, and several subordinate officers in that department. The plaintiffs brought the suit to challenge the constitutionality, under the First and Fourteenth Amendments, of § 415.071 of the California Department of Corrections Manual, which provides that "[p]ress and other media interviews with specific individual inmates will not be permitted." They sought both injunctive and declaratory relief under 42 U.S.C. § 1983. Section 415.071 was promulgated by defendant Procunier under authority vested in him by § 5058 of the California Penal Code, and is applied uniformly throughout the State's penal system to prohibit face-to-face interviews between press representatives and individual inmates whom they specifically name and request to interview.

In accordance with 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened to hear the case. [Footnote 1]

The facts are undisputed. Pell, Segal, and Jacobs each requested permission from the appropriate corrections officials to interview inmates Spain, Bly, and Guile, respectively. In addition, the editors of a certain periodical requested permission to visit inmate Hillery to discuss the possibility of their publishing certain of his writings and to interview him concerning conditions at the prison. [Footnote 2] Pursuant to § 415.071, these requests were all denied. [Footnote 3] The plaintiffs thereupon sued to enjoin the continued enforcement of this regulation. The inmate plaintiffs contended that § 415.071 violates their rights of free speech

under the First and Fourteenth Amendments. Similarly, the media plaintiffs asserted that the limitation that this regulation places on their newsgathering activity unconstitutionally infringes the freedom of the press guaranteed by the First and Fourteenth Amendments.

The District Court granted the inmate plaintiffs' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists, unconstitutionally infringed their First and Fourteenth Amendment freedoms. With respect to the claims of the media plaintiffs, the court granted the defendants' motion to dismiss. The court noted that,

"[e]ven under § 415.071 as it stood before today's ruling [that inmates' constitutional rights were violated by § 415.071], the press was given the freedom to enter the California institutions and interview at random,"

and concluded

"that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates."

364 F.Supp. 196, 200.

In No. 73-754, Corrections Director Procunier and the other defendants appeal from the judgment of the District Court that § 415.071 infringes the inmate plaintiffs' First and Fourteenth Amendment rights. In No. 73-918, the media plaintiffs appeal the court's rejection of their claims. We noted probable jurisdiction of both appeals and consolidated the cases for oral argument. 414 U.S. 1127, 1155.

I

In No. 73-754, the inmate plaintiffs claim that § 415.071, by prohibiting their participation in face-to-face communication with newsmen and other members of the general public, violates their right of free speech under the First and Fourteenth Amendments. Although the constitutional right of free speech has never been

thought to embrace a right to require a journalist or any other citizen to listen to a person's views, let alone a right to require a publisher to publish those views in his newspaper, *see Avins v. Rutgers, State University of New Jersey,* 385 F.2d 151 (CA3 1967); *Chicago Joint Board, Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (CA7 1970); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (CA9 1971), we proceed upon the hypothesis that, under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher.

We start with the familiar proposition that

"[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Price v. Johnston, 334 U. S. 266, 334 U. S. 285 (1948). *See also Cruz v. Beto*, 405 U. S. 319, 405 U. S. 321 (1972). In the First Amendment context, a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

An important function of the corrections system is the deterrence of crime. The premise is that, by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This

isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

The regulation challenged here clearly restricts one manner of communication between prison inmates and members of the general public beyond the prison walls. But this is merely to state the problem, not to resolve it. For the same could be said of a refusal by corrections authorities to permit an inmate temporarily to leave the prison in order to communicate with persons outside. Yet no one could sensibly contend that the Constitution requires the authorities to give even individualized consideration to such requests. *Cf. Zemel v. Rusk*, 381 U. S. 1, 381 U. S. 16-17 (1965). In order properly to evaluate the constitutionality of § 415.071, we think that the regulation cannot be considered in isolation, but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. We recognize that there "may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," and

"that [the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of the appellees in this particular form of access."

Kleindienst v. Mandel, 408

U.S. 753,. 765 (1972). But we regard the available "alternative means of [communication as] a relevant factor" in a case such as this where "we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests." *Ibid.*

One such alternative available to California prison inmates is communication by mail. Although prison regulations, until recently, called for the censorship of statements, *inter alia,* that "unduly complain" or "magnify grievances," that express "inflammatory political, racial, religious or other views," or that were deemed "defamatory" or "otherwise inappropriate," we recently held that "the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands," and accordingly affirmed a district court judgment invalidating the regulations. *Procunier v. Martinez*, 416 U. S. 396, 416 U. S. 416 (1974). In addition, we held that

"[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment."

Accordingly, we concluded that any "decision to censor or withhold delivery of a particular letter must be accompanied by minimal procedural safeguards." *Id.* at416 U. S. 418, 416 U. S. 417. Thus, it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.

Moreover, the visitation policy of the California Corrections Department does not seal the inmate off from personal contact with those outside the prison. Inmates are permitted to receive limited visits from members

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of their families, the clergy, their attorneys, and friends of prior acquaintance. [Footnote 4] The selection of these categories of visitors is based on the Director's professional judgment that such visits will aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system. This is not a case in which the selection is based on the anticipated content of the communication between the inmate and the prospective visitor. If a member of the press fell within any of these categories, there is no suggestion that he would not be permitted to visit with the inmate. More importantly, however, inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison. Thus, this provides another alternative avenue of communication between prison inmates and persons outside the prison.

We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that

"[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private

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citizen,"

and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 U. S. 475, 411 U. S. 492(1973).

In *Procunier v. Martinez*, *supra*, we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude." *Cruz v. Beto*, 405 U.S. at 405 U. S. 321.

In a number of contexts, we have held

"that reasonable 'time, place and manner' regulations [of communicative activity] may be necessary to further significant governmental interests, and are permitted."

Grayned v. City of Rockford, 408 U. S. 104, 408 U. S. 115 (1972); *Cox v. New Hampshire*, 312 U. S. 569, 312 U. S. 575-576 (1941); *Poulos v. New Hampshire*, 345 U. S. 395, 345 U. S. 398 (1953); *Cox v. Louisiana*, 379 U. S. 536, 379 U. S. 554-555 (1965); *Adderley v. Florida*, 385 U. S. 39, 385 U. S. 46-48 (1966). "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned*, *supra*, at 408 U. S. 116 (internal quotation marks omitted). The "normal activity" to which a prison is committed — the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence — necessarily requires

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that considerable attention be devoted to the maintenance of security. Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.

In this case, the restriction takes the form of limiting visitations to individuals who have either a personal or professional relationship to the inmate family, friends of prior acquaintance, legal counsel, and clergy. In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation.

Accordingly, in light of the alternative channels of communication that are open to prison inmates, [Footnote 5] we

cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional. So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject," *Cruz v. Beto*, *supra*, at 405 U. S. 321, and does not abridge any First Amendment freedoms retained by prison inmate. [Footnote 6]

II

In No. 73-918, the media plaintiffs ask us to hold that the limitation on press interviews imposed by § 415.071 violates the freedom of the press guaranteed by the First and Fourteenth Amendments. They contend that, irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system. In this regard, the media plaintiffs do not claim any impairment of their freedom to publish, for California imposes no restrictions on what may be published about its prisons, the prison inmates, or the officers who administer the prisons. Instead, they rely on their right to gather news without governmental interference, which the media plaintiffs assert includes a right

of access to the sources of what is regarded as newsworthy information. We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions. [Footnote 7] The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, new men are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants. In short, members

of the press enjoy access to California prisons that is not available to other members of the public.

The sole limitation on newsgathering in California prisons is the prohibition in § 415.071 of interviews with individual inmates specifically designated by representatives of the press. This restriction is of recent vintage, having been imposed in 1971 in response to a violent episode that the Department of Corrections felt was at least partially attributable to the former policy with

respect to face-to-face prisoner-press interviews. Prior to the promulgation of § 415.071, every journalist had virtually free access to interview any individual inmate whom he might wish. Only members of the press were accorded this privilege; other members of the general public did not have the benefit of such an unrestricted visitation policy. Thus, the promulgation of § 415.071 did not impose a discrimination against press access, but merely eliminated a special privilege formerly given to representatives of the press vs-a-vs members of the public generally. [Footnote 8]

In practice, it was found that the policy in effect prior to the promulgation of § 415.071 had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual "public figures" within the prison society and gained a disproportionate degree of notoriety and influence among their

fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems. For example, extensive press attention to an inmate who espoused a practice of noncooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institutions' ability to deal effectively with the inmates generally. Finally, in the words of the District Court, on August 21, 1971,

"[d]uring an escape attempt at San Quentin, three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and, on August 23, § 415.071 was adopted to mitigate the problem."

364 F.Supp. at 198. It is against this background that we consider the media plaintiffs' claims under the First and Fourteenth Amendments.

The constitutional guarantee of a free press "assures the maintenance of our political system and an open society," *Time, Inc. v. Hill*, 385 U. S. 374, 385 U. S. 389(1967), and secures "the paramount public interest in a free flow of information to the people concerning public officials," *Garrison v. Louisiana*, 379 U. S. 64, 379 U. S. 77 (1964). *See also New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). By the same token, "*[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" New York Times Co. v. United States*, *403 U. S. 713*, *403 U. S. 714 (1971); Organization for a Better Austin v. Keefe*, *402 U. S. 415 (1971); Bantam Books, Inc. v. Sullivan*, *372 U. S. 58*, *372 U. S. 70 (1963); Near v. Minnesota ex rel. Olson*, *283 U. S. 697 (1931). Correlatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published. Kleindienst v. Mandel*, *408 U.S. at 408 U. S. 762-763; Stanley v. Georgia*, *394 U. S. 557*, *394 U. S. 564 (1969).*

In *Branzburg v. Hayes*, 408 U. S. 665 (1972), the Court went further and acknowledged that "news gathering is not without its First Amendment protections," *id.* at 408 U. S. 707, for "without some protection for seeking out the news, freedom of the press could be eviscerated," *id.* at 408 U. S. 681. In *Branzburg*,the Court held that the First and Fourteenth Amendments were not abridged by requiring reporters to disclose the identity of their confidential sources to a grand jury when that information was needed in the course of a good faith criminal investigation. The Court there could

"perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial,"

id. at 408 U. S. 690-691.

In this case, the media plaintiffs contend that § 415.071 constitutes governmental interference with their newsgathering activities that is neither consequential nor uncertain, and that no substantial governmental interest can be shown to justify the denial of press access to specifically designated prison inmates. More particularly, the media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press — access broader than is accorded members of the public generally — face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press. We do not agree.

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may

be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."

Branzburg v. Hayes, *supra*, at 408 U. S. 684-685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally. [Footnote 9] It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, *cf. Branzburg v. Hayes*, *supra*, and that government cannot restrain the publication of news emanating from such sources. *Cf. New York Times Co. v. United States*, *supra*.It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision

of this Court. Accordingly, since § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.

For the reasons stated, we reverse the District Court's judgment that § 415.071 infringes the freedom of speech of the prison inmates and affirm its judgment that that regulation does not abridge the constitutional right of a free press. Accordingly, the judgment is vacated, and the cases are remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

* Together with No. 73-754, *Procunier, Corrections Director v. Hillery et al.*, also on appeal from the same court.

[Footnote 1]

This litigation was first initiated before a single judge and proceeded for nearly a year with the court's attention focused on the interview practice at San Quentin State Penitentiary, where all the inmate plaintiffs are confined, where the interviews sought by the media plaintiffs were to occur, and where all the defendants, except Mr. Procunier, are employed. After the matter was briefed and argued, the single judge preliminarily enjoined the enforcement of § 415.071. Only then did the defendants bring to the court's attention that § 415.071 was a regulation of state-wide application. Thereafter a three-judge court was convened to pass on the constitutional validity of the regulation.

[Footnote 2]

The periodical has since ceased publication and its editors did not join the media plaintiffs in this litigation.

[Footnote 3]

There is some question as to whether the interview between Hillery and the magazine editors was denied under the authority of § 415.071. Department of Corrections interview policy permits, on a case-by-case basis, meetings between inmate authors and their publishers. The defendants contend that the interview was denied here because the officials made an individualized determination that the meeting was not, in fact, necessary to effectuate the publication of Hillery's works. Hillery, on the other hand, notes that the editors had indicated to the prison officials that they also wished to discuss with him the conditions in the prison in order to publish an article on that subject. Thus, it appears that the denial was, in all likelihood, based at least in part on § 415.071.

[Footnote 4]

This policy does not appear to be codified or otherwise expressly articulated in any generally applicable rule or regulation. The statement of visiting privileges for San Quentin State Penitentiary indicates that all visitors must be approved by the corrections officials and must be either "members of the family or friends of long standing." It also permits visits by attorneys to their clients. Although nothing is said in this statement about visits by members of the clergy, there is no dispute among the parties that the

practice of the Department of Corrections is to permit such visits. There is also no disagreement among the parties that this visitation policy is generally applied by the Department throughout the state corrections system.

[Footnote 5]

It is suggested by the inmate appellees that the use of the mails as an alternative means of communication may not be effective in the case of prisoners who are inarticulate or even illiterate. There is no indication, however, that any of the four inmates before the Court suffer from either of these disabilities. Indeed, the record affirmatively shows that two of the inmates are published writers. Although the complaint was filed as a class action, the plaintiffs never moved the District Court to certify the case as a class action as required by Fed.Rules Civ.Proc. 23(b)(3) and (c). Thus, the short answer to the inmates' contention is that there is neither a finding by the District Court nor support in the record for a finding that the alternative channels of communication are not an effective means for the inmate appellees to express themselves to persons outside the prison.

Even with respect to inmates who may not be literate or articulate, however, there is no suggestion that the corrections officials would not permit such inmates to seek the aid of fellow inmates or of family and friends who visit them to commit their thoughts to writing for communication to individuals in the general public. *Cf. Johnson v. Avery*, 393 U. S. 483 (1969). Merely because such inmates may need assistance to utilize one of the alternative channels does not make it an ineffective alternative, unless, of course, the State prohibits the inmate from receiving such assistance.

[Footnote 6]

The inmates argue that restricting their access to press representatives unconstitutionally burdens their First and Fourteenth Amendment right to petition the government for the redress of grievances. Communication with the press, the inmates contend, provides them with their only effective opportunity to communicate their grievances, through the channel of public opinion, to the legislative and executive branches of the government. We think, however, that the alternative means of communication with the press that are available to prisoners, together with the substantial access to prisons that California accords the press and other members of the public, *see infra* at 417 U. S. 830-831, satisfies whatever right the inmates may have to petition the government through the press.

We also note that California accords prison inmates substantial opportunities to petition the executive, legislative, and judicial branches of government directly. Section 2600 of the California Penal Code permits an inmate to correspond confidentially with any public officeholder. And various rules promulgated by the Department of Corrections explicitly permit an inmate to correspond with the Governor, any other elected state or federal official, and any appointed head of a state or federal agency. Similarly, California has acted to assure prisoners the right to petition for judicial relief. *See, e.g., In re Jordan*, 7 Cal.3d 930, 500 P.2d 873 (1972); *In re Van Geldern*, 5 Cal.3d 832, 489 P.2d 578 (1971); *In re Harrell*, 2 Cal.3d 675, 470 P.2d 640 (1970). Section 845.4 of the California Government Code also makes prison officials liable for intentional interference with the right of a prisoner to obtain judicial relief from his confinement.

[Footnote 7]

This policy reflects a recognition that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance. As THE CHIEF JUSTICE has commented, we cannot

"continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence. . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem."

Burger, Our Options are Limited, 18 Vill.L.Rev. 165, 167 (1972). Along the same lines, THE CHIEF JUSTICE has correctly observed that,

"[i]f we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change. . . . A visit to most prisons will make you a zealot for prison reform."

W. Burger, For Whom the Bell Tolls, reprinted at 25 Record of N.Y.C.B.A. (Supp.) 14, 20, 21 (1970).

[Footnote 8]

It cannot be contended that, because California permits family, friends, attorneys, and clergy to visit inmates, it cannot limit visitations by the press. No member of the general public who does not have a personal or professional relationship to the inmate is

permitted to enter the prison and name an inmate with whom he would like to engage in face-to-face discourse. Thus, the press is granted the same access in this respect to prison inmates as is accorded any member of the general public. Indeed, as is noted in the text, the aggregate access that the press has to California prisons and their inmates is substantially greater than that of the general public.

[Footnote 9]

As Mr. Chief Justice Warren put the matter in writing for the Court in *Zemel v. Rusk*,381 U. S. 1, 381 U. S. 117 (1965),

"[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information."

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

These cross-appeals concern the constitutionality, under the First and Fourteenth Amendments, of a regulation of the California Department of Corrections that prohibits all personal interviews of prison inmates by representatives of the news media. This regulation is substantially identical to the United States Bureau of Prisons policy statement whose validity is at issue in *Saxbe v. Washington Post Co.*, *post*, p. 417 U. S. 843. For the reasons stated in my dissenting opinion in that case, *post*, p. 417 U. S. 850, I would hold that California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government. Accordingly, I dissent from the judgment of the Court.

The California cross-appeals differ from the *Washington Post* case in one significant respect. Here, the constitutionality of the interview ban is challenged by prisoners as well as newsmen. Thus, these appeals, unlike *Washington Post*, raise the question whether inmates as

individuals have a personal constitutional right to demand interviews with willing reporters. Because I agree with the majority that they do not, I join 417 U. S.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.*

These cases involve the constitutionality, under the First and Fourteenth Amendments, of prison regulations limiting communication between state and federal prisoners and the press. Nos. 73-754 and 73-918 are cross-appeals from the judgment of a three-judge District Court for the Northern District of California. 364 F.Supp. 196. Suit was brought in that court by four California state prisoners and three professional journalists challenging the constitutionality of California Department of Corrections Manual § 415.071, which imposes an absolute ban on media interviews with individually designated inmates.

The court upheld the prisoners' claim that this regulation is violative of their right of free speech, and, in No. 73-754, the Director of the California Department of Corrections appeals from the court's injunction against further enforcement of the regulation. As to the journalists' claim, the court noted:

"The media plaintiffs herein and *amicus curiae* argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees."

364 F.Supp. at 199. In No. 73-918, the journalists appeal this rejection of their claim.

No. 73-1265 involves a media challenge to Federal Bureau of Prisons Policy Statement 1220.1A, ¶ 4(b)(6), which prohibits press interviews with any particular federal

prisoner in any medium security or maximum security facility. The District Court held the total ban violative of the First Amendment's free press guarantee and enjoined its enforcement. 357 F.Supp. 770. The Court of Appeals affirmed *sub nom. Washington Post Co. v. Kleindienst*, 161 U.S.App.D.C. 75, 494 F.2d 994. As the majority notes, "[t]he policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies" here under review.

I

In analyzing the prisoner challenge to California's absolute ban on media interviews with individual inmates, I start with the proposition that

"foremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment. Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process. . . . Free speech and press within the meaning of the First Amendment are, in my judgment, among the preeminent privileges and immunities of all citizens."

Procunier v. Martinez, 416 U. S. 396, 416 U. S. 428-429 (DOUGLAS, J., concurring in judgment). With that premise, I cannot agree with the Court that California's grossly overbroad restrictions on prisoner speech are constitutionally permissible. I agree that prison discipline, inmate safety, and rehabilitation must be considered in evaluating First Amendment rights in the prison context. First Amendment principles must always be applied "in light of the special characteristics of the . . . environment." *Tinker v. Des Moines School District*, 393 U. S. 503, 393 U. S. 506; *Healy v. James*, 408 U. S. 169, 408 U. S. 180. But the prisoners here do not contend that prison officials are powerless to impose reasonable limitations on

visits by the media which are necessary in particularized circumstances to maintain security, discipline, and good order.

All that the prisoners contend, and all that the courts below found, is that these penal interests cannot be used as a justification for an absolute ban on media interviews, because

"[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

NAACP v. Button, 371 U. S. 415, 371 U. S. 438. *And see Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 311.

It is true that the prisoners are left with other means of expression, such as visits by relatives and communication by mail. But the State can hardly defend an overly broad restriction on expression by demonstrating that it has not eliminated expression completely.

As Mr. Justice Black has said:

"I cannot accept my Brother HARLAN's view [in dissent] that the abridgment of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop."

NLRB v. Fruit Packers, 377 U. S. 58, 377 U. S. 79-80 (concurring opinion).

A State might decide that criticism of its affairs could be reduced by prohibiting all its employees from discussing governmental operations in interviews with the media, leaving criticism of the State to those with the time, energy, ability, and inclination to communicate

through the mails. The prohibition here is no less offensive to First Amendment principles; it flatly prohibits interview communication with the media on the government's penal operations by the only citizens with the best knowledge and real incentive to discuss them.

I agree with the court below that the State's interest in order and prison discipline cannot justify its total ban on all media interviews with any individually designated inmate on any matter whatsoever. Such a coarse attempt at regulation is patently unconstitutional in an area where "[p]recision of regulation must be the touchstone." *NAACP v. Button*, *supra* at 371 U. S. 438; *Elfbrandt v. Russell*, 384 U. S. 11, 384 U. S. 18. I would affirm the District Court's judgment in this regard.

II

In Nos. 73-918 and 73-1265, the media claim that the state and federal prison regulations here, by flatly prohibiting interviews with inmates selected by the press, impinge upon the First Amendment's free press guarantee, directly protected against federal

infringement and protected against state infringement by the Fourteenth Amendment. In rejecting the claim, the Court notes that the ban on access to prisoners applies as well to the general public, and it holds that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Ante* at 417 U. S. 834.

In dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves. In enjoining enforcement of the federal regulation in No. 73-1265, Judge Gesell did not vindicate any right of the Washington Post, but rather the right of the people, the true sovereign under our constitutional scheme, to govern in

an informed manner.

"The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people."

Branzburg v. Hayes, 408 U. S. 665, 408 U. S. 721 (DOUGLAS, J., dissenting).

Prisons, like all other public institutions, are ultimately the responsibility of the populace. Crime, like the economy, health, education, defense, and the like, is a matter of grave concern in our society, and people have the right and the necessity to know not only of the incidence of crime, but of the effectiveness of the system designed to control it.

"On any given day, approximately 1,500,000 people are under the authority of [federal, state and local prison] systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society. [Footnote 2/1]"

The public's interest in being informed about prisons is thus paramount.

As with the prisoners' free speech claim, no one asserts that the free press right is such that the authorities are powerless to impose reasonable regulations as to the time, place, and manner of interviews to effectuate prison discipline and order. The only issue here is whether the complete ban on interviews with inmates selected by the press goes beyond what is necessary for the protection of these interests and infringes upon our cherished right of a free press. As the Court of Appeals noted in No. 73-1265:

"[W]hile we do not question that the concerns

voiced by the Bureau [of Prisons] are legitimate interests that merit protection, we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose."

161 U.S.App.D.C. at 86, 494 F.2d at 1005.

It is thus not enough to note that the press — the institution which "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs" [Footnote 2/2] — is denied no more access to the prisons than is denied the public generally. The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely, instead, in a society which values a free press, to rely upon the media for information.

It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?

I agree with the courts below in No. 73-1265 that the absolute ban on press interviews with specifically designated federal inmates is far broader than is necessary to protect any legitimate governmental interests, and is an unconstitutional infringement on the public's right to know protected by the free press guarantee of the First Amendment. I would affirm the judgment in this regard.

Since this basic right is guaranteed against state infringement by the application of the First Amendment to the States through the Fourteenth, [Footnote 2/3] California's absolute ban can fare no better. I would reverse the District Court's rejection of this claim in

No. 73-918.

* [This opinion applies also to No. 73-1265, *Saxbe et al. v. Washington Post Co. et al.*, *post*, p. 417 U. S. 843.]

[Footnote 2/1]

Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess., Report on the Inspection of Federal Facilities at Leavenworth Penitentiary and the Medical Center for Federal Prisoners 2 (Comm.Print 1974).

[Footnote 2/2]

Mills v. Alabama, 384 U. S. 214, 384 U. S. 219.

[Footnote 2/3]

"While Mr. Chief Justice Hughes, in *Stromberg v. California*, 283 U. S. 359, stated that the First Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth, it has become customary to rest on the broader foundation of the entire Fourteenth Amendment. Free speech and press within the meaning of the First Amendment is, in my judgment, one of the preeminent privileges and immunities of all citizens."

Procunier v. Martinez, 416 U. S. 396, 416 U. S. 428-429 (DOUGLAS, J., concurring in judgment).

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2.7: Freedom of Religion- Cooper v. Pate

U.S. Supreme Court

Cooper v. Pate, 378 U.S. 546 (1964)

Cooper v. Pate, 378 U.S. 546 (1964)

No. 1134, Misc.

Decided June 22, 1964

78 U.S. 546

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The petitioner, an inmate at the Illinois State Penitentiary, brought an action under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, § 1979 of the Revised Statutes, alleging that solely because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners. The District Court granted the respondent's motion to dismiss for failure to state a claim on which relief could be granted and the Court of Appeals affirmed. 324 F.2d 165 (C.A.7th Cir.). We reverse the judgment below. Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action, and it was error to dismiss it. *See Pierce v. LaVallee*, 293 F.2d 233 (C.A.2d Cir.); *Sewell v. Pegelow*, 291 F.2d 196 (C.A.4th Cir.).

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2.8: Freedom of Religion- O'Lone v. Estate of Shabazz 482 U.S. 342 (1987)

U.S. Supreme Court

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)

O'Lone v. Estate of Shabazz

No. 85-1722

Argued March 24, 1987

Decided June 9, 1987

482 U.S. 342

Respondents, prison inmates and members of the Islamic faith, brought suit under 42 U.S.C. § 1983 contending that two policies adopted by New Jersey prison officials prevented them from attending Jumu'ah, a Muslim congregational service held on Friday afternoons, and thereby violated their rights under the Free Exercise Clause of the First Amendment. The first such policy, Standard 853, required inmates in respondents' custody classifications to work outside the buildings in which they were housed and in which Jumu'ah was held, while the second, a policy memorandum, prohibited inmates assigned to outside work from returning to those buildings during the day. The Federal District Court concluded that no constitutional violation had occurred, but the Court of Appeals vacated and remanded, ruling that the prison policies could be sustained only if the State showed that the challenged regulations were intended to and did serve the penological goal of security, and that no reasonable method existed by which prisoners' religious rights could be accommodated without creating bona fide security problems. The court also held that the expert testimony of prison officials should be given due weight on, but is not dispositive of, the accommodation issue.

Held:

1. The Court of Appeals erred in placing the burden on prison officials to disprove the availability of alternative methods of accommodating prisoners' religious rights. That approach fails to reflect the respect and deference the Constitution allows for the judgment of prison administrators. P. 482 U. S. 350.

2. The District Court's findings establish that the policies challenged here are reasonably related to legitimate penological interests, and therefore do not offend the Free Exercise Clause. Both policies have a rational connection to the legitimate governmental interests in institutional order and security invoked to justify them, as is demonstrated by findings that Standard 853 was a response to critical overcrowding and was designed to ease tension and drain on the facilities during that part of the day when the inmates were outside, and that the policy memorandum was necessary since returns from outside work details generated congestion and delays at the main gate, a high-risk area, and since the Homeneed to decide return requests placed pressure on guards supervising outside work details. Rehabilitative concerns also support the policy memorandum, in light of testimony indicating that corrections officials sought thereby to simulate working conditions and responsibilities in society. Although the policies at issue may prevent some Muslim prisoners from attending Jumu'ah, their reasonableness is supported by the fact that they do not deprive respondents of all forms of religious exercise, but instead allow participation in a number of Muslim religious ceremonies. Furthermore, there are no obvious, easy alternatives to the policies, since both of respondents' suggested accommodations would, in the judgment of prison officials, have adverse effects on the prison institution. Placing all Muslim inmates in inside work details would be inconsistent with the legitimate concerns underlying Standard 853, while providing weekend labor for Muslims would require extra supervision that would be a drain on scarce human resources. Both proposed accommodations would also threaten prison security by fostering "affinity groups" likely to challenge institutional authority, while any special arrangements for one group would create a perception of favoritism on the part of other inmates. Pp. 482 U. S. 350-353.

3. Even where claims are made under the First Amendment, this Court will not substitute its judgment on difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison. P. 482 U. S. 353.

782 F.2d 416, reversed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post* p. 482 U. S. 354.

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2.9: Freedom of Religion- McCreary County v. American Civil Liberties Union of Ky.

SUPREME COURT OF THE UNITED STATES

McCREARY COUNTY, KENTUCKY, et al. *v*. AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY et al.

certiorari to the united states court of appeals for the sixth circuit

No. 03–1693.Argued March 2, 2005—Decided June 27, 2005

After petitioners, two Kentucky Counties, each posted large, readily visible copies of the Ten Commandments in their courthouses, respondents, the American Civil Liberties Union (ACLU) et al., sued under 42 U. S. C. §1983 to enjoin the displays on the ground that they violated the First Amendment's Establishment Clause. The Counties then adopted nearly identical resolutions calling for a more extensive exhibit meant to show that the Commandments are Kentucky's "precedent legal code." The resolutions noted several grounds for taking that position, including the state legislature's acknowledgment of Christ as the "Prince of Ethics." The displays around the Commandments were modified to include eight smaller, historical documents containing religious references as their sole common element, *e.g.*, the Declaration of Independence's "endowed by their Creator" passage. Entering a preliminary injunction, the District Court followed the *Lemon* v. *Kurtzman*, 403 U. S. 602, test to find, *inter alia*, that the original display lacked any secular purpose because the Commandments are a distinctly religious document, and that the second version lacked such a purpose because the Counties narrowly tailored their selection of foundational documents to those specifically referring to Christianity. After changing counsel, the Counties revised the exhibits again. No new resolution authorized the new exhibits, nor did the Counties repeal the resolutions that preceded the second one. The new posting, entitled "The Foundations of American Law and Government Display," consists of nine framed documents of equal size. One sets out the Commandments explicitly identified as the "King James Version," quotes them at greater length, and explains that they have profoundly influenced the formation of Western legal thought and this Nation. With the Commandments are framed copies of, *e.g.*, the Star Spangled Banner's lyrics and the Declaration of Independence, accompanied by statements about their historical and legal significance. On the ACLU's motion, the District Court included this third display in the injunction despite the Counties' professed intent to show that the Commandments were part of the foundation of American Law and Government and to educate County citizens as to the documents. The court took proclaiming the Commandments' foundational value as a religious, rather than secular, purpose under *Stone* v. *Graham*, 449 U. S. 39, and found that the Counties' asserted educational goals crumbled upon an examination of this litigation's history. Affirming, the Sixth Circuit stressed that, under *Stone*, displaying the Commandments bespeaks a religious object unless they are integrated with a secular message. The court saw no integration here because of a lack of a demonstrated analytical or historical connection between the Commandments and the other documents.

Held:

1. A determination of the Counties' purpose is a sound basis for ruling on the Establishment Clause complaints. The Counties' objective may be dispositive of the constitutional enquiry. Pp. 10–19.

(a) Lemon's "secular legislative purpose" enquiry, 403 U. S., at 612, has been a common, albeit seldom dispositive, element of this Court's cases, *Wallace* v. *Jaffree*,472 U. S. 38, 75. When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter&nbhyph;day Saints* v. *Amos*, 483 U. S. 327, 335. A purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding … that liberty and social stability demand a … tolerance that respects the religious views of all citizens." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 718. Pp. 11–12.

(b) The Court declines the Counties' request to abandon *Lemon*'s purpose test. Their assertions that true "purpose" is unknowable, and its search merely an excuse for courts to act selectively and unpredictably in picking out evidence of subjective intent, are as seismic as they are unconvincing. Examination of purpose is a staple of statutory interpretation for every American appellate court, *e.g.*,*General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 600, and governmental purpose is a key element of a good deal of constitutional doctrine, *e.g.*, *Washington*v. *Davis*, 426 U. S. 229. Scrutinizing purpose makes practical sense in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact set forth in a statute's text, legislative history, and implementation or comparable official act. *Wallace* v. *Jaffree*, 472 U. S., at 73–74. Nor is there any

indication that the purpose enquiry is rigged in practice to finding a religious purpose dominant every time a case is filed. Pp. 12–15.

(c) The Court also avoids the Counties' alternative tack of trivializing the purpose enquiry. They would read the Court's cases as if the enquiry were so naive that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for these arguments, or reason supporting them. Pp. 15–19.

(1) A legislature's stated reasons will generally warrant the deference owed in the first instance to such official claims, but *Lemon* requires the secular purpose to be genuine, not a sham, and not merely secondary to a religious objective, see, *e.g.*, *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 308. In those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object, as against a predominantly religious one. See, *e.g.*, *Stone*, *supra*, at 41. Pp. 15–17.

(2) The Counties' argument that purpose in a case like this should be inferred only from the latest in a series of governmental actions, however close they may all be in time and subject, bucks common sense. Reasonable observers have reasonable memories, and the Court's precedents sensibly forbid an observer "to turn a blind eye to the context in which [the] policy arose." *Santa Fe*, *supra*, at 315. Pp. 17–19.

2. Evaluation of the Counties' claim of secular purpose for the ultimate displays may take their evolution into account. The development of the presentation should be considered in determining its purpose. Pp. 19–26.

(a) *Stone* is the Court's initial benchmark as its only case dealing with the constitutionality of displaying the Commandments. It recognized that the Commandments are an "instrument of religion" and that, at least on the facts before the Court, their text's display could presumptively be understood as meant to advance religion: although state law specifically required their posting in classrooms, their isolated exhibition did not allow even for an argument that secular education explained their being there. 449 U. S., at 41, n. 3. But *Stone* did not purport to decide the constitutionality of every possible way the government might set out the Commandments, and under the Establishment Clause detail is key, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*,492 U. S. 573, 595. Hence, the Court looks to the record showing the progression leading up to the Commandments' third display, beginning with the first. Pp. 19–20.

(b) There are two obvious similarities between the display *Stone* rejected and the first one here: both set out the Commandments' text as distinct from any traditionally symbolic representation like blank tablets, and each stood alone, not as part of an arguably secular display. *Stone* stressed the significance of integrating the Commandments into a secular scheme to forestall the broadcast of an otherwise clearly religious message, 449 U. S., at 42, and for good reason, the Commandments being a central point of reference in the religious and moral history of Jews and Christians. They proclaim the existence of a monotheistic god (no other gods), regulate details of religious obligation (no graven images, sabbath breaking, or vain oath swearing), and unmistakably rest even the universally accepted prohibitions (as against murder, theft, etc.) on the sanction of the divinity proclaimed at the text's beginning. Displaying that text is thus different from symbolic representation, like tablets with 10 roman numerals, which could be seen as alluding to a general notion of law, not a sectarian conception of faith. Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view. The display in *Stone* had no such context, and the Counties' solo exhibit here did nothing more to counter the sectarian implication than the *Stone* postings. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message. Pp. 20–21.

(c) The Counties' second display, unlike the first, did not hang the Commandments in isolation, but included the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents whose references to God were highlighted as their sole common element. The display's unstinting focus was on religious passages, showing that the Counties posted the Commandments precisely because of their sectarian content. That demonstration of the government's objective was enhanced by serial religious references and the accompanying resolutions' claim about the embodiment of ethics in Christ. Together, the display and resolution presented an indisputable, and undisputed, showing of an impermissible purpose. Pp. 21–22.

(d) The lower courts' conclusion that no legitimizing secular purpose prompted the Counties' third display, the "Foundations of American Law and Government" exhibit, is amply justified. That display placed the Commandments in the company of other

documents the Counties deemed especially significant in the historical foundation of American government. In trying to persuade the District Court to lift the preliminary injunction, the Counties cited several new purposes for the third version, including a desire to educate County citizens as to the significance of the documents displayed. The Counties' claims, however, persuaded neither that court, which was intimately familiar with this litigation's details, nor the Sixth Circuit. Where both lower courts were unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one. *Edwards* v. *Aguillard*, 482 U. S. 578, 594. The Counties' new statements of purpose were presented only as a litigating position, there being no further authorizing resolutions by the Counties' governing boards. And although repeal of the earlier county authorizations would not have erased them from the record of evidence bearing on current purpose, the extraordinary resolutions for the second displays passed just months earlier were not repealed or otherwise repudiated. Indeed, the sectarian spirit of the resolutions found enhanced expression in the third display, which quoted more of the Commandment's purely religious language than the first two displays had done. No reasonable observer, therefore, could accept the claim that the Counties had cast off the objective so unmistakable in the earlier displays. Nor did the selection of posted material suggest a clear theme that might prevail over evidence of the continuing religious object. For example, it is at least odd in a collection of documents said to be "foundational" to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original framing. An observer would probably suspect the Counties of reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality. Pp. 22–25.

(e) In holding that the preliminary injunction was adequately supported by evidence that the Counties' purpose had not changed at the third stage, the Court does not decide that the Counties' past actions forever taint any effort on their part to deal with the subject matter. The Court holds only that purpose is to be taken seriously under the Establishment Clause and is to be understood in light of context. District courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions. Nor does the Court hold that a sacred text can never be integrated constitutionally into a governmental display on law or history. Its own courtroom frieze depicts Moses holding tablets exhibiting a portion of the secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating religious neutrality. P. 26.

354 F. 3d 438, affirmed.

Souter, J., delivered the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed a concurring opinion. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined, and in which Kennedy, J., joined as to Parts II and III.

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2.10: Freedom to Assembly- Brandenburg v. Ohio 395 U.S. 444 (1969)

U.S. Supreme Court

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Brandenburg v. Ohio

No. 492

Argued February 27, 1969

Decided June 9, 1969

395 U.S. 444

APPEAL FROM THE SUPREME COURT OF OHIO

Appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for

"advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform"

and for

"voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

Neither the indictment nor the trial judge's instructions refined the statute's definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Held: Since the statute, by its words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, it falls within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Whitney v. California*, 274 U. S. 357, overruled.

Reversed.

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety Homeof crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for

"voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

Ohio Rev.Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal *sua sponte* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 94 (196). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. [Footnote 1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are — we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."

"We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you. "

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal.Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. *Cf. Fiske v. Kansas*, 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. *See Dennis v. United States*, 341 U. S. 494, at 341 U. S. 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. [Footnote 2] As we said in *Noto v. United States*, 367 U. S. 290, 367 U. S. 297-298 (1961),

"the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

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See also Herndon v. Lowry, 301 U. S. 242, 301 U. S. 259-261 (1937); *Bond v. Floyd*, 385 U. S. 116, 385 U. S. 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. *Cf. Yates v. United States*, 354 U. S. 298(1957); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Stromberg v. California*, 283 U. S. 359(1931). *See also United States v. Robel*, 389 U. S. 258 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt v. Russell*, 384 U. S. 11 (1966); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *Baggett v. Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action. [Footnote 3]

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Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. [Footnote 4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, *supra*,cannot be supported, and that decision is therefore overruled.

Reversed.

[Footnote 1]

The significant portions that could be understood were:

“How far is the nigger going to — yeah.”

“This is what we are going to do to the niggers.”

“A dirty nigger.”

“Send the Jews back to Israel.”

“Let’s give them back to the dark garden.”

“Save America.”

“Let’s go back to constitutional betterment.”

“Bury the niggers.”

“We intend to do our part.”

“Give us our state rights.”

“Freedom for the whites.”

“Nigger will have to fight for every inch he gets from now on.”

[Footnote 2]

It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. § 35, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act’s constitutionality. *Dennis v. United States*, 341 U. S. 494 (1951). That this was the basis for *Dennis* was emphasized in *Yates v. United States*, 354 U. S. 298, 354 U. S. 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge’s instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

[Footnote 3]

The first count of the indictment charged that appellant

“did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform. . . .”

The second count charged that appellant “did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism. . . .” The trial judge’s charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State v. Kassay*, 126 Ohio St. 177, 184 N.E. 521 (1932), where the constitutionality of the statute was sustained.

[Footnote 4]

Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for, as Chief Justice Hughes wrote in *De Jonge v. Oregon*, *supra*, at 299 U. S. 364: “The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental.” *See also United States v. Cruikshank*, 92 U. S. 542, 92 U. S. 552 (1876); *Hague v. CIO*, 307 U. S. 496, 307 U. S. 513, 307 U. S. 519 (1939); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 357 U. S. 460-461 (1958).

MR. JUSTICE BLACK, concurring.

I agree with the views expressed by MR. JUSTICE DOUGLAS in his concurring opinion in this case that the "clear and present danger" doctrine should have no place

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in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites *Dennis v. United States*, 341 U. S. 494 (1951), but does not indicate any agreement on the Court's part with the "clear and present danger" doctrine on which *Dennis* purported to rely.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a *caveat.*

The "clear and present danger" test was adumbrated by Mr. Justice Holmes in a case arising during World War I — a war "declared" by the Congress, not by the Chief Executive. The case was *Schenck v. United States*, 249 U. S. 47, 249 U. S. 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes, in rejecting that defense, said:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Frohwerk v. United States, 249 U. S. 204, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. *Schenck* was referred to as a conviction for obstructing security "by words of persuasion." *Id.* at 249 U. S. 206. And the conviction in *Frohwerk* was sustained because "the circulation of the paper was

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in quarters where a little breath would be enough to kindle a flame." *Id.* at 249 U. S. 209.

Debs v. United States, 249 U. S. 211, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his "opposition was so expressed that its natural and intended effect would be to obstruct recruiting." *Id.* at 249 U. S. 215.

"If that was intended, and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief."

Ibid.

In the 1919 Term, the Court applied the *Schenck* doctrine to affirm the convictions of other dissidents in World War I. *Abrams v. United States*, 250 U. S. 616, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to *Schenck*, he did not think that, on the facts, a case for overriding the First Amendment had been made out:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."

Id. at 250 U. S. 628.

Another instance was *Schaefer v. United States*, 251 U. S. 466, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was *Pierce v. United States*, 252 U. S. 239, in which, again, Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of "clear and present danger" on the First Amendment. Whether the war power — the greatest leveler of them all — is adequate to sustain that doctrine is debatable.

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The dissents in *Abrams*, *Schaefer*, and *Pierce* show how easily "clear and present danger" is manipulated to crush what Brandeis called "[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions" by

argument and discourse (*Pierce v. United States*, *supra*, at 252 U. S. 273) even in time of war. Though I doubt if the "clear and present danger" test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules *Whitney v. California*, 274 U. S. 357, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the "clear and present danger" test, moved closer to the First Amendment ideal when he said in dissent in *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 673:

"Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

We have never been faithful to the philosophy of that dissent.

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The Court, in *Herndon v. Lowry*, 301 U. S. 242, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. *Id.* at 301 U. S. 259-261. *And see Hartzel v. United States*, 322 U. S. 680. In *Bridges v. California*, 314 U. S. 252, 314 U. S. 261-263, we approved the "clear and present danger" test in an elaborate dictum that tightened it and confined it to a narrow category. But in *Dennis v. United States*, 341 U. S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition. [Footnote 2/1]

In that case, the prosecution dubbed an agreement to teach the Marxist creed a "conspiracy." The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants "intended to overthrow the Government as speedily as circumstances would permit.'" *Id.* at 341 U. S. 509-511. The Court sustained convictions under that charge, construing it to mean a determination of

""whether the gravity of the *evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [Footnote 2/2]"*

Id. at 341 U. S. 510, quoting from *United States v. Dennis*, 183 F.2d 201, 212.

Out of the "clear and present danger" test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. *Yates v. United States*, 354 U. S. 298, 354 U. S. 318. But an "active" member, who has a guilty knowledge and intent of the aim to overthrow the Government

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by violence, *Noto v. United States*, 367 U. S. 290, may be prosecuted. *Scales v. United States*, 367 U. S. 203, 367 U. S. 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. *Barenblatt v. United States*, 360 U. S. 109, 360 U. S. 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in *Dennis*, coined the "not improbable" test, 183 F.2d 201, 214, which this Court adopted and which Judge Hand preferred over the "clear and present danger" test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the "clear and present danger" test, he said, "I cannot help thinking that, for once, Homer nodded."

My own view is quite different. I see no place in the regime of the First Amendment for any "clear and present danger" test, whether strict and tight, as some would make it, or free-wheeling, as the Court in *Dennis* rephrased it.

When one reads the opinions closely and sees when and how the "clear and present danger" test has been applied, great misgivings are aroused. First, the threats were often loud, but always puny, and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers

of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression, and within the protection of the First Amendment.

Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

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Suppose one rips his own Bible to shreds to celebrate his departure from one "faith" and his embrace of atheism. May he be indicted?

Last Term, the Court held in *United States v. O'Brien*, 391 U. S. 367, 391 U. S. 382, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

"The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration."

391 U.S. at 391 U. S. 377-378.

But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried, and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement, as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is "free speech plus." *See Bakery Drivers Local v. Wohl*, 315 U. S. 769, 315 U. S. 775 (DOUGLAS, J., concurring); *Giboney v. Empire Storage Co.*, 336 U. S. 490, 336 U. S. 501; *Hughes v. Superior Court*, 339 U. S. 460, 339 U. S. 465; *Labor Board v. Fruit Packers*, 377 U. S. 58, 377 U. S. 77 (BLACK, J., concurring), *and id.* at 377 U. S. 93 (HARLAN, J., dissenting); *Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 578 (opinion of BLACK, J.); *Food Employees v. Logan Plaza*, 391 U. S. 308, 391 U. S. 326 (DOUGLAS, J., concurring). That means that it can be regulated when it comes to the "plus" or "action" side of the protest. It can be regulated as to

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the number of pickets and the place and hours (*see Cox v. Louisiana, supra*), because traffic and other community problems would otherwise suffer.

But none of these considerations is implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an "active" Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty security hearings which, since 1947, when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. *See Speiser v. Randall*, 357 U. S. 513, 357 U. S. 536-537 (DOUGLAS, J., concurring). They are indeed inseparable, and a prosecution can be launched for the overt

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acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas, as in *Yates*, and advocacy of political action, as in *Scales*.The quality of advocacy turns on the depth of the conviction, and government has no power to invade that sanctuary of belief and conscience. [Footnote 2/3]

[Footnote 2/1]

See McKay, The Preference For Freedom, 34 N.Y.U.L.Rev. 1182, 1203-1212 (1959).

[Footnote 2/2]

See Feiner v. New York, 340 U. S. 315, where a speaker was arrested for arousing an audience when the only "clear and present danger" was that the hecklers in the audience would break up the meeting.

[Footnote 2/3]

See MR. JUSTICE BLACK, dissenting, in *Communications Assn. v. Douds*, 339 U. S. 382,339 U. S. 446, 339 U. S. 449 *et seq.*

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2.11: Freedom of Assembly- National Socialist Party of America v. Village of Skokie 432 U.S. 43 (1977)

U.S. Supreme Court

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977)

National Socialist Party of America v. Village of Skokie

No. 76-1786

Decided June 14, 1977

432 U.S. 43

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF ILLINOIS

The Illinois Supreme Court denied a stay of the trial court's injunction prohibiting petitioners from marching, walking, or parading in the uniform of the National Socialist Party of America or otherwise displaying the swastika, and from distributing pamphlets or displaying materials inciting or promoting hatred against Jews or persons of any faith, ancestry, or race, and also denied leave for an expedited appeal.

Held:

1. The Illinois Supreme Court's order is a final judgment for purposes of this Court's jurisdiction, since it finally determined the merits of petitioners' claim that the injunction will deprive them of First Amendment rights during the period of appellate review.

2. The State must allow a stay where procedural safeguards, including immediate appellate review, are not provided, and the Illinois Supreme Court's order denied this right.

Certiorari granted; reversed and remanded.

PER CURIAM.

On April 29, 1977, the Circuit Court of Cook County entered an injunction against petitioners. The injunction prohibited them from performing any of the following actions within the village of Skokie, Ill.:

"[m]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion."

The Illinois Appellate Court denied an application for stay pending appeal. Applicants then filed a petition for a stay in the Illinois Supreme Court, together with a request for a direct expedited appeal to that court. The Illinois Supreme Court denied both the stay and leave for an expedited appeal. Applicants then filed an application for a stay with MR. JUSTICE STEVENS, as Circuit Justice, who referred the matter to the Court.

Treating the application as a petition for certiorari from the order of the Illinois Supreme Court, we grant certiorari and reverse the Illinois Supreme Court's denial of a stay. That order is a final judgment for purposes of our jurisdiction, since it involved a right "separable from, and collateral to" the merits, *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 337 U. S. 546 (1949). *See Abney v. United States*, 431 U. S. 651 (1977); *cf. Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 420 U. S. 476-487 (1975). It finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete. If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, *Freedman v. Maryland*, 380 U. S. 51 (1965), including immediate appellate review, *see Nebraska Press Assn. v. Stuart*, 423 U. S. 1319, 423 U. S. 1327 (1975) (BLACKMUN, J., in chambers). Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right.

Reversed and remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE WHITE would deny the stay.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

The Court treats an application filed here to stay a judgment of the Circuit Court of Cook County as a petition for certiorari to review the refusal of the Supreme Court of Illinois to stay the injunction. It summarily reverses this refusal of a stay. I simply do not see how the refusal of the Supreme Court of Illinois to stay an injunction granted by an inferior court within the state system can be described as a "[f]inal judgmen[t] or decre[e] rendered by the highest court of a State in which a decision could be had," which is the limitation that Congress has imposed on our jurisdiction to review state court judgments under 28 U.S.C. § 1257. *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 420 U. S. 476-487 (1975), relied upon by the Court, which surely took as liberal a view of this jurisdictional grant as can reasonably be taken, does not support the result reached by the Court here. In *Cox*, there had been a final decision on the federal claim by the Supreme Court of Georgia, which was the highest court of that State in which such a decision could be had. Here, all the Supreme Court of Illinois has done is, in the exercise of the discretion possessed by every appellate court, to deny a stay of a lower court ruling pending appeal. No Illinois appellate court has heard or decided the merits of applicants' federal claim.

I do not disagree with the Court that the provisions of the injunction issued by the Circuit Court of Cook County are extremely broad, and I would expect that, if the Illinois appellate courts follow cases such as *Freedman v. Maryland*, 380 U. S. 51(1965), and *Nebraska Press Assn. v. Stuart*, 423 U. S. 1319 (1975), relied upon by the Court, the injunction will be at least substantially modified by them. But I do not believe that, in the long run, respect for the Constitution or for the law is encouraged by actions of this Court which disregard the limitations placed on us by Congress in order to assure that an erroneous injunction issued by a state trial court does not wrongly interfere with the constitutional rights of those enjoined.

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2.12: Freedom of Speech- Schenck v. United States 249 U.S. 47 (1919)

U.S. Supreme Court

Schenck v. United States, 249 U.S. 47 (1919)

Schenck v. United States

Nos. 437, 438

Argued January 9, 10, 1919

Decided March 3, 1919

249 U.S. 47

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Evidence *held* sufficient to connect the defendants with the mailing of printed circulars in pursuance of a conspiracy to obstruct the recruiting and enlistment service, contrary to the Espionage Act of June 15, 1917. P 249 U. S. 49.

Incriminating document seized under a search warrant directed against a Socialist headquarters, *held* admissible in evidence, consistently with the Fourth and Fifth Amendment, in a criminal prosecution against the general secretary of a Socialist party, who had charge of the office. P. 249 U. S. 50.

Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment may become subject to prohibition when of such a nature and used in such circumstances a to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent. The character of every act depends upon the circumstances in which it is done. P. 249 U. S. 51.

A conspiracy to circulate among men called and accepted for military service under the Selective Service Act of May 18, 1917, a circular tending to influence them to obstruct the draft, with the intent to effect that result, and followed by the sending of such circulars, is within the power of Congress to punish, and is punishable under the Espionage Act, § 4, although unsuccessful. P. 249 U. S. 52.

The word “recruiting,” as used in the Espionage Act, § 3, means the gaining of fresh supplies of men for the military forces, as well by draft a otherwise. P. 249 U. S. 52

The amendment of the Espionage Act by the Act of May 16, 1918, c. 75, 40 Stat. 553, did not affect the prosecution of offenses under the former. P. 249 U. S. 53.

Affirmed.

The case is stated in the opinion.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217, 219, by causing and attempting

to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendants willfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offence against the United States, to-wit, to use the mails for the transmission of matter declared to be nonmailable by Title XII, § 2 of the Act of June 15, 1917, to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law

abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony, Schenck said he was general secretary of the Socialist party, and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On August 20, the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c., and there was a resolve that Comrade Schenck be allowed $125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular, and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer, there was evidence that she was a member of the Executive Board, and that the minutes of its transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585; *Weeks v. United States*, 232 U. S. 383, 232 U. S. 395, 232 U. S. 396. The search warrant did not issue against the defendant, but against the Socialist headquarters at 1326 Arch Street, and it would seem that the documents technically were not even in the defendants' possession. *See Johnson v. United States*, 228 U. S. 457. Notwithstanding some protest in argument, the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 218 U. S. 252, 218 U. S. 253.

The document in question, upon its first printed side, recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language, it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said "Do not submit to intimidation," but in form, at least, confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on

"If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."

It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course, the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462. We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.*Aikens v. Wisconsin*, 195 U. S. 194, 195 U. S. 205, 195 U. S. 206. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 221 U. S. 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right

to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right. It seems to be admitted that, if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in § 4, punishes conspiracies to obstruct, as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 245 U. S. 477. Indeed, that case might be said to dispose of the present contention if the precedent covers all *media concludendi*. But, as the right to free speech was not referred to specially, we have thought fit to add a few words.

It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The words are "obstruct the recruiting or enlistment service," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers, the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment, and would not even if the former act had been repealed. Rev.Stats., § 13.

Judgments affirmed.

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2.13: Freedom of Speech- Dennis v. United States 341 U.S. 494 (1951)

U.S. Supreme Court

Dennis v. United States, 341 U.S. 494 (1951)

Dennis v. United States

No. 336

Argued December 4, 1950

Decided June 4, 1951

341 U.S. 494

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

1. As construed and applied in this case, §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act, 54 Stat. 671, making it a crime for any person knowingly or willfully to advocate the overthrow or destruction of the Government of the United States by force or violence, to organize or help to organize any group which does so, or to conspire to do so, do not violate the First Amendment or other provisions of the Bill of Rights and do not violate the First or Fifth Amendments because of indefiniteness. Pp. 341 U. S. 495-499, 341 U. S. 517.

2. Petitioners, leaders of the Communist Party in this country, were indicted in a federal district court under § 3 of the Smith Act for willfully and knowingly conspiring (1) to organize as the Communist Party a group of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The trial judge instructed the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit," but that, if they so found, then, as a matter of law, there was sufficient danger of a substantive evil that Congress has a right to prevent to justify application of the statute under the First Amendment. Petitioners were convicted, and the convictions were sustained by the Court of Appeals. This Court granted certiorari, limited to the questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights, and (2) whether either § 2 or § 3, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Held: The convictions are affirmed. Pp. 341 U. S. 495-499, 341 U. S. 511-512, 341 U. S. 517.

183 F.2d 201, affirmed.

For the opinions of the Justices constituting the majority of the Court, *see:*

Opinion of THE CHIEF JUSTICE, joined by MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON, p. 341 U. S. 495.

Opinion of MR. JUSTICE FRANKFURTER, p. 341 U. S. 517.

Opinion of MR. JUSTICE JACKSON, p. 341 U. S. 561.

For the dissenting opinion of MR. JUSTICE BLACK, *see* p. 341 U. S. 579.

For the dissenting opinion of MR. JUSTICE DOUGLAS, *see* p. 341 U. S. 581.

The case is stated in the opinion of THE CHIEF JUSTICE, pp. 341 U. S. 495-499.

Affirmed, p. 341 U. S. 517.

MR. CHIEF JUSTICE VINSON announced the judgment of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

Petitioners were indicted in July, 1948, for violation of the conspiracy provisions of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 ed.) § 11, during the period of April, 1945, to July, 1948. The pretrial motion to quash the indictment on the grounds, *inter alia*, that the statute was unconstitutional was denied, *United States v. Foster,*80 F.Supp. 479, and the case was set for trial on January 17, 1949. A verdict of guilty as to all the petitioners was returned by the jury on October 14, 1949. The Court of Appeals affirmed the convictions. 183 F.2d 201. We granted certiorari, 340 U.S. 863, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith

Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.

Sections 2 and 3 of the Smith Act, 54 Stat. 671, 18 U.S.C. (1946 ed.) §§ 10, 11 (*see*present 18 U.S.C. § 2385), provide as follows:

"SEC. 2.(a) It shall be unlawful for any person –"

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;"

"(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;"

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

"(b) For the purposes of this section, the term 'government in the United States' means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them."

"SEC. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title."

The indictment charged the petitioners with willfully and knowingly conspiring (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment further alleged that § 2 of the Smith Act proscribes these acts and that any conspiracy to take such action is a violation of § 3 of the Act.

The trial of the case extended over nine months, six of which were devoted to the taking of evidence, resulting in a record of 16,000 pages. Our limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence to support the jury's determination that petitioners are guilty of the offense charged. Whether, on this record, petitioners did, in fact, advocate the overthrow of the Government by force and violence is not before us, and we must base any discussion of this point upon the conclusions stated in the opinion of the Court of Appeals, which treated the issue in great detail. That court held that the record in this case amply supports the necessary finding of the jury that petitioners, the leaders of the Communist Party in this country, were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared. Petitioners dispute the meaning to be drawn from the evidence, contending that the Marxist-Leninist

doctrine they advocated taught that force and violence to achieve a Communist form of government in an existing democratic state would be necessary only because the ruling classes of that state would never permit the transformation to be accomplished peacefully, but would use force and violence to defeat any peaceful political and economic gain the Communists could achieve. But the Court of Appeals held that the record supports the following broad conclusions: by virtue of their control over the political apparatus of the Communist Political Association, [Footnote 1] petitioners were able to transform that organization into the Communist Party; that the policies of the Association were changed from peaceful cooperation with the United States and its economic and political structure to a policy which had existed before the United States and the Soviet Union were fighting a

common enemy, namely, a policy which worked for the overthrow of the Government by force and violence; that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party; that the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence.

I

It will be helpful in clarifying the issues to treat next the contention that the trial judge improperly interpreted the statute by charging that the statute required an unlawful intent before the jury could convict. More specifically, he charged that the jury could not find the petitioners guilty under the indictment unless they found that petitioners had the intent to "overthrow . . . the Government of the United States by force and violence as speedily as circumstances would permit."

Section 2(a)(1) makes it unlawful

"to knowingly or willfully advocate, . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence. . . . ;"

Section 2(a)(3), "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow. . . ." Because of the fact that § 2(a)(2) expressly requires a specific intent to overthrow the Government, and because of the absence of precise language in the foregoing subsections, it is claimed that Congress deliberately omitted any such requirement. We do not agree. It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly or willfully" in § 2(a)(1), or the omission of exact language in § 2(a)(3). The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence. *See Williams v. United States*, 341 U. S. 97, 341 U. S. 101-102 (1951); *Screws v. United States*, 325 U. S. 91, 325 U. S. 101-105 (1945); *Cramer v. United States*, 325 U. S. 1,325 U. S. 31 (1945).

Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. A survey of Title 18 of the U.S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as "knowingly," "maliciously," "willfully," "with the purpose of," "with intent to," or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. *See American Communications Assn. v. Douds*, 339 U. S. 382, 339 U. S. 411 (1950).

It has been suggested that the presence of intent makes a difference in the law when an "act otherwise excusable or carrying minor penalties" is accompanied by such an evil intent. Yet the existence of such an intent made the killing condemned in *Screws*, *supra*, and the beating in *Williams*, *supra*, both clearly and severely punishable under state law, offenses constitutionally punishable by the Federal Government. In those cases, the Court required the Government to prove that the defendants intended to deprive the victim of a constitutional right. If that precise mental state may be an essential element of a crime, surely an intent to overthrow the Government of the United States by advocacy thereof is equally susceptible of proof. [Footnote 2]

II

The obvious purpose of the statute is to protect existing Government not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism. That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion. Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy. No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence. The

question with which we are concerned here is not whether Congress has such power, but whether the means which it has employed conflict with the First and Fifth Amendments to the Constitution.

One of the bases for the contention that the means which Congress has employed are invalid takes the form of an attack on the face of the statute on the grounds that, by its terms, it prohibits academic discussion of the merits of Marxism-Leninism, that it stifles ideas and is contrary to all concepts of a free speech and a free press. Although we do not agree that the language itself has that significance, we must bear in mind that it is the duty of the federal courts to interpret federal legislation in a manner not inconsistent with the demands of the Constitution.*American Communications Assn. v. Douds*, 339 U. S. 382, 339 U. S. 407 (1950). We are not here confronted with cases similar to *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Herndon v. Lowry*, 301 U. S. 242 (1937), and *De Jonge v. Oregon*, 299 U. S. 353 (1937),Home

where a state court had given a meaning to a state statute which was inconsistent with the Federal Constitution. This is a federal statute which we must interpret as well as judge. Herein lies the fallacy of reliance upon the manner in which this Court has treated judgments of state courts. Where the statute as construed by the state court transgressed the First Amendment, we could not but invalidate the judgments of conviction.

The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did "no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas." He further charged that it was not unlawful

"to conduct in an American college or university a course explaining the philosophical theories set forth in the books which have been placed in evidence."

Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged.

III

But although the statute is not directed at the hypothetical cases which petitioners have conjured, its application in this case has resulted in convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech.

We pointed out in *Douds*, *supra*, that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse. An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.

No important case involving free speech was decided by this Court prior to *Schenck v. United States*, 249 U. S. 47 (1919). Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. [Footnote 3] It was not until the classic dictum of Justice Holmes in the *Schenck* case that speech *per se* received that emphasis in a majority opinion. That case involved a conviction under the Criminal Espionage Act, 40 Stat. 217. The question the Court faced was whether the evidence was sufficient to sustain the conviction. Writing for a unanimous Court, Justice Holmes stated that the

"question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

249 U.S. at 249 U. S. 52. But the force of even this expression is considerably weakened by the reference at the end of the opinion to *Goldman v. United States*,245 U. S. 474 (1918), a prosecution under the same statute. Said Justice Holmes,

"Indeed, [*Goldman*] might be said to dispose of the present contention if the precedent covers all *media concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words."

249 U.S. at 249 U. S. 52. The fact is inescapable, too, that the phrase bore no connotation that the danger was to be any threat to the safety of the Republic. The charge was causing and attempting to cause insubordination in the military forces and obstruct recruiting. The objectionable document denounced conscription and its most inciting sentence was, "You must do your share to maintain, support and uphold the rights of the people of this country." 249 U.S. at 249 U. S. 51. Fifteen thousand copies were printed, and some circulated. This insubstantial gesture toward insubordination in 1917 during war was held to be a clear and present danger of bringing about the evil of military insubordination.

In several later cases involving convictions under the Criminal Espionage Act, the nub of the evidence the Court held sufficient to meet the "clear and present danger" test enunciated in *Schenck* was as follows: *Frohwerk v. United States*, 249 U. S. 204 (1919) — publication of twelve newspaper articles attacking the war; *Debs v. United States*, 249 U. S. 211 (1919) — one speech attacking United States' participation in the war; *Abrams v. United States*, 250 U. S. 616 (1919) — circulation of copies of two different socialist circulars attacking the war; *Schaefer v. United States*, 251 U. S. 466 (1920) — publication of a German language newspaper with allegedly false articles, critical of capitalism and the war; *Pierce v. United States*, 252 U. S. 239 (1920) — circulation of copies of a four-page pamphlet written by a clergyman, attacking the purposes of the war and United States' participation therein. Justice Holmes wrote the opinions for a unanimous Court in *Schenck*, *Frohwerk* and *Debs.* He and Justice Brandeis dissented in *Abrams*, *Schaefer* and *Pierce.* The basis of these dissents was that, because of the protection which the First Amendment gives to speech, the evidence in each case was insufficient to show that the defendants had created the requisite danger under *Schenck.* But these dissents did not mark a change of principle. The dissenters doubted only the probable effectiveness of the puny efforts toward subversion. In *Abrams*, they wrote,

"I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."

250 U.S. at 250 U. S. 627. And in *Schaefer* the test was said to be one of "degree," 251 U.S. at 251 U. S. 482, although it is not clear whether "degree" refers to clear and present danger or evil. Perhaps both were meant.

The rule we deduce from these cases is that, where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a "clear and present danger" of attempting or accomplishing the prohibited crime, *e.g.*, interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence.

The next important case [Footnote 4] before the Court in which free speech was the crux of the conflict was *Gitlow v. New York*, 268 U. S. 652 (1925). There, New York had made it a crime to advocate "the necessity or propriety of overthrowing . . . organized government by force. . . ." The evidence of violation of the statute was that the defendant had published a Manifesto attacking the Government and capitalism. The convictions were sustained, Justices Holmes and Brandeis dissenting. The majority refused to apply the "clear and present danger" test to the specific utterance. Its reasoning was as follows: the "clear and present danger" test was applied to the utterance itself in *Schenck* because the question was merely one of sufficiency of evidence under an admittedly constitutional statute. *Gitlow*however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was "reasonable." Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable. The only question remaining in the case became whether there was evidence to support the conviction, a question which gave the majority no difficulty. Justices Holmes and Brandeis refused to accept this approach, but insisted that, wherever speech was the evidence of the violation, it was necessary to show that the speech created the "clear and present danger" of the substantive evil which the legislature had the right to prevent. Justices Holmes and Brandeis, then, made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself the crime. This approach was emphasized in *Whitney v. California*, 274 U. S. 357 (1927), where the Court was confronted with a conviction under the California Criminal Syndicalist statute. The Court sustained the conviction, Justices Brandeis and Holmes Homeconcurring in the result. In their concurrence they repeated that, even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.

Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale. [Footnote 5] And in *American Communications Assn. v. Douds*, *supra*, we were called upon to decide the validity of § 9(h) of the Labor Management Relations Act of 1947. That section required officials of unions which desired to avail themselves of the facilities of the National Labor Relations Board to take oaths that they did not belong to the Communist Party and that they did not believe in the overthrow of the Government by force and violence. We pointed out that Congress did not intend to punish belief, but rather intended to regulate the conduct of union affairs. We therefore held that any indirect sanction on speech which might arise from the oath requirement did not present a proper case for the "clear and present danger" test, for the regulation was aimed at conduct, rather than speech. In discussing the proper measure of evaluation of this kind of legislation, we suggested that the Homes-Brandeis philosophy insisted that, where there was a direct restriction upon speech, a "clear and present danger" that the substantive evil would be caused was necessary before the statute in question could be constitutionally applied. And we stated,

"[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."

339 U.S. at 339 U. S. 412. But we further suggested that neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction. Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. *See American Communications Assn. v. Douds*, 339 U.S. at339 U. S. 397. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.

In this case, we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as *Schneider v. State*, 308 U. S. 147 (1939); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Martin v. Struthers*, 319 U. S. 141 (1943); *West Virginia Board of Education*

v. Barnette, 319 U. S. 624 (1943); *Thomas v. Collins*, 323 U. S. 516 (1945); *Marsh v. Alabama*, 326 U. S. 501 (1946); *but cf. Prince v. Massachusetts*, 321 U. S. 158 (1944); *Cox v. New Hampshire*, 312 U. S. 569 (1941). Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that, before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case, the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government "as speedily as circumstances would permit." This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion.

The situation with which Justices Holmes and Brandeis were concerned in *Gitlow*was a comparatively isolated event, bearing little relation in their minds to any substantial threat to the safety of the community. Such also is true of cases like *Fiske v. Kansas*, 274 U. S. 380 (1927), and *De Jonge v. Oregon*, 299 U. S. 353 (1937); *but cf. Lazar v. Pennsylvania*, 286 U.S. 532 (1932). They were

not confronted with any situation comparable to the instant one — the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis.

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows:

"In each case, [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words.

Likewise, we are in accord with the court below, which affirmed the trial court's finding that the requisite danger existed. The mere fact that, from the period 1945 to 1948, petitioners' activities did not result in an attempt to overthrow the Government by force and violence is, of course, no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.*Cf. Pinkerton v. United States*, 328 U. S. 640 (1946); *Goldman v. United States*, 245 U. S. 474 (1918); *United States v. Rabinowich*, 238 U. S. 78 (1915). If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

IV

Although we have concluded that the finding that there was a sufficient danger to warrant the application of the statute was justified on the merits, there remains the problem of whether the trial judge's treatment of the issue was correct. He charged the jury, in relevant part, as follows:

"In further construction and interpretation of the statute, I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

"* * * *"

"If you are satisfied that the evidence establishes beyond a reasonable doubt that the defendants, or any of them, are guilty of a violation of the statute, as I have interpreted it to you, I find as matter of law that there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

"This is matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support my ruling that the case should be submitted to you to pass upon the guilt or innocence of the defendants. . . ."

It is thus clear that he reserved the question of the existence of the danger for his own determination, and the question becomes whether the issue is of such a nature that it should have been submitted to the jury.

The first paragraph of the quoted instructions calls for the jury to find the facts essential to establish the substantive crime, violation of §§ 2(a)(1) and 2(a)(3) of the Smith Act, involved in the conspiracy charge. There can be no doubt that, if the jury found those facts against the petitioners, violation of the Act would be established. The argument that the action of the trial court is erroneous in

declaring as a matter of law that such violation shows sufficient danger to justify the punishment despite the First Amendment rests on the theory that a jury must decide a question of the application of the First Amendment. We do not agree.

When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case.

Petitioners' reliance upon Justice Brandeis' language in his concurrence in *Whitney, supra*, is misplaced. In that case, Justice Brandeis pointed out that the defendant could have made the existence of the requisite danger the important issue at her trial, but that she had not done so. In discussing this failure, he stated that the defendant could have had the issue determined by the court or the jury. [Footnote 6] No realistic construction of this disjunctive language could arrive at the conclusion that he intended to state that the question was only determinable by a jury. Nor is the incidental statement of the majority in *Pierce, supra*, of any more persuasive effect. [Footnote 7] There, the issue of the probable effect of the publication had been submitted to the jury, and the majority was apparently addressing its remarks to the contention of the dissenters that the jury could not reasonably have returned a verdict of guilty on the evidence. [Footnote 8] Indeed, in the very case in which the phrase was born, *Schenck*, this Court itself examined the record to find whether the requisite danger appeared, and the issue was not submitted to a jury. And in every later case in which the Court has measured the validity of a statute by the "clear and present danger" test, that determination has been by the court, the question of the danger not being submitted to the jury.

The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a "clear and present danger" of the substantive evil which the legislature had the right to prevent. Bearing, as it does, the marks of a "question of law," the issue is properly one for the judge to decide.

V

There remains to be discussed the question of vagueness — whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. *See Abrams v. United States*, 250 U. S. 616, 250 U. S. 627-629 (1919) (dissenting opinion); *Whitney v. California*, 274 U. S. 357, 274 U. S. 373 (1927) (concurring opinion); *Taylor v. Mississippi*, 319 U. S. 583, 319 U. S. 589 (1943). A claim of guilelessness ill becomes those with evil intent. *Williams v. United States*, 341 U. S. 97, 341 U. S. 101-102 (1951); *Jordan v. De George*, 341 U. S. 223, 341 U. S. 230-232 (1951); *American Communications Assn. v. Douds*, 339 U.S. at 339 U. S. 413; *Screws v. United States*, 325 U. S. 91, 325 U. S. 101 (1945).

We agree that the standard as defined is not a neat, mathematical formulary. Like all verbalizations it is subject to criticism on the score of indefiniteness. But petitioners themselves contend that the verbalization "clear and present danger" is the proper standard. We see no difference, from the standpoint of vagueness, whether the standard of "clear and present danger" is one contained *in haec verba*within the statute, or whether it is the judicial measure of constitutional applicability. We have shown the indeterminate standard the phrase necessarily connotes. We do not think we have rendered that standard any more indefinite by our attempt to sum up the factors which are included within its scope. We think it well serves to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go — a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place, will well appreciate and understand. *Williams, supra*, at 341 U. S. 101-102; *Jordan, supra*,at 341 U. S. 230-232; *United States v. Petrillo*, 332 U. S. 1, 332 U. S. 7 (1948); *United States v. Wurzbach*, 280 U. S. 396, 280 U. S. 399 (1930); *Nash v. United States*, 229 U. S. 373, 229 U. S. 376-377 (1913). Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that, because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute.

We have not discussed many of the questions which could be extracted from the record, although they were treated in detail by the court below. Our limited grant of the writ of certiorari has withdrawn from our consideration at this date those questions, which include, *inter alia*, sufficiency of the evidence, composition of jury, and conduct of the trial.

We hold that §§ 2(a)(1), 2(a)(3) and 3 of the Smith Act do not inherently, or as construed or applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights, or the First and Fifth Amendments because of indefiniteness. Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act. The judgments of conviction are

Affirmed.

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

[Footnote 1]

Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to achieve national unity and peace and prosperity in the post-war period.

[Footnote 2]

We have treated this point because of the discussion accorded it by the Court of Appeals and its importance to the administration of this statute, *compare Johnson v. United States*, 318 U. S. 189 (1943), although petitioners themselves requested a charge similar to the one given, and under Rule 30 of the Federal Rules of Criminal Procedure would appear to be barred from raising this point on appeal. *Cf. Boyd v. United States*, 271 U. S. 104 (1926).

[Footnote 3]

Toledo Newspaper Co. v. United States, 247 U. S. 402 (1918); *Fox v. Washington*, 236 U. S. 273 (1915); *Davis v. Massachusetts*, 167 U. S. 43 (1897); *see Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 221 U. S. 439 (1911); *Robertson v. Baldwin*, 165 U. S. 275,165 U. S. 281 (1897).

[Footnote 4]

Cf. Gilbert v. Minnesota, 254 U. S. 325 (1920).

[Footnote 5]

Contempt of court: *Craig v. Harney*, 331 U. S. 367, 331 U. S. 373 (1947); *Pennecamp v. Florida*, 328 U. S. 331, 328 U. S. 333-336 (1946); *Bridges v. California*, 314 U. S. 252,314 U. S. 260-263 (1941).

Validity of state statute: *Thomas v. Collins*, 323 U. S. 516, 323 U. S. 530 (1945); *Taylor v. Mississippi*, 319 U. S. 583, 319 U. S. 589-590 (1943); *Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 104-106 (1940).

Validity of local ordinance or regulation: *West Virginia Board of Education v. Barnette*,319 U. S. 624, 319 U. S. 639 (1943); *Carlson v. California*, 310 U. S. 106, 310 U. S. 113(1940).

Common law offense: *Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 308, 310 U. S. 311 (1940).

[Footnote 6]

"Whether, in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute, as applied to her, violated the Federal Constitution, but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by *the court or a jury.* On the other hand, there was evidence on which *the court or jury* might have found that such danger existed."

(Emphasis added.) 274 U.S. at 274 U. S. 379.

[Footnote 7]

"Whether the printed words would, in fact, produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution."

252 U.S. 239, 252 U. S. 250 (1920).

[Footnote 8]

A similarly worded expression is found in that part of the majority opinion sustaining the overruling of the defendants' general demurrer to the indictment. 252 U.S. at 252 U. S. 244. Since the defendants had not raised the issue of "clear and present danger" at the trial, it is clear that the Court was not faced with the question whether the trial judge erred in not determining, as a conclusive matter, the existence or nonexistence of a "clear and present danger." The only issue to which the remarks were addressed was whether the indictment sufficiently alleged the violation.

MR. JUSTICE FRANKFURTER, concurring in affirmance of the judgment.

The defendants were convicted under § 3 of the Smith Act for conspiring to violate § 2 of that Act, which makes it unlawful

"to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence."

Act of June 28, 1940, § 2(a)(3), 54 Stat. 670, 671, 18 U.S.C. § 10, now 18 U.S.C. § 2385. The substance of the indictment is that the defendants between April 1, 1945, and July 20, 1948, agreed to bring about the dissolution of a body known as the Communist Political Association and to organize in its place the Communist Party of the United States; that the aim of the new party was "the overthrow and destruction of the Government of the United States by force and violence"; that the defendants were to assume leadership of the Party and to recruit members for it and that the Party was to publish books and conduct classes, teaching the duty and the necessity of forceful overthrow. The jury found all the defendants guilty. With one exception, each was sentenced to imprisonment for five years and to a fine of $10,000. The convictions were affirmed by the Court of Appeals for the Second Circuit. 183 F.2d 201. We were asked to review this affirmance on all the grounds considered by the Court of Appeals. These included not only the scope of the freedom of speech guaranteed by the Constitution, but also serious questions regarding the legal composition of the jury and the fair conduct of the trial. We granted certiorari, strictly limited, however, to the contention that §§ 2 and 3 of the Smith Act, inherently and as applied, violated the First and Fifth Amendments. 340 U.S. 863. No attempt was made to seek an enlargement of the range of questions thus defined, and these alone are now open for our consideration. All others are foreclosed by the decision of the Court of Appeals.

As thus limited, the controversy in this Court turns essentially on the instructions given to the jury for determining guilt or innocence. 9 F.R.D. 367. The first question is whether — wholly apart from constitutional matters — the judge's charge properly explained to the jury what it is that the Smith Act condemns. The conclusion that he did so requires no labored argument. On the basis of the instructions, the jury found, for the purpose of our review, that the advocacy which the defendants conspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit. This brings us to the ultimate issue. In enacting a statute which makes it a crime for the defendants to conspire to do what they have been found to have conspired to do, did Congress exceed its constitutional power?

Few questions of comparable import have come before this Court in recent years. The appellants maintain that they have a right to advocate a political theory, so long, at least, as their advocacy does not create an immediate danger of obvious magnitude to the very existence of our present scheme of society. On the other hand, the Government asserts the right to safeguard the security of the Nation by such a measure as the Smith Act. Our judgment is thus solicited on a conflict of interests of the utmost concern to the wellbeing of the country. This conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is, in fact, only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty title-deeds.

I

There come occasions in law, as elsewhere, when the familiar needs to be recalled. Our whole history proves even more decisively than the course of decisions in this Court that the United States has the powers inseparable from a sovereign nation.

"America has chosen to be, in many respects, and to many purposes, a nation, and for all these purposes, her government is complete; to all these objects, it is competent."

Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 19 U. S. 414. The right of a government to maintain its existence — self-preservation — is the most pervasive aspect of sovereignty. "Security against foreign danger," wrote Madison, "is one of the primitive objects of civil society." The Federalist, No. 41. The constitutional power to act upon this basic principle has been recognized by this Court at different periods and under diverse circumstances.

"To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come. . . . The government, possessing the powers which are to be exercised

for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth. . . ."

Chinese Exclusion Case, 130 U. S. 581, 130 U. S. 606. *See also De Lima v. Bidwell*, 182 U. S. 1; *Mackenzie v. Hare*, 239 U. S. 299; *Missouri v. Holland*, 252 U. S. 416; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304. The most tragic experience in our history is a poignant reminder that the Nation's continued existence may be threatened from within. To protect itself from such threats, the Federal Government

"is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions."

Mr. Justice Bradley, concurring in *Legal Tender Cases*, 12 Wall. 457, 79 U. S. 554, 79 U. S. 556, *and see In re Debs*, 158 U. S. 564, 158 U. S. 582.

But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. *See Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 251 U. S. 156. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.

The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that

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

The right of a man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1799 and 1803. [Footnote 2/1] The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech. [Footnote 2/2] Madison's own State put on its books in 1792 a statute confining the abusive exercise of the right of utterance. [Footnote 2/3] And it deserves to be noted that, in writing to John Adams' wife, Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief in unrestrained utterance as to political matter. The First Amendment, he argued, reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States. [Footnote 2/4]

The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may

forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument.

"The law is perfectly well settled," this Court said over fifty years ago,

"that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."

Robertson v. Baldwin, 165 U. S. 275, 165 U. S. 281. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years.*See, e.g., Gompers v. United States*, 233 U. S. 604, 233 U. S. 610. Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. [Footnote 2/5] The demands of free speech in a democratic society, as well as the interest

in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment? — who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. *Sinking-Fund Cases*, 99 U. S. 700, 99 U. S. 718; *Mugler v. Kansas*, 123 U. S. 623,123 U. S. 660-661; *United States v. Carolene Products Co.*, 304 U. S. 144. We are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against undue concentration of authority secured by separation of power. *United States v. Cohen Grocery Co.*, 255 U. S. 81.

We must assure fairness of procedure, allowing full scope to governmental discretion but mindful of its impact on individuals in the context of the problem involved. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123. And, of course, the proceedings in a particular case before us must have the warrant of substantial proof. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all, we must remember that this Court's power of judicial review is not "an exercise of the powers of a super-legislature." Mr. Justice Brandeis and Mr. Justice Holmes, dissenting in *Burns Baking Co. v. Bryan*, 264 U. S. 504, 264 U. S. 534.

A generation ago, this distribution of responsibility would not have been questioned. *See Fox v. Washington*, 236 U. S. 273; *Meyer v. Nebraska*, 262 U. S. 390; *Bartels v. Iowa*, 262 U. S. 404; *cf. New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63. But, in recent decisions, we have made explicit what has long been implicitly recognized. In reviewing statutes which restrict freedoms protected by the First Amendment, we have emphasized the close relation which those freedoms bear to maintenance of a free society. *See Kovacs v. Cooper*, 336 U. S. 77, 336 U. S. 89, 336 U. S. 95 (concurring). Some members of the Court — and at times a majority — have done more. They have suggested that our function in reviewing statutes restricting freedom of expression differs sharply from our normal duty in sitting in judgment on legislation. It has been said that such statutes

"must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice."

Thomas v. Collins, 323 U. S. 516, 323 U. S. 530. It has been suggested, with the casualness of a footnote, that such legislation is not presumptively valid, *see United States v. Carolene Products Co.*, 304 U. S. 144, 304 U. S. 152, n. 4, and it has been weightily reiterated that freedom of speech has a "preferred position" among constitutional safeguards. *Kovacs v. Cooper*, 336 U. S. 77, 336 U. S. 88.

The precise meaning intended to be conveyed by these phrases need not now be pursued. It is enough to note that they have recurred in the Court's opinions, and their cumulative force has, not without justification, engendered belief that there is a constitutional principle, expressed by those attractive but imprecise words, prohibiting restriction upon utterance unless it creates a situation of "imminent" peril against which legislation may guard. [Footnote 2/6] It is on this body of the Court's pronouncements that the defendants' argument here is based.

In all fairness, the argument cannot be met by reinterpreting the Court's frequent use of "clear" and "present" to mean an entertainable "probability." In giving this meaning to the phrase "clear and present danger," the Court of Appeals was fastidiously confining the rhetoric of opinions to the exact scope of what was decided by them. We have greater responsibility for having given constitutional support, over repeated protests, to uncritical libertarian generalities. Nor is the argument of the defendants adequately met by citing isolated cases. Adjustment of clash of interests which are at once subtle and fundamental is not likely to reveal entire consistency in a series of instances presenting the clash. It is not too difficult to find what one seeks in the language of decisions reporting the effort to reconcile free speech with the interests with which it conflicts. The case for the defendants requires that their conviction be tested against the entire body of our relevant decisions. Since the significance of every expression of thought derives from the circumstances evoking it, results reached, rather than language employed give the vital meaning. *See Cohens v. Virginia*, 6 Wheat. 264, 19 U. S. 442; Wambaugh, The Study of Cases, 10.

There is an added reason why we must turn to the decisions. "Great cases," it is appropriate to remember,

"like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

Mr. Justice Holmes, dissenting in *Northern Securities Co. v. United States*, 193 U. S. 197, 193 U. S. 400-401.

This is such a case. Unless we are to compromise judicial impartiality and subject these defendants to the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times, the constitutionality of their conviction must be determined by principles established in cases decided in more tranquil periods. If those decisions are to be used as a guide, and not as an argument, it is important to view them as a whole, and to distrust the easy generalizations to which some of them lend themselves.

II

We have recognized and resolved conflicts between speech and competing interests in six different types of cases. [Footnote 2/7]

1. The cases involving a conflict between the interest in allowing free expression of ideas in public places and the interest in protection of the public peace and the primary uses of streets and parks, were too recently considered to be rehearsed here. *Niemotko v. Maryland*, 340 U. S. 268, 340 U. S. 273. It suffices to recall that the result in each case was found to turn on the character of the interest with which the speech clashed, the method used to impose the restriction, and the nature and circumstances of the utterance prohibited. While the decisions recognized the importance of free speech and carefully scrutinized the justification for its regulation, they rejected the notion that vindication of the deep public interest in freedom of expression requires subordination of all conflicting values.

2. A critique of the cases testing restrictions on picketing is made more difficult by the inadequate recognition by the Court from the outset that the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication. *See Thornhill v. Alabama*, 310 U. S. 88. But the crux of the decision in the *Thornhill* case was that a State could not constitutionally punish peaceful picketing when neither the aim of the picketing nor the manner in which it was carried out conflicted with a substantial interest. In subsequent decisions, we sustained restrictions designed to prevent recurrence of violence, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, or reasonably to limit the area of industrial strife, *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U. S. 722; *cf. Bakery & Pastry Drivers Local v. Wohl*, 315 U. S. 769. We held that a State's policy against restraints of trade justified it in prohibiting picketing which violated that policy, *Giboney v. Empire Storage Co.*, 336

U. S. 490; we sustained restrictions designed to encourage self-employed persons, *International Brotherhood of Teamsters Union v. Hanke*, 339 U. S. 470, and to prevent racial discrimination, *Hughes v. Superior Court*, 339 U. S. 460. The Fourteenth Amendment bars a State from prohibiting picketing when there is no fair justification for the breadth of the restriction imposed. *American Federation of Labor v. Swing*, 312 U. S. 321; *Cafeteria Employees Union v. Angelos*, 320 U. S. 293. But it does not prevent a State from denying the means of communication that picketing affords in a fair balance between the interests of trade unionism and other interests of the community.

3. In three cases, we have considered the scope and application of the power of the Government to exclude, deport, or denaturalize aliens because of their advocacy or their beliefs. In *United States ex rel. Turner v. Williams*, 194 U. S. 279, we held that the First Amendment did not disable Congress from directing the exclusion of an alien found in an administrative proceeding to be an anarchist. "[A]s long as human governments endure," we said, "they cannot be denied the power of self-preservation, as that question is presented here. "194 U.S. at 194 U. S. 294. In *Schneiderman v. United States*, 320 U. S. 118, and *Bridges v. Wixon*, 326 U. S. 135, we did not consider the extent of the power of Congress. In each case, by a closely divided Court, we interpreted a statute authorizing denaturalization or deportation to impose on the Government the strictest standards of proof.

4. History regards "freedom of the press" as indispensable for a free society and for its government. We have, therefore, invalidated discriminatory taxation against the press and prior restraints on publication of defamatory matter. *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota*, 283 U. S. 697.

We have also given clear indication of the importance we attach to dissemination of ideas in reviewing the attempts of States to reconcile freedom of the press with protection of the integrity of the judicial process. In *Pennekamp v. Florida*, 328 U. S. 331, the Court agreed that the Fourteenth Amendment barred a State from adjudging in contempt of court the publisher of critical and inaccurate comment about portions of a litigation that, for all practical purposes, were no longer pending. We likewise agreed, in a minor phase of our decision in *Bridges v. California*, 314 U. S. 252, that even when statements in the press relate to matters still pending before a court, convictions for their publication cannot be sustained if their utterance is too trivial to be deemed a substantial threat to the impartial administration of justice.

The Court has, however, sharply divided on what constitutes a sufficient interference with the course of justice. In the first decision, *Patterson v. Colorado*,205 U. S. 454, the Court affirmed a judgment for contempt imposed by a State supreme court for publication of articles reflecting on the conduct of the court in cases still before it on motions for rehearing. In the *Bridges* case, however, a majority held that a State court could not protect itself from the implied threat of a powerful newspaper that failure of an elected judge to impose a severe sentence would be a "serious mistake." The same case also placed beyond a State's power to punish the publication of a telegram from the president of an important union who threatened a damaging strike in the event of an adverse decision. The majority in *Craig v. Harney*, 331 U. S. 367, 331 U. S. 376, held that the Fourteenth Amendment protected "strong," "intemperate," "unfair" criticism of the way an elected lay judge was conducting a pending civil case. None of the cases establishes that the public interest in a free press must in all instances prevail over the public interest in dispassionate adjudication. But the *Bridges* and *Craig* decisions, if they survive, tend to require a showing that interference be so imminent and so demonstrable that the power theoretically possessed by the State is largely paralyzed.

5. Our decision in *American Communications Assn. v. Douds*, 339 U. S. 382, recognized that the exercise of political rights protected by the First Amendment was necessarily discouraged by the requirement of the Taft-Hartley Act that officers of unions employing the services of the National Labor Relations Board sign affidavits that they are not Communists. But we held that the statute was not for this reason presumptively invalid. The problem, we said, was

"one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. "339 U.S. at 339 U. S. 400. On balance, we decided that the legislative judgment was a permissible one. [Footnote 2/8]

6. Statutes prohibiting speech because of its tendency to lead to crime present a conflict of interests which bears directly on the problem now before us. The first case in which we considered this conflict was *Fox v. Washington*, *supra*. The statute there challenged had been interpreted to prohibit publication of matter "encouraging an actual breach of law." We held that the Fourteenth Amendment did not prohibit application of the statute to an article which we concluded incited a breach of laws against indecent exposure. We said that the statute

"lays hold of encouragements that, apart from statute, if directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor, if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience."

236 U.S. at 236 U. S. 277-278. To be sure, the *Fox* case preceded the explicit absorption of the substance of the First Amendment in the Fourteenth. But subsequent decisions extended the *Fox* principle to free speech situations. They are so important to the problem before us that we must consider them in detail.

(a) The first important application of the principle was made in six cases arising under the Espionage Act of 1917. That Act prohibits conspiracies and attempts to "obstruct the recruiting or enlistment service." In each of the first three cases, Mr. Justice Holmes wrote for a unanimous Court, affirming the convictions. The evidence in *Schenck v. United States*, 249 U. S. 47, showed that the defendant had conspired to circulate among men called for the draft 15,000 copies of a circular which asserted a "right" to oppose the draft. The defendant in *Frohwerk v. United States*, 249 U. S. 204, was shown to have conspired to publish in a newspaper twelve articles describing the sufferings of American troops and the futility of our war aims. The record was inadequate, and we said that it was therefore

"impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."

249 U.S. at 249 U. S. 209. In *Debs v. United States*, 249 U. S. 211, the indictment charged that the defendant had delivered a public speech expounding socialism and praising Socialists who had been convicted of abetting violation of the draft laws.

The ground of decision in each case was the same. The First Amendment

"cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U. S. 275, 165 U. S. 281."

Frohwerk v. United States, *supra*, at 249 U. S. 206.

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

Schenck v. United States, *supra*, at 249 U. S. 52. When "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service," and "the defendant had the specific intent to do so in his mind," conviction in wartime is not prohibited by the Constitution. *Debs v. United States*, *supra*, at 249 U. S. 216.

In the three succeeding cases, Holmes and Brandeis, JJ., dissented from judgments of the Court affirming convictions. The indictment in *Abrams v. United States*, 250 U. S. 616, was laid under an amendment to the Espionage Act which prohibited conspiracies to advocate curtailment of production of material necessary to prosecution of the war, with the intent thereby to hinder the United States in the prosecution of the war. It appeared that the defendants were anarchists who had printed circulars and distributed them in New York City. The leaflets repeated standard Marxist slogans, condemned American intervention in Russia, and called for a general strike in protest. In *Schaefer v. United States*, 251 U. S. 466, the editors of a German language newspaper in Philadelphia were charged with obstructing the recruiting service and with willfully publishing false reports with the intent to promote the success of the enemies of the United States. The evidence showed publication of articles which accused American troops of weakness and mendacity, and in one instance misquoted or mistranslated two words of a Senator's speech. The indictment in *Pierce v. United States*, 252 U. S. 239, charged that the defendants had attempted to cause insubordination in the armed forces and had conveyed false reports with intent to interfere with military operations. Conviction was based on circulation of a pamphlet which belittled Allied war aims and criticized conscription in strong terms.

In each case, both the majority and the dissenting opinions relied on *Schenck v. United States.* The Court divided on its view of the evidence. The majority held that the jury could infer the required intent and the probable effect of the articles from their content. Holmes and Brandeis, JJ., thought that only "expressions of opinion and exhortations," 250 U.S. at 250 U. S. 631, were involved, that they were "puny anonymities," 250 U.S. at 250 U. S. 629, "impotent to produce the evil against which the statute aimed," 251 U. S. 251 U.S. 493, and that, from them, the specific intent required by the statute could not reasonably be inferred. The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement.

(b) In the eyes of a majority of the Court, *Gitlow v. New York*, 268 U. S. 652, presented a very different problem. There, the defendant had been convicted under a New York statute nearly identical with the Smith Act now before us. The evidence showed that the defendant was an official of the Left Wing Section of the Socialist Party, and that he was responsible for publication of a Left Wing Manifesto. This document repudiated "moderate Socialism," and urged the necessity of a militant "revolutionary Socialism," based on class struggle and revolutionary mass action. No evidence of the effect of the Manifesto was introduced, but the jury were instructed that they could not convict unless they found that the document advocated employing unlawful acts for the purpose of overthrowing organized government.

The conviction was affirmed. The question, the Court held, was entirely different from that involved in *Schenck v. United States*, where the statute prohibited acts without reference to language. Here, where

"the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil is not open to consideration."

268 U.S. at 268 U. S. 670. It is sufficient that the defendant's conduct falls within the statute, and that the statute is a reasonable exercise of legislative judgment.

This principle was also applied in *Whitney v. California*, 274 U. S. 357, to sustain a conviction under a State criminal syndicalism statute. That statute made it a felony to assist in organizing a group assembled to advocate the commission of crime, sabotage, or unlawful acts of violence as a means of effecting political or industrial change. The defendant was found to have assisted in organizing the Communist Labor Party of California, an organization found to have the specified character. It was held that the legislature was not unreasonable in believing organization of such a party

"involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power."

274 U.S. at 274 U. S. 371.

In neither of these cases did Mr. Justice Holmes and Mr. Justice Brandeis accept the reasoning of the Court. "*The question,'" they said, quoting from Schenck v. United States,*

"'in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent.'"

268 U.S. at 268 U. S. 672-673. Since the Manifesto circulated by Gitlow "had no chance of starting a present conflagration," 268 U.S. at 268 U. S. 673, they dissented from the affirmance of his conviction. In *Whitney v. California*, they concurred in the result reached by the Court, but only because the record contained some evidence that organization of the Communist Labor Party might further a conspiracy to commit immediate serious crimes, and the credibility of the evidence was not put in issue by the defendant. [Footnote 2/9]

(c) Subsequent decisions have added little to the principles established in these two groups of cases. In the only case arising under the Espionage Act decided by this Court during the last war, the substantiality of the evidence was the crucial issue. The defendant in *Hartzel 322 U. S. S. 538*[illegible] v. United States,@ 322 U. S. 680, was an educated man and a citizen, not actively affiliated with any political group. In 1942, he wrote three articles condemning our wartime allies and urging that the war be converted into a racial conflict. He mailed the tracts to 600 people, including high-ranking military officers. According to his testimony, his intention was to "create sentiment against war amongst the white races." The majority of this Court held that a jury could not reasonably infer from these facts that the defendant had acted with a specific intent to cause insubordination or disloyalty in the armed forces.

Of greater importance is the fact that the issue of law which divided the Court in the *Gitlow* and *Whitney* cases has not again been clearly raised, although in four additional instances we have reviewed convictions under comparable statutes.*Fiske v. Kansas*, 274 U. S. 380, involved a criminal syndicalism statute similar to that before us in *Whitney v. California*. We reversed a conviction based on evidence that the defendant exhibited an innocuous preamble to the constitution of the Industrial Workers of the World in soliciting members for that organization. In *Herndon v. Lowry*, 301 U. S. 242, the defendant had solicited members for the Communist Party, but there was no proof that he had urged or even approved those of the Party's aims which were unlawful. We reversed a conviction obtained under a statute prohibiting an attempt to incite to insurrection by violence on the ground that the

Fourteenth Amendment prohibited conviction where, on the evidence, a jury could not reasonably infer that the defendant had violated the statute the State sought to apply. [Footnote 2/10]

The other two decisions go no further than to hold that the statute, as construed by the State courts, exceeded the bounds of a legislative judgment founded in reason. The statute presented in *De Jonge v. Oregon*, 299 U. S. 353, had been construed to apply to anyone who merely assisted in the conduct of a meeting held under the auspices of the Communist Party. In *Taylor v. Mississippi*, 319 U. S. 583, the statute prohibited dissemination of printed matter "designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi." We reversed a conviction for what we concluded was mere criticism and prophesy, without indicating whether we thought the statute could in any circumstances validly be applied. What the defendants communicated, we said,

"is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or to have threatened any clear and present danger to our institutions or our Government."

319 U.S. at 319 U. S. 589-590.

I must leave to others the ungrateful task of trying to reconcile all these decisions. In some instances, we have too readily permitted juries to infer deception from error, or intention from argumentative or critical statements. *Abrams v. United States, supra; Schaefer v. United States, supra; Pierce v. United States, supra; Gilbert v. Minnesota*, 254 U. S. 325. In other instances, we weighted the interest in free speech so heavily that we permitted essential conflicting values to be destroyed.*Bridges v. California, supra; Craig v. Harney, supra.* Viewed as a whole, however, the decisions express an attitude toward the judicial function and a standard of values which, for me, are decisive of the case before us.

First. — Free-speech cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

On occasion, we have strained to interpret legislation in order to limit its effect on interests protected by the First Amendment. *Schneiderman v. United States, supra; Bridges v. Wixon, supra.* In some instances, we have denied to States the deference to which I think they are entitled. *Bridges v. California, supra; Craig v. Harney, supra.*Once in this recent course of decisions the Court refused to permit a jury to draw inferences which seemed to me to be obviously reasonable. *Hartzel v. United States, supra.*

But in no case has a majority of this Court held that a legislative judgment, even as to freedom of utterance, may be overturned merely because the Court would have made a different choice between the competing interests had the initial legislative judgment been for it to make. In the cases in which the opinions go farthest towards indicating a total rejection of respect for legislative determinations, the interests between which choice was actually made were such that decision might well have been expressed in the familiar terms of want of reason in the legislative judgment. In *Thomas v. Collins*, 323 U. S. 516, for example, decision could not unreasonably have been placed on the ground that no substantial interest justified a State in requiring an out-of-State labor leader to register before speaking in advocacy of the cause of trade unionism. In *Martin v. City of Struthers*, 319 U. S. 141, it was broadly held that a municipality was not justified in prohibiting knocking on doors and ringing doorbells for the purpose of delivering handbills. But since the good faith and reasonableness of the regulation were placed in doubt by the fact that the city did not think it necessary also to prohibit door-to-door commercial sales, decision could be sustained on narrower ground. *And compare Breard v. Alexandria, post*, p. 341 U. S. 622, decided this day.

In other cases, moreover, we have given clear indication that even when free speech is involved, we attach great significance to the determination of the legislature. *Gitlow v. New York, supra; Whitney v. California, supra; American Communications Assn. v. Douds, supra; cf. Bridges v. California*, 314 U.S. at 314 U. S. 260. *And see Hughes v. Superior Court, supra; International Brotherhood of Teamsters Union v. Hanke, supra.*

In *Gitlow v. New York*, we put our respect for the legislative judgment in terms which, if they were accepted here, would make decision easy. For that case held that, when the legislature has determined that advocacy of forceful overthrow should be forbidden, a conviction may be sustained without a finding that, in the particular case, the advocacy had a close relation to a serious attempt at overthrow. We held that it was enough that the statute be a reasonable exercise of the legislative judgment, and that the defendant's conduct fall within the statute.

One of the judges below rested his affirmance on the *Gitlow* decision, and the defendants do not attempt to distinguish the case. They place their argument squarely on the ground that the case has been overruled by subsequent decisions. It has not been explicitly overruled. But it would be disingenuous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision.

The result of the *Gitlow* decision was to send a left-wing Socialist to jail for publishing a Manifesto expressing Marxist exhortations. It requires excessive tolerance of the legislative judgment to suppose that the *Gitlow* publication in the circumstances could justify serious concern.

In contrast, there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security. If the Smith Act is justified at all, it is justified precisely because it may serve to prohibit the type of conspiracy for which these defendants were convicted. The court below properly held that, as a matter of separability, the Smith Act may be limited to those situations to which it can constitutionally be applied. *See* 183 F.2d at 214-215. Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow v. New York.* While reliance may properly be placed on the attitude of judicial self-restraint which the *Gitlow*decision reflects, it is not necessary to depend on the facts or the full extent of the theory of that case in order to find that the judgment of Congress, as applied to the facts of the case now before us, is not in conflict with the First Amendment.

Second. — A survey of the relevant decisions indicates that the results which we have reached are on the whole those that would ensue from careful weighing of conflicting interests. The complex issues presented by regulation of speech in public places, by picketing, and by legislation prohibiting advocacy of crime have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened. The matter has been well summarized by a reflective student of the Court's work.

"The truth is that the 'clear and present danger' test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed, and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must dissentangle."

Freund, On Understanding the Supreme Court, 27-28.

It is a familiar experience in the law that new situations do not fit neatly into legal conceptions that arose under different circumstances to satisfy different needs. So it was when the injunction was tortured into an instrument of oppression against labor in industrial conflicts. So it is with the attempt to use the direction of thought lying behind the criterion of "clear and present danger" wholly out of the context in which it originated, and to make of it an absolute dogma and definitive measuring rod for the power of Congress to deal with assaults against security through devices other than overt physical attempts.

Bearing in mind that Mr. Justice Holmes regarded questions under the First Amendment as questions of "proximity and degree," *Schenck v. United States,* 249 U.S. at 249 U. S. 52, it would be a distortion, indeed a mockery, of his reasoning to compare the "puny anonymities," 250 U.S. at 250 U. S. 629, to which he was addressing himself in the *Abrams* case in 1919 or the publication that was "futile and too remote from possible consequences," 268 U.S. at 268 U. S. 673, in the *Gitlow* case in 1925 with the setting of events in this case in 1950.

"It does an ill service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis by being turned into dogma."

"It is one of the misfortunes of the law that ideas become encysted in phrases, and thereafter for a long time cease to provoke further analysis."

"Holmes, J., dissenting, in *Hyde v. United*

States, 225 U. S. 347, 225 U. S. 384, at 225 U. S. 391."

The phrase "clear and present danger," in its origin,

"served to indicate the importance of freedom of speech to a free society, but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution."

Pennekamp v. Florida, 328 U. S. 331, 328 U. S. 350, 328 U. S. 352-353 (concurring). It were far better that the phrase be abandoned than that it be sounded once more to hide from the believers in an absolute right of free speech the plain fact that the interest in speech, profoundly important as it is, is no more conclusive in judicial review than other attributes of democracy or than a determination of the people's representatives that a measure is necessary to assure the safety of government itself.

Third. — Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances:

"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace."

Chaplinsky v. New Hampshire, 315 U. S. 568, 315 U. S. 572. We have frequently indicated that the interest in protecting speech depends on the circumstances of the occasion. *See cases collected in Niemotko v. Maryland*, 340 U.S. at 340 U. S. 275-283. It is pertinent to the decision before us to consider where on the scale of values we have in the past placed the type of speech now claiming constitutional immunity.

The defendants have been convicted of conspiring to organize a party of persons who advocate the overthrow of the Government by force and violence. The jury has found that the object of the conspiracy is advocacy as "a rule or principle of action," "by language reasonably and ordinarily calculated to incite persons to such action,"and with the intent to cause the overthrow "as speedily as circumstances would permit."

On any scale of values which we have hitherto recognized, speech of this sort ranks low.

Throughout our decisions, there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action and advocacy that such action be taken. The distinction has its root in the conception of the common law, supported by principles of morality, that a person who procures another to do an act is responsible for that act as though he had done it himself. This principle was extended in *Fox v. Washington*, *supra*, to words directed to the public generally which would constitute an incitement were they directed to an individual. It was adapted in *Schenck v. United States*, *supra*, into a rule of evidence designed to restrict application of the Espionage Act. It was relied on by the Court in *Gitlow v. New York*, *supra.* The distinction has been repeated in many of the decisions in which we have upheld the claims of speech. We frequently have distinguished protected forms of expression from statements which "incite to violence and crime and threaten the overthrow of organized government by unlawful means."*Stromberg v. California*, 283 U.S. at 283 U. S. 369. *See also Near v. Minnesota*, 283 U.S. at 283 U. S. 716; *De Jonge v. Oregon*, 299 U.S. at 299 U. S. 365; *Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 308; *Taylor v. Mississippi*, 319 U.S. at 319 U. S. 589.

It is true that there is no divining rod by which we may locate "advocacy." Exposition of ideas readily merges into advocacy. The same Justice who gave currency to application of the incitement doctrine in this field dissented four times from what he thought was its misapplication. As he said in the *Gitlow* dissent, "Every idea is an incitement." 268 U.S. at 268 U. S. 673. Even though advocacy of overthrow deserves little protection, we should hesitate to prohibit it if we thereby inhibit the interchange of rational ideas so essential to representative government and free society.

But there is underlying validity in the distinction between advocacy and the interchange of ideas, and we do not discard a useful tool because it may be misused. That such a distinction could be used unreasonably by those in power against hostile or unorthodox views does not negate the fact that it may be used reasonably against an organization wielding the power of the centrally controlled international Communist movement. The object of the conspiracy before us is so clear that the chance of error in saying that the defendants conspired to advocate, rather than to express ideas is slight. MR. JUSTICE DOUGLAS quite properly points out that the conspiracy before us is not a conspiracy to overthrow the Government. But it would be equally wrong to treat it as a seminar in political theory.

III

These general considerations underlie decision of the case before us.

On the one hand is the interest in security. The Communist Party was not designed by these defendants as an ordinary political party. For the circumstances of its organization, its aims and methods, and the relation of the defendants to its organization and aims, we are concluded by the jury's verdict. The jury found that the Party rejects the basic premise of our political system — that change is to be brought about by nonviolent constitutional process. The jury found that the Party advocates the theory that there is a

duty and necessity to overthrow the Government by force and violence. It found that the Party entertains and promotes this view not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherents and as a policy to be translated into action.

In finding that the defendants violated the statute, we may not treat as established fact that the Communist Party in this country is of significant size, well organized, well disciplined, conditioned to embark on unlawful activity when given the command. But, in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendency in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

In 1947, it has been reliably reported, at least 60,000 members were enrolled in the Party. [Footnote 2/11] Evidence was introduced in this case that the membership was organized in small units, linked by an intricate chain of command, and protected by elaborate precautions designed to prevent disclosure of individual identity. There are no reliable data tracing acts of sabotage or espionage directly to these defendants. But a Canadian Royal Commission appointed in 1946 to investigate espionage reported that it was "overwhelmingly established" that "the Communist movement was the principal base within which the espionage network was recruited." [Footnote 2/12] The most notorious spy in recent history was led into the service of the Soviet Union through Communist indoctrination. [Footnote 2/13] Evidence supports the conclusion that members of the Party seek and occupy positions of importance in political and labor organizations. [Footnote 2/14] Congress was not barred by the Constitution from believing that indifference to such experience would be an exercise not of freedom, but of irresponsibility.

On the other hand is the interest in free speech. The right to exert all governmental powers in aid of maintaining our institutions and resisting their physical overthrow does not include intolerance of opinions and speech that cannot do harm although opposed and perhaps alien to dominant, traditional opinion. The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization attained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights.

Of course, no government can recognize a "right" of revolution, or a "right" to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform, and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, The American Commonwealth, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that, in sustaining the convictions before us, we can hardly escape restriction on the interchange of ideas.

We must not overlook the value of that interchange. Freedom of expression is the well spring of our civilization — the civilization we seek to maintain and further by recognizing the right of Congress to put some limitation upon expression. Such are the paradoxes of life. For social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore, the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes.

"The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies — religious, political, economic, or scientific — which are immune from debate and dispute. Back of that is the assumption — itself an orthodoxy, and the one permissible exception — that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies."

International Brotherhood of Electrical Workers v. Labor Board, 181 F.2d 34, 40. In the last analysis, it is on the validity of this faith that our national security is staked.

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and

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the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends. [Footnote 2/15]

Can we then say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First Amendment deprives Congress of what it deemed necessary for the Government's protection?

To make validity of legislation depend on judicial reading of events still in the womb of time a forecast, that is, of the outcome of forces, at best, appreciated only with knowledge of the topmost secrets of nations — is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on bygone events. Even historians have conflicting views to this day on the origins and conduct of the French Revolution, or, for that matter, varying interpretations of "the glorious Revolution" of 1688. It is as absurd to be confident that we can measure the present clash of forces and

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their outcome as to ask us to read history still enveloped in clouds of controversy.

In the light of their experience, the Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process. In asserting the power to pass on the constitutionality of legislation, Marshall and his Court expressed the purposes of the Founders. *See* Charles A. Beard, The Supreme Court and the Constitution. But the extent to which the exercise of this power would interpenetrate matters of policy could hardly have been foreseen by the most prescient. The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental. But, in its actual operation, it is rather subtle, certainly to the common understanding. Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous.

Even when moving strictly within the limits of constitutional adjudication, judges are concerned with issues that may be said to involve vital finalities. The too easy transition from disapproval of what is undesirable to condemnation as unconstitutional has led some of the wisest judges to question the wisdom of our scheme in lodging such authority in courts. But it is relevant to remind that, in sustaining the power of Congress in a case like this, nothing irrevocable is done. The democratic process, at all events, is not impaired or restricted. Power and responsibility remain with the people, and, immediately, with their representatives. All the Court says is that Congress was not forbidden by the Constitution to pass this enactment and that a prosecution under it may be brought against a conspiracy such as the one before us.

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IV

The wisdom of the assumptions underlying the legislation and prosecution is another matter. In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. Considerations there enter which go beyond the criteria that are binding upon judges within the narrow confines of their legitimate authority. The legislation we are here considering is but a truncated aspect of a deeper issue. For me, it has been most illuminatingly expressed by

one in whom responsibility and experience have fructified native insight, the Director-General of the British Broadcasting Corporation:

“We have to face up to the fact that there are powerful forces in the world today misusing the privileges of liberty in order to destroy her. The question must be asked, however, whether suppression of information or opinion is the true defense. We may have come a long way from Mill’s famous dictum that: ”

“If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind,”

“but Mill’s reminders from history as to what has happened when suppression was most virulently exercised ought to warn us that no debate is ever permanently won by shutting one’s ears or by even the most Draconian policy of silencing opponents. The *debate* must be won . And it must be won with full information. Where there are lies, they must be shown for what they are. Where there are errors, they must be refuted. It would be a major defeat if the enemies of democracy forced us to abandon our faith in the power of informed discussion, and so brought us down

to their own level. Mankind is so constituted, moreover, that, if, where expression and discussion are concerned, the enemies of liberty are met with a denial of liberty, many men of goodwill will come to suspect there is something in the proscribed doctrine after all. Erroneous doctrines thrive on being expunged. They die if exposed.”

Sir William Haley, What Standards for Broadcasting? Measure, Vol. I, No. 3, Summer 1950, pp. 211-212.

In the context of this deeper struggle, another voice has indicated the limitations of what we decide today. No one is better equipped than George F. Kennan to speak on the meaning of the menace of Communism and the spirit in which we should meet it.

“If our handling of the problem of Communist influence in our midst is not carefully moderated — if we permit it, that is, to become an emotional preoccupation and to blind us to the more important positive tasks before us — we can do a damage to our national purpose beyond comparison greater than anything that threatens us today from the Communist side. The American Communist party is today, by and large, an external danger. It represents a tiny minority in our country, it has no real contact with the feelings of the mass of our people, and its position as the agency of a hostile foreign power is clearly recognized by the overwhelming mass of our citizens.”

“But the subjective emotional stresses and temptations to which we are exposed in our attempt to deal with this domestic problem are not an external danger: they represent a danger within ourselves — a danger that something may occur in our own minds and souls which will make us no longer like the persons by whose efforts this republic was founded and held together, but rather like the representatives

of that very power we are trying to combat: intolerant, secretive, suspicious, cruel, and terrified of internal dissension because we have lost our own belief in ourselves and in the power of our ideals. The worst thing that our Communists could do to us, and the thing we have most to fear from their activities, is that we should become like them.”

“That our country is beset with external dangers I readily concede. But these dangers, at their worst, are ones of physical destruction, of the disruption of our world security, of expense and inconvenience and sacrifice. These are serious, and sometimes terrible things, but they are all things that we can take and still remain Americans.”

“The internal danger is of a different order. America is not just territory and people. There is lots of territory elsewhere, and there are lots of people; but it does not add up to America. America is something in our minds and our habits of outlook which causes us to believe in certain things and to behave in certain ways, and by which, in its totality, we hold ourselves distinguished from others. If that, once goes there will be no America to defend. And that can go too easily if we yield to the primitive human instinct to escape from our frustrations into the realms of mass emotion and hatred and to find scapegoats for our difficulties in individual fellow-citizens who are, or have at one time been, disoriented or confused.”

George F. Kennan, Where Do You Stand on Communism? New York Times Magazine, May 27, 1951, pp. 7, 53, 55.

Civil liberties draw, at best, only limited strength from legal guaranties. Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial

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brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcized. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its incertitudes. Without open minds, there can be no open society. And if society be not open, the spirit of man is mutilated, and becomes enslaved.

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APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

Opinions responsible for the view that speech could not constitutionally be restricted unless there would result from it an imminent — *i.e.*, close at hand — substantive evil.

1. *Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 104-105 (State statute prohibiting picketing held invalid):

". . . Every

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expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. . . ."

". . . [N]o clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."

2. *Bridges v. California*, 314 U. S. 252, 314 U. S. 262-263 (convictions for contempt of court reversed):

". . . [T]he 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States, supra,* [249 U.S. 47]; *Abrams v. United States*, 250 U. S. 616; under a criminal syndicalism act, *Whitney v. California, supra,* [274 U.S. 357]; under an 'anti-insurrection' act, *Herndon v. Lowry, supra,* [301 U.S. 242], and for breach of the peace at common law, *Cantwell v. Connecticut, supra,* [310 U.S. 296]. And, very recently, we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented

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by the restriction is 'destruction of life or property, or invasion of the right of privacy.' *Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 105."

"* * * *"

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

3. *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 319 U. S. 639 (flag salute requirement for school children held invalid):

"In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible

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of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case."

4. *Thomas v. Collins*, 323 U. S. 516, 323 U. S. 529-530 (State statute requiring registration of labor organizers held invalid as applied):

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. *Cf. Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Prince v. Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. *Compare United States v. Carolene Products Co.*, 304 U. S. 144, 304 U. S. 152-153."

"For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. "

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5. *Craig v. Harney*, 331 U. S. 367, 331 U. S. 376 (conviction for contempt of court reversed):

"The fires which [the language] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

6. *Giboney v. Empire Storage Co.*, 336 U. S. 490, 336 U. S. 503 (injunction against picketing upheld):

". . . There was clear danger, imminent and immediate, that, unless restrained, appellants would succeed in making [the State's policy against restraints of trade] a dead letter insofar as purchases by nonunion men were concerned. . . ."

7. *Terminiello v. Chicago*, 337 U. S. 1, 337 U. S. 4-5 (conviction for disorderly conduct reversed):

"Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire, supra,* [315 U.S. 568,] 315 U. S. 571-572, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *See Bridges v. California*, 314 U. S. 252, 314 U. S. 262; *Craig v. Harney*, 331 U. S. 367, 331 U. S. 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

8. *American Communications Assn. v. Douds*, 339 U. S. 382, 339 U. S. 396, 339 U. S. 412 ("Non-Communist affidavit" provision of Taft-Hartley Act upheld):

"Speech may be fought with speech. Falsehoods and fallacies must be exposed, not suppressed, unless there is not sufficient time to avert the evil consequences of noxious doctrine by argument and education. That is the command of the First Amendment."

And again,

"[The First] Amendment requires

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that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom."

[Footnote 2/1]

Mass.Const., 1780, Part I, Art. XVI. *See* Duniway, Freedom of the Press in Massachusetts, 144-146.

[Footnote 2/2]

Pa.Const., 1790, Art. IX, § 7; Del.Const., 1792, Art. I, § 5.

[Footnote 2/3]

The General Assembly of Virginia passed a statute on December 26, 1792, directed at establishment of

"any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose first obtained."

The statute provided that

"EVERY person . . . who shall by writing or advised speaking, endeavour to instigate the people of this commonwealth to erect or establish such government without such assent as aforesaid, shall be adjudged guilty of a high crime and misdemeanor. . . ."

Va.Code, 1803, c. CXXXVI.

[Footnote 2/4]

In a letter to Abigail Adams, dated September 11, 1804, Jefferson said with reference to the Sedition Act:

"Nor does the opinion of the unconstitutionality and consequent nullity of that law remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it. While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so."

The letter will be published in a forthcoming volume of The Papers of Thomas Jefferson (Boyd ed.), to which I am indebted for its reproduction here in its exact form.

The Sedition Act of July 14, 1798, was directed at two types of conduct. Section 1 made it a criminal offense to conspire "to impede the operation of any law of the United States," and to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination." Section 2 provided:

"That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or

writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."

1 Stat. 596-597.

No substantial objection was raised to § 1 of the Act. The argument against the validity of § 2 is stated most fully in the Virginia Report of 1799-1800. That Report, prepared for the House of Delegates by a committee of which Madison was chairman, attempted to establish that the power to regulate speech was not delegated to the Federal Government by the Constitution, and that the First Amendment had prohibited the National Government from exercising the power. In reply, it was urged that power to restrict seditious writing was implicit in the acknowledged power of the Federal Government to prohibit seditious acts, and that the liberty of the press did not extend to the sort of speech restricted by the Act. *See* the Report of the Committee of the House of Representatives to which were referred memorials from the States, H.R.Rep. No. 110, 5th Cong., 3d Sess., published in American State Papers, Misc. Vol. 1, p. 181. For an extensive contemporary account of the controversy, *see* St. George Tucker's 1803 edition of Blackstone's Commentaries, Appendix to Vol. First, Part Second, Note G.

[Footnote 2/5]

Professor Alexander Meiklejohn is a leading exponent of the absolutist interpretation of the First Amendment. Recognizing that certain forms of speech require regulation, he excludes those forms of expression entirely from the protection accorded by the Amendment.

"The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare."

Meiklejohn, Free Speech, 39.

"The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money."

Id. at 104. Professor Meiklejohn even suggests that scholarship may now require such subvention and control that it no longer is entitled to protection by the First Amendment. *See id.* at 99-100. Professor Chafee, in his review of the Meiklejohn book, 62 Harv.L.Rev. 891, has subjected this position to trenchant comment.

[Footnote 2/6]

In *Hartzel v. United States*, 322 U. S. 680, 322 U. S. 687, the Court reversed a conviction for willfully causing insubordination in the military forces on the ground that the intent required by the statute was not shown. It added that there was a second element necessary to conviction,

"consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck v. United States*, 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt."

Other passages responsible for attributing to the Court the principle that imminence of the apprehended evil is necessary to conviction in free speech cases are collected in an Appendix to this opinion, *post*, p. 341 U. S. 556.

[Footnote 2/7]

No useful purpose would be served by considering here decisions in which the Court treated the challenged regulation as though it imposed no real restraint on speech or on the press. *E.g., Associated Press v. Labor Board*, 301 U. S. 103; *Valentine v. Chrestensen*, 316 U. S. 52; *Railway Express Agency v. New York*, 336 U. S. 106; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288. We recognized that restrictions on speech were involved in *United States ex rel. Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, and *Gilbert*

v. Minnesota, 254 U. S. 325; but the decisions raised issues so different from those presented here that they too need not be considered in detail. Our decisions in *Stromberg v. California*, 283 U. S. 359, and *Winters v. New York*, 333 U. S. 507, turned on the indefiniteness of the statutes.

[Footnote 2/8]

The Taft-Hartley Act also requires that an officer of a union using the services of the National Labor Relations Board take oath that he

"does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

The Court divided on the validity of this requirement. Test oaths raise such special problems that decisions on their validity are not directly helpful here. *See West Virginia Board of Education v. Barnette*, 319 U. S. 624.

[Footnote 2/9]

Burns v. United States, 274 U. S. 328, adds nothing to the decision in *Whitney v. California.*

[Footnote 2/10]

In *Herndon v. Georgia*, 295 U. S. 441, the opinion of the Court was concerned solely with a question of procedure. Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo, however, thought that the problem of *Gitlow v. New York* was raised. *See* 295 U.S. at 295 U. S. 446.

[Footnote 2/11]

See the testimony of the Director of the Federal Bureau of Investigation. Hearings before the House Committee on Un-American Activities, on H.R. 1884 and H.R. 2122, 80th Cong., 1st Sess., Part 2, p. 37.

[Footnote 2/12]

Report of the Royal Commission to Investigate Communication of Secret and Confidential Information to Agents of a Foreign Power, June 27, 1946, p. 44. There appears to be little reliable evidence demonstrating directly that the Communist Party in this country has recruited persons willing to engage in espionage or other unlawful activity on behalf of the Soviet Union. The defection of a Soviet diplomatic employee, however, led to a careful investigation of an espionage network in Canada, and has disclosed the effectiveness of the Canadian Communist Party in conditioning its members to disclose to Soviet agents vital information of a secret character. According to the Report of the Royal Commission investigating the network, conspiratorial characteristics of the Party similar to those shown in the evidence now before us were instrumental in developing the necessary motivation to cooperate in the espionage. *See* pp. 43-83 of the Report.

[Footnote 2/13]

The Communist background of Dr. Klaus Fuchs was brought out in the proceedings against him. *See* The [London] Times, Mar. 2, 1950, p.2, col. 6.

[Footnote 2/14]

See American Communications Assn. v. Douds, 339 U. S. 382. Former Senator Robert M. La Follette, Jr., has reported his experience with infiltration of Communist sympathizers into congressional committee staffs. Collier's, Feb. 8, 1947, p. 22.

[Footnote 2/15]

Immigration laws require, for instance, exclusion and deportation of aliens who advocate the overthrow of the Government by force and violence, and declare ineligible for naturalization aliens who are members of organizations so advocating. Act of Feb. 5, 1917, § 19, 39 Stat. 889, 8 U.S.C. § 155; Act of Oct. 16, 1918, 40 Stat. 1012, 8 U.S.C. § 137; Act of Oct. 14, 1940, § 305, 54 Stat. 1141, 8 U.S.C. § 705. The Hatch Act prohibits employment by any Government agency of members of organizations advocating overthrow of "our constitutional form of government." Act of Aug. 2, 1939, § 9A, 53 Stat. 1148, 5 U.S.C. (Supp. III) § 118j. The Voorhis Act of Oct. 17, 1940, was passed to require registration of organizations subject to foreign control which engage in political activity. 54 Stat. 1201, 18 U.S.C. § 2386. The Taft-Hartley Act contains a section designed to exclude Communists from positions of leadership in labor organizations. Act of June 23, 1947, § 9(h), 61 Stat. 146, 29 U.S.C. (Supp. III) § 159(h). And, most recently,

the McCarran Act requires registration of “Communist action” and “Communist front” organizations. Act of Sept. 23, 1950, § 7, 64 Stat. 987, 993.

MR. JUSTICE JACKSON, concurring.

This prosecution is the latest of never-ending, because never successful, quests for some legal formula that will secure an existing order against revolutionary radicalism. It requires us to reappraise, in the light of our own times and conditions, constitutional doctrines devised under other circumstances to strike a balance between authority and liberty.

Activity here charged to be criminal is conspiracy — that defendants conspired to teach and advocate, and to organize the Communist Party to teach and advocate, overthrow and destruction of the Government by force and violence. There is no charge of actual violence or attempt at overthrow. [Footnote 3/1]

The principal reliance of the defense in this Court is that the conviction cannot stand under the Constitution because the conspiracy of these defendants presents no “clear and present danger” of imminent or foreseeable overthrow.

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I

The statute before us repeats a pattern, originally devised to combat the wave of anarchistic terrorism that plagued this country about the turn of the century, [Footnote 3/2] which lags at least two generations behind Communist Party techniques.

Anarchism taught a philosophy of extreme individualism and hostility to government and property. Its avowed aim was a more just order, to be achieved by violent destruction of all government. [Footnote 3/3] Anarchism’s sporadic and uncoordinated acts of terror were not integrated with an effective revolutionary machine, but the Chicago Haymarket riots of 1886, [Footnote 3/4] attempted murder of the industrialist Frick, attacks on state officials, and

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assassination of President McKinley in 1901, were fruits of its preaching.

However, extreme individualism was not educive to cohesive and disciplined organization. Anarchism fell into disfavor among incendiary radicals, many of whom shifted their allegiance to the rising Communist Party. Meanwhile, in Europe, anarchism had been displaced by Bolshevism as the doctrine and strategy of social and political upheaval. Led by intellectuals hardened by revolutionary experience, it was a more sophistic&ted, dynamic and realistic movement. Establishing a base in the Soviet Union, it founded an aggressive international Communist apparatus which has modeled and directed a revolutionary movement able only to harass our own country. But it has seized control of a dozen other countries.

Communism, the antithesis of anarchism, [Footnote 3/5] appears today as a closed system of thought representing Stalin’s

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version of Lenin’s version of Marxism. As an ideology, it is not one of spontaneous protest arising from American working-class experience. It is a complicated system of assumptions, based on European history and conditions, shrouded in an obscure and ambiguous vocabulary, which allures our ultrasophisticated intelligentsia more than our hard-headed working people. From time to time it champions all manner of causes and grievances and makes alliances that may add to its foothold in government or embarrass the authorities.

The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. [Footnote 3/6] It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power, it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion.

The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder, but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts of violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not

as a principle but as an expedient. Force or violence, as they would resort to it, may never be necessary, because infiltration and deception may be enough.

Force would be utilized by the Communist Party not to destroy government, but for its capture. The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency, and revolution is seen not as a sudden episode, but as the consummation of a long process.

The United States, fortunately, has experienced Communism only in its preparatory stages, and, for its pattern of final action, must look abroad. Russia, of course, was the pilot Communist revolution which, to the Marxist, confirms the Party's assumptions and points its destiny. [Footnote 3/7]

But Communist technique in the overturn of a free government was disclosed by the *coup d'etat* in which they seized power in Czechoslovakia. [Footnote 3/8] There, the Communist Party, during its preparatory stage, claimed and received protection for its freedoms of speech, press, and assembly. Pretending to be but another political party, it eventually was conceded participation in government, where it entrenched reliable members chiefly in control of police and information services. When the government faced a foreign and domestic crisis, the Communist Party had established a leverage strong enough to threaten civil war. In a period of confusion, the Communist plan unfolded, and the underground organization came to the surface throughout the country in the form chiefly of labor "action committees." Communist officers of the unions took over transportation, and allowed only persons with party permits to travel. Communist printers took over the newspapers and radio, and put out only party-approved versions of events. Possession was taken of telegraph and telephone systems, and communications were cut off wherever directed by party heads. Communist unions took over the factories, and in the cities, a partisan distribution of food was managed by the Communist organization. A virtually bloodless abdication by the elected government admitted the Communists to power, whereupon they instituted a reign of oppression and terror, and ruthlessly denied to all others the freedoms which had sheltered their conspiracy.

II

The foregoing is enough to indicate that,.either by accident or design, the Communist stratagem outwits the anti-anarchist pattern of statute aimed against "overthrow by force and violence" if qualified by the doctrine that only "clear and present danger" of accomplishing that result will sustain the prosecution.

The "clear and present danger" test was an innovation by Mr. Justice Holmes in the *Schenck case*, [Footnote 3/9] reiterated and refined by him and Mr. Justice Brandeis in later cases, [Footnote 3/10] all arising before the era of World War II revealed the subtlety and efficacy of modernized revolutionary techniques used by totalitarian parties. In those cases, they were faced with convictions under so-called criminal syndicalism statutes aimed at anarchists but which, loosely construed, had been applied to punish socialism, pacifism, and left-wing ideologies, the charges often resting on far-fetched

inferences which, if true, would establish only technical or trivial violations. They proposed "clear and present danger" as a test for the sufficiency of evidence in particular cases.

I would save it, unmodified, for application as a "rule of reason" [Footnote 3/11] in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime, but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in such cases favors freedoms that are vital to our society, and even if sometimes applied too generously, the consequences cannot be grave. But its recent expansion has extended, in particular to

Communists, unprecedented immunities. [Footnote 3/12] Unless we are to hold our Government captive in a judge-made verbal trap, we must approach the problem of a well organized, nationwide conspiracy, such as I have

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described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason.

I think reason is lacking for applying that test to this case.

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If we must decide that this Act and its application are constitutional only if we are convinced that petitioner's conduct creates a "clear and present danger" of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist coup would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections, and nothing more.

The authors of the clear and present danger test never applied it to a case like this, nor would I. If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; the Government can move only after imminent action is manifest, when it would, of course, be too late.

III

The highest degree of constitutional protection is due to the individual acting without conspiracy. But even an individual cannot claim that the Constitution protects him in advocating or teaching overthrow of government by force or violence. I should suppose no one would doubt that Congress has power to make such attempted

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overthrow a crime. But the contention is that one has the constitutional right to work up a public desire, and will to do what it is a crime to attempt. I think direct incitement by speech or writing can be made a crime, and I think there can be a conviction without also proving that the odds favored its success by 99 to 1, or some other extremely high ratio.

The names of Mr. Justice Holmes and Mr. Justice Brandeis cannot be associated with such a doctrine of governmental disability. After the *Schenck* case, in which they set forth the clear and present danger test, they joined in these words of Mr. Justice Holmes, spoken for a unanimous Court:

". . . [T]he First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U. S. 275, 165 U. S. 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

Frohwerk v. United States, 249 U. S. 204, 249 U. S. 206.

The same doctrine was earlier stated in *Fox v. Washington*, 236 U. S. 273, 236 U. S. 277, and that case was recently and with approval cited in *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 336 U. S. 502.

As aptly stated by Judge Learned Hand in *Masses Publishing Co. v. Patten*, 244 F. 535, 540:

"One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. "

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Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. It is a question of fact in each case.

IV

What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy. One of the dissenting opinions even appears to chide me for "invoking the law of conspiracy." As that is the case before us, it may be more amazing that its reversal can be proposed without even considering the law of conspiracy.

The Constitution does not make conspiracy a civil right. The Court has never before done so, and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization. Indeed, this Court seems, particularly in cases where the conspiracy has economic ends, to be applying its doctrines with increasing severity. While I consider criminal conspiracy a dragnet device capable of perversion into an instrument of injustice in the hands of a partisan or complacent judiciary, it has an established place in our system of law, and no reason appears for applying it only to concerted action claimed to disturb interstate commerce and withholding it from those claimed to undermine our whole Government. [Footnote 3/13]

The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish. Thus, we recently held in *Pinkerton v. United States*, 328 U. S. 640, 328 U. S. 643-644,

"It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. . . . And the plea of double jeopardy is no defense to a conviction for both offenses. . . ."

So far does this doctrine reach that it is well settled that Congress may make it a crime to conspire with others to do what an individual may lawfully do on his own. This principle is illustrated in conspiracies that violate the antitrust laws as sustained and applied by this Court. Although one may raise the prices of his own products, and many, acting without concert, may do so, the moment they conspire to that end, they are punishable. The same principle is applied to organized labor. Any workman may quit his work for any reason, but concerted actions to the same end are in some circumstances forbidden. National Labor Relations Act, as amended, 61 Stat. 136, § 8(b), 29 U.S.C. § 158(b).

The reasons underlying the doctrine that conspiracy may be a substantive evil in itself, apart from any evil it may threaten, attempt, or accomplish, are peculiarly appropriate to conspiratorial Communism.

"The reason for finding criminal liability in case of a combination to effect an unlawful end or to use unlawful means, where none would exist, even though the act contemplated were actually committed by an individual, is that a combination of persons to commit a wrong, either as an end or as a means to an end, is so much more dangerous, because of its increased power to do wrong, because it is more difficult

to guard against and prevent the evil designs of a group of persons than of a single person, and because of the terror which fear of such a combination tends to create in the minds of people. [Footnote 3/14]"

There is lamentation in the dissents about the injustice of conviction in the absence of some overt act. Of course, there has been no general uprising against the Government, but the record is replete with acts to carry out the conspiracy alleged, acts such as always are held sufficient to consummate the crime where the statute requires an overt act.

But the shorter answer is that no overt act is or need be required. The Court, in antitrust cases, early upheld the power of Congress to adopt the ancient common law that makes conspiracy itself a crime. Through Mr. Justice Holmes, it said:

"Coming next to the objection that no overt act is laid, the answer is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing — that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability."

Nash v. United States, 229 U. S. 373, 229 U. S. 378. Reiterated, *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 310 U. S. 252. It is not to be supposed that the power of Congress to protect the Nation's existence is more limited than its power to protect interstate commerce.

Also, it is urged that, since the conviction is for conspiracy to teach and advocate, and to organize the Communist Party to teach and advocate, the First Amendment is violated because freedoms of speech and press protect teaching and advocacy regardless of what is taught or advocated. I have never thought that to be the law.

I do not suggest that Congress could punish conspiracy to advocate something, the doing of which it may not punish. Advocacy or exposition of the doctrine of communal property ownership, or any political philosophy unassociated with advocacy of its imposition by force or seizure of government by unlawful means could not be reached through conspiracy prosecution. But it is not forbidden to put down force or violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.

The defense of freedom of speech or press has often been raised in conspiracy cases, because, whether committed by Communists, by businessmen, or by common criminals, it usually consists of words written or spoken, evidenced by letters, conversations, speeches or documents. Communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved. However, when labor unions raised the defense of free speech against a conspiracy charge, we unanimously said:

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. . . ."

". . . It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation

of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade, as well as many other agreements and conspiracies deemed injurious to society."

Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 336 U. S. 498, 336 U. S. 502.

A contention by the press itself, in a conspiracy case, that it was entitled to the benefits of the "clear and present danger" test, was curtly rebuffed by this Court, saying:

"Nor is a publisher who engages in business practices made unlawful by the Sherman Act entitled to a partial immunity by reason of the 'clear and present danger' doctrine. . . . Formulated as it was to protect liberty of thought and of expression, it would degrade the clear and present danger doctrine to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act. . . ."

Associated Press v. United States, 326 U. S. 1, 326 U. S. 7. I should think it at least as "degrading" to fashion of it a shield for conspirators whose ultimate purpose is to capture or overthrow the Government.

In conspiracy cases, the Court not only has dispensed with proof of clear and present danger, but even of power to create a danger:

"It long has been settled, however, that a 'conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.' . . . Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy. . . ."

American Tobacco Co. v. United States, 328 U. S. 781, 328 U. S. 789.

Having held that a conspiracy alone is a crime and its consummation is another, it would be weird legal reasoning to hold that Congress could punish the one only if there was "clear and present danger" of the second. This

would compel the Government to prove two crimes in order to convict for one.

When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty were the Government, on the one hand, and the individual citizen, on the other. It was thought that, if the state could be kept in its place, the individual could take care of himself.

In more recent times, these problems have been complicated by the intervention between the state and the citizen of permanently organized, well financed, semi-secret and highly disciplined political organizations. Totalitarian groups here and abroad perfected the technique of creating private paramilitary organizations to coerce both the public government and its citizens. These organizations assert as against our Government all of the constitutional rights and immunities of individuals, and at the same time exercise over their followers much of the authority which they deny to the Government. The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic. It demands these freedoms not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line, and enforces its authoritarian rule by crude purges, if nothing more violent.

The law of conspiracy has been the chief means at the Government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the Government. There is no constitutional right to "gang up" on the Government.

While I think there was power in Congress to enact this statute and that, as applied in this case, it cannot be

held unconstitutional, [Footnote 3/15] I add that I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry. [Footnote 3/16] Corruption, ineptitude, inflation, oppressive taxation, militarization, injustice, and loss of leadership capable of intellectual initiative in domestic or foreign affairs are allies on which the Communists

count to bring opportunity knocking to their door. Sometimes I think they may be mistaken. But the Communists are not building just for today — the rest of us might profit by their example.

[Footnote 3/1]

The Government's own summary of its charge is:

"The indictment charged that from, April 1, 1945, to the date of the indictment, petitioners unlawfully, willfully, and knowingly conspired with each other and with other persons unknown to the grand jury (1) to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. The indictment alleged that Section 2 of the Smith Act proscribes these acts, and that the conspiracy to take such action is a violation of Section 3 of the act (18 U.S.C. 10, 11 (1946 ed.))."

[Footnote 3/2]

The Government says this Act before us was modeled after the New York Act of 1909, sustained by this Court in *Gitlow v. New York*, 268 U. S. 652. That, in turn, as the Court pointed out, followed an earlier New York Act of 1902. Shortly after the assassination of President McKinley by an anarchist, Congress adopted the same concepts in the Immigration Act of March 3, 1903. 32 Stat. 1213, § 2. Some germs of the same concept can be found in some reconstruction legislation, such as the Enforcement Act of 1871, 17 Stat. 13. The Espionage Act of 1917, 40 Stat. 217, tit. 1, § 3, which gave rise to a series of civil rights decisions, applied only during war and defined as criminal "false statements with intent" to interfere with our war effort or cause insubordination in the armed forces or obstruct recruiting. However, a wave of "criminal syndicalism statutes" were enacted by the States. They were generally upheld, *Whitney v. California*, 274 U. S. 357, and prosecutions under them were active from 1919 to

1924. In California alone, 531 indictments were returned and 164 persons convicted. 4 Encyc.Soc.Sci. 582, 583. The Smith Act followed closely the terminology designed to incriminate the methods of terroristic anarchism.

[Footnote 3/3]

Elementary texts amplify the theory and practice of these movements which must be greatly oversimplified in this opinion. *See* Anarchism, 2 Encyc.Soc.Sci. 46; Nihilism, 11 Encyc.Soc.Sci. 377.

[Footnote 3/4]

Spies v. Illinois, 122 Ill. 1, 12 N.E. 865, 17 N.E. 898.

[Footnote 3/5]

Prof. Beard demonstrates this antithesis by quoting the Russian anarchist leader Bakunin, as follows:

"'Marx is an authoritarian and centralizing communist. He wishes what we wish: the complete triumph of economic and social equality, however, within the state and through the power of the state, through the dictatorship of a very strong and, so to speak, despotic provisional government, that is, by the negation of liberty. His economic ideal is the state as the sole owner of land and capital, tilling the soil by means of agricultural associations, under the management of its engineers, and directing through the agency of capital all industrial and commercial associations."

"'We demand the same triumph of economic and social equality through the abolition of the state and everything called juridical right, which is according to our view the permanent negation of human right. We wish the reconstruction of society and the establishment of the unity of mankind not from above downward through authority, through socialistic officials, engineers and public technicians, but from below upward through the voluntary federation of labor associations of all kinds emancipated entirely from the yoke of the state.'"

Beard, Individualism and Capitalism, 1 Encyc.Soc.Sci. 145, 158.

[Footnote 3/6]

For methods and objects of infiltration of labor unions, *see American Communications Assn. v. Douds*, 339 U. S. 382, 339 U. S. 422.

[Footnote 3/7]

The Czar's government, in February, 1917, literally gave up, almost without violence, to the Provisional Government because it was ready to fall apart from its corruption, ineptitude, superstition, oppression and defeat. The revolutionary parties had little to do with this, and regarded it as a bourgeoisie triumph. Lenin was an exile in Switzerland, Trotsky in the United States, and Stalin was in Siberia. The Provisional Government attempted to continue the war against Germany, but it, too, was unable to solve internal problems, and its Galician campaign failed with heavy losses. By October, its prestige and influence sank so low that it could not continue. Meanwhile, Lenin and Trotsky had returned and consolidated the Bolshevik position around the Soviets, or trade unions. They simply took over power in an almost bloodless revolution between October 25 and November 7, 1917. That Lenin and Trotsky represented only a minority was demonstrated in November elections, in which the Bolsheviks secured less than a quarter of the seats. Then began the series of opportunistic movements to entrench themselves in power. Faced by invasion of the allies, by counterrevolution, and the attempted assassination of Lenin, terrorism was resorted to on a large scale, and all the devices of the Czar's police state were reestablished. *See* 1 Carr, The Bolshevik Revolution 1917-1923, 99-110, and Moore, Soviet Politics — The Dilemma of Power, 117-139.

[Footnote 3/8]

Duchacek, The Strategy of Communist Infiltration: Czechoslovakia, 1944-1948, World Politics, Vol. II, No. 3 (April 1950) 345-372, and The February Coup in Czechoslovakia, *id.*, July, 1950, 511-532; *see also* Kertesz, The Methods of Communist Conquest: Hungary, 1944-1947, *id.*, October 1950, 20-54; Lasswell, The Strategy of Soviet Propaganda, 24 Acad.Pol.Sci.Proc. 214, 221. *See also* Friedman, The Break-up of Czech Democracy.

[Footnote 3/9]

Schenck v. United States, 249 U. S. 47. This doctrine has been attacked as one which "annuls the most significant purpose of the First Amendment. It destroys the intellectual basis of our plan of self-government." Meiklejohn, Free Speech And Its Relation to

Self-Government, 29. It has been praised:

"The concept of freedom of speech received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution."

Chafee, Free Speech in the United States, 82. In either event, it is the only original judicial thought on the subject, all later cases having made only extensions of its application. All agree that it means something very important, but no two seem to agree on what it is. *See* concurring opinion, MR. JUSTICE FRANKFURTER, *Kovacs v. Cooper,* 336 U. S. 77, 336 U. S. 89.

[Footnote 3/10]

Gitlow v. New York, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357. Holmes' comment on the former, in his letters to Sir Frederick Pollock of June 2 and 18, 1925, as "a case in which conscience and judgment are a little in doubt," and description of his dissent as one "in favor of the rights of an anarchist (so-called) to talk drool in favor of the proletarian dictatorship" show the tentative nature of his test, even as applied to a trivial case. Holmes-Pollock Letters (Howe ed.1946).

[Footnote 3/11]

So characterized by Mr. Justice Brandeis in *Schaefer v. United States*, 251 U. S. 466,251 U. S. 482.

[Footnote 3/12]

Recent cases have pushed the "clear and present danger" doctrine to greater extremes. While Mr. Justice Brandeis said only that the evil to be feared must be "imminent" and "relatively serious," *Whitney v. California*, 274 U. S. 357, 274 U. S. 376 and 274 U. S. 377, more recently it was required

"that the substantive evil must be *extremely* serious and the *degree of imminence extremely high* before utterances can be punished."

Bridges v. California, 314 U. S. 252, 314 U. S. 263. (Italics supplied.)

Schneiderman v. United States, 320 U. S. 118, overruled earlier holdings that the courts could take judicial notice that the Communist Party does advocate overthrow of the Government by force and violence. This Court reviewed much of the basic Communist literature that is before us now, and held that it was within "the area of allowable thought," *id.* at 320 U. S. 139, that it does not show lack of attachment to the Constitution, and that success of the Communist Party would not necessarily mean the end of representative government. The Court declared further that

"[a] tenable conclusion from the foregoing is that the Party, in 1927, desired to achieve its purpose by peaceful and democratic means, and, as a theoretical matter, justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

Id. at 320 U. S. 157. Moreover, the Court considered that this

"mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time — prediction that is not calculated or intended to be presently acted upon. . . ."

ibid., was within the realm of free speech. A dissent by Mr. Chief Justice Stone, for himself and Justices Roberts and Frankfurter, challenged these naive conclusions, as they did again in *Bridges v. Wixon*, 326 U. S. 135, in which the Court again set aside an Attorney General's deportation order. Here, Mr. Justice Murphy, without whom there would not have been a majority for the decision, speaking for himself in a concurring opinion, pronounced the whole deportation statute unconstitutional, as applied to Communists, under the "clear and present danger test," because

"Not the slightest evidence was introduced to show that either Bridges or the Communist Party seriously and imminently threatens to uproot the Government by force or violence."

326 U.S. at 326 U. S. 165.

[Footnote 3/13]

These dangers were more fully set out in *Krulewitch v. United States*, 336 U. S. 440,336 U. S. 445.

[Footnote 3/14]

Miller on Criminal Law, 110. Similar reasons have been reiterated by this Court.*United States v. Rabinowich*, 238 U. S. 78, 238 U. S. 88; *Pinkerton v. United States*, 328 U. S. 640, 328 U. S. 643-644.

[Footnote 3/15]

The defendants have had the benefit so far in this case of all the doubts and confusions afforded by attempts to apply the "clear and present danger" doctrine. While I think it has no proper application to the case, these efforts have been in response to their own contentions and favored, rather than prejudiced, them. There is no call for reversal on account of it.

[Footnote 3/16]

The pathetically ineffective efforts of free European states to overcome feebleness of the Executive and decomposition of the Legislative branches of government by legal proscriptions are reviewed in Loewenstein, Legislative Control of Political Extremism in European Democracies, 38 Col.L.Rev. 591, 725 (1938). The Nazi Party seizure of power in Germany occurred while both it and its Communist counterpart were under sentence of illegality from the courts of the Weimar Republic. The German Criminal Code struck directly at the disciplinary system of totalitarian parties. It provided:

"The participation in an organization the existence, constitution, or purposes of which are to be kept secret from the Government, or in which obedience to unknown superiors or unconditional obedience to known superiors is pledged, is punishable by imprisonment up to six months for the members and from one month to one year for the founders and officers. Public officials may be deprived of the right to hold public office for a period of from one to five years."

2 Nazi Conspiracy and Aggression (GPO 1946) 11. The Czar's government of Russia fell while the Communist leaders were in exile. *See* <l=|341 u.s.="" 494fn3="" 7|="">n. 7. Instances of similar failures could be multiplied indefinitely.</l=|341>

MR. JUSTICE BLACK, dissenting.

Here again, as in *Breard v. Alexandria*, *post*, p. 341 U. S. 622, decided this day, my basic disagreement with the Court is not as to how we should explain or reconcile what was said in prior decisions, but springs from a fundamental difference in constitutional approach. Consequently, it would serve no useful purpose to state my position at length.

At the outset, I want to emphasize what the crime involved in this case is, and what it is not. These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: the indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

But let us assume, contrary to all constitutional ideas of fair criminal procedure, that petitioners, although not indicted for the crime of actual advocacy, may be punished for it. Even on this radical assumption, the other opinions in this case show that the only way to affirm

these convictions is to repudiate directly or indirectly the established "clear and present danger" rule. This the Court does in a way which greatly restricts the protections afforded by the First Amendment. The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom. At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression," but does "no more than recognize a minimum compulsion of the Bill of Rights." *Bridges v. California*, 314 U. S. 252, 314 U. S. 263.

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection. I must also express my objection to the holding because, as MR. JUSTICE DOUGLAS dissent shows, it sanctions the determination of a crucial issue of fact by the judge, rather than by the jury. Nor can I let this opportunity

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pass without expressing my objection to the severely limited grant of certiorari in this case which precluded consideration here of at least two other reasons for reversing these convictions: (1) the record shows a discriminatory selection of the jury panel which prevented trial before a representative cross-section of the community; (2) the record shows that one member of the trial jury was violently hostile to petitioners before and during the trial.

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that, in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

MR. JUSTICE DOUGLAS, dissenting.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy, and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial. There is a statute which makes a seditious conspiracy unlawful. [Footnote 4/1] Petitioners, however, were not

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charged with a "conspiracy to overthrow" the Government. They were charged with a conspiracy to form a party and groups and assemblies of people who teach and advocate the overthrow of our Government by force or violence and with a conspiracy to advocate and teach its overthrow by force and violence. [Footnote 4/2] It may well be that indoctrination in the techniques of terror to destroy the Government would be indictable under either statute. But the teaching which is condemned here is of a different character.

So far as the present record is concerned, what petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books: [Footnote 4/3] Stalin, Foundations of Leninism (1924); Marx and Engels, Manifesto of the Communist Party (1848); Lenin, The State and Revolution (1917); History of the Communist Party of the Soviet Union (B.) (1939).

Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon.

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The opinion of the Court does not outlaw these texts nor condemn them to the fire, as the Communists do literature offensive to their creed. But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime? It would not be a crime under the Act to introduce these books to a class, though that would be teaching what the creed of violent overthrow of the Government is. The Act, as construed, requires the element of intent — that those who teach the creed believe in it. The crime then depends not on what is taught, but on who the teacher is. That is to make freedom of speech turn not on *what is said*, but on the intent with which it is said. Once we start down that road, we enter territory dangerous to the liberties of every citizen.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king, but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse, and took steps to see that the practice would not flourish here. Treason was defined to require overt acts — the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did, but *for what they thought;* they get convicted not for what they said, but for the purpose with which they said it.

Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts, but with speech, to which the Constitution has given a special sanction.

The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion, which, by invoking the law of conspiracy, makes speech do service for deeds which are dangerous to society. The doctrine of conspiracy has served divers and oppressive purposes, and, in its broad reach, can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech plus acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme.

Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false, and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our

people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed. The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 274 U. S. 376-377,

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended

is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. *If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.*"

(Italics added.)

I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury. It was squarely held in *Pierce v. United States*, 252 U. S. 239, 252 U. S. 244, to be a jury question. Mr. Justice Pitney, speaking for the Court, said,

"Whether the statement contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial."

That is the only time the Court has passed on the issue. None of our other decisions is contrary. Nothing said in any of the nonjury cases has detracted from that ruling. [Footnote 4/4] The statement in *Pierce v. United States*, *supra*, states the law as it has been, and as it should be. The Court, I think, errs when it treats the question as one of law.

Yet, whether the question is one for the Court or the jury, there should be evidence of record on the issue. This record, however, contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation. The Court, however, rules to the contrary. It says,

"The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

That ruling is, in my view, not responsive to the issue in the case. We might as well say that the speech of

petitioners is outlawed because Soviet Russia and her Red Army are a threat to world peace.

The nature of Communism as a force on the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. But the primary consideration is the strength and tactical position of petitioners and their converts in this country. On that, there is no evidence in the record. If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that, as a political party, they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving,

the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness, and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic

steps and jail these men for merely speaking their creed. But in America, they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.

The political impotence of the Communists in this country does not, of course, dispose of the problem. Their numbers; their positions in industry and government; the extent to which they have, in fact, infiltrated the police, the armed services, transportation, stevedoring, power plants, munitions works, and other critical places — these facts all bear on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record is silent on these facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech. I could not so hold unless I were willing to conclude that the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards were so futile as to leave the country on the edge of grave peril. To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the FBI; that, in case of war with Russia, they will be picked up overnight, as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.

This is my view if we are to act on the basis of judicial notice. But the mere statement of the opposing views indicates how important it is that we know the facts before we act. Neither prejudice nor hate nor senseless

fear should be the basis of this solemn act. Free speech — the glory of our system of government — should not be sacrificed on anything less that plain and objective proof of danger that the evil advocated is imminent. On this record, no one can say that petitioners and their converts are in such a strategic position as to have even the slightest chance of achieving their aims.

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” The Constitution provides no exception. This does not mean, however, that the Nation need hold its hand until it is in such weakened condition that there is no time to protect itself from incitement to revolution. Seditious conduct can always be punished. But the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself. The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. The First Amendment reflects the philosophy of Jefferson

“that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. [Footnote 4/5]”

The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes

of law to be invoked only when the provocateurs among us move from speech to action.

Vishinsky wrote in 1938 in The Law of the Soviet State, “In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism.”

Our concern should be that we accept no such standard for the United States. Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.

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APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

There have been numerous First Amendment cases before the Court raising the issue of clear and present danger since Mr. Justice Holmes first formulated the test in *Schenck v. United States*, 249 U. S. 47, 249 U. S. 52. Most of them, however, have not involved jury trials.

The cases which may be deemed at all relevant to our problem can be classified as follows:

CONVICTIONS FOR CONTEMPT OF COURT (NON-JURY): *Near v. Minnesota*, 283 U. S. 697; *Bridges v. California*, 314 U. S. 252; *Thomas v. Collins*, 323 U. S. 516; *Pennekamp v. Florida*, 328 U. S. 331; *Craig v. Harney*, 331 U. S. 367.

CONVICTIONS BY STATE COURTS SITTING WITHOUT JURIES, GENERALLY FOR VIOLATIONS OF LOCAL ORDINANCES: *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. State*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296; *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517; *Winters v. New York*, 333 U. S. 507; *Saia v. New York*, 334 U. S. 558; *Kovacs v. Cooper*, 336 U. S. 77; *Kunz v. New York*, 340 U. S. 290; *Feiner v. New York*, 340 U. S. 315.

INJUNCTIONS AGAINST ENFORCEMENT OF STATE OR LOCAL LAWS (NON-JURY):*Grosjean v. American Press Co.*, 297

U.S. 233; *Hague v. CIO*, 307 U. S. 496; *Minersville School District v. Gobitis*, 310 U. S. 586; *West Virginia Board of Education v. Barnette*, 319 U. S. 624.

ADMINISTRATIVE PROCEEDINGS (NON-JURY): *Bridges v. Wixon*, 326 U. S. 135; *Schneiderman v. United States*, 320 U. S. 118; *American Communications Association v. Douds*, 339 U. S. 382.

CASES TRIED BEFORE JURIES FOR VIOLATIONS OF STATE LAWS DIRECTED AGAINST ADVOCACY OF ANARCHY, CRIMINAL SYNDICALISM, ETC.: *Gilbert v. Minnesota*, 254 U. S. 325; *Gitlow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *Fiske v. Kansas*, 274 U. S. 380; *Stromberg v. California*, 283 U. S. 359; *De Jonge v. Oregon*,299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Taylor v. Mississippi*, 319 U. S. 583; or for minor local offenses: *Cox v. New Hampshire*, 312 U. S. 569; *Chaplinsky v. New Hampshire*, 315 U. S. 568; *Terminiello v. Chicago*, 337 U. S. 1; *Niemotko v. Maryland*,340 U. S. 268.

FEDERAL PROSECUTIONS BEFORE JURIES UNDER THE ESPIONAGE ACT OF 1917 FOLLOWING WORLD WAR I: *Schenck v. United States*, 249 U. S. 47; *Frohwerk v. United States*, 249 U. S. 204; *Debs v. United States*, 249 U. S. 211; *Abrams v. United States*, 250 U. S. 616; *Schaefer v. United States*, 251 U. S. 466; *Pierce v. United States*, 252 U. S. 239. *Pierce v. United States* ruled that the question of clear and present danger was for the jury. In the other cases in this group the question whether the issue was for the court or the jury was not raised or passed upon.

FEDERAL PROSECUTION BEFORE A JURY UNDER THE ESPIONAGE ACT OF 117 FOLLOWING WORLD WAR II: *Hartzel v. United States*, 322 U. S. 680. The jury was instructed on clear and present danger in terms drawn from the language of Mr. Justice Holmes in *Schenck v. United States*, *supra*, p. 249 U. S. 52. The Court reversed the conviction on the ground that there had not been sufficient evidence for submission of the case to the jury.

[Footnote 4/1]

18 U.S.C. § 2384 provides:

"If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined not more than $5,000 or imprisoned not more than six years, or both."

[Footnote 4/2]

54 Stat. 671, 18 U.S.C. §§ 10, 11.

[Footnote 4/3]

Other books taught were Stalin, Problems of Leninism, Strategy and Tactics of World Communism (H.R.Doc. No. 619, 80th Cong., 2d Sess.), and Program of the Communist International.

[Footnote 4/4]

The cases which reached the Court are analyzed in the Appendix attached to this opinion, *post*, p. 341 U. S. 591.

[Footnote 4/5]

12 Hening's Stat. (Virginia 1823), c. 34, p. 84. Whipple, Our Ancient Liberties (1927), p. 95, states:

"This idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It had been asserted by a long line of distinguished thinkers, including John Locke, Montesquieu in his *The Spirit of the Laws* ('Words do not constitute an overt act'), the Rev. Phillip Furneaux, James Madison, and Thomas Jefferson."

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2.14: Freedom of Speech- Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969)

U.S. Supreme Court

Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969)

Tinker v. Des Moines Independent Community School District

No. 21

Argued November 12, 1968

Decided February 24, 1969

393 U.S. 503

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired — that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld

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the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F.Supp. 971 (1966). The court referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966). [Footnote 1]

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. *See West Virginia v. Barnette*, 319 U. S. 624 (1943); *Stromberg v. California*, 283 U. S. 359 (1931). *Cf. Thornhill v. Alabama*, 310 U. S. 88(1940); *Edwards v. South Carolina*, 372 U. S. 229 (1963); *Brown v. Louisiana*, 383 U. S. 131 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech"

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which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. *Cf. Cox v. Louisiana*, 379 U. S. 536, 555 (1965); *Adderley v. Florida*, 385 U. S. 39 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), and *Bartels v. Iowa*, 262 U. S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. [Footnote 2] *See also Pierce v. Society of Sisters,* 268

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U.S. 510 (1925); *West Virginia v. Barnette*, 319 U. S. 624 (1943); *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Wieman v. Updegraff*, 344 U. S. 183, 195 (1952) (concurring opinion); *Sweezy v. New Hampshire*, 354 U. S. 234 (1957); *Shelton v. Tucker*, 364 U. S. 479, 487 (1960); *Engel v. Vitale*, 370 U. S. 421 (1962); *Keyishian v. Board of Regents*, 385 U. S. 589, 603 (1967); *Epperson v. Arkansas*, *ante*, p. 97 (1968).

In *West Virginia v. Barnette*, *supra*, this Court held that, under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."319 U.S. at 637.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *See Epperson v. Arkansas*, *supra*, at 104; *Meyer v. Nebraska*, *supra*, at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing,

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to hair style, or deportment. *Cf. Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take

this risk, *Terminiello v. Chicago*, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom — this kind of openness — that is

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the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.*Burnside v. Byars*, *supra* at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. [Footnote 3]

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On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. [Footnote 4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded. [Footnote 5])

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement

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in Vietnam — was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." *Burnside v. Byars*, *supra*, at 749.

In *Meyer v. Nebraska*, *supra*, at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

"In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a

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State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents*, 385 U. S. 589, 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

"'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' *Shelton v. Tucker,* [364 U.S. 479,] at 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. [Footnote 6] This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on

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the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.*Burnside v. Byars, supra,* at 749. But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. *Cf. Blackwell v. Issaquena County Board of Education.*, 363 F.2d 740 (C.A. 5th Cir.1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. *Cf. Hammond*

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v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (D.C.M.D. Ala. 967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I

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cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*, 390 U. S. 629. I continue to hold the view I expressed in that case:

"[A] State may permissibly determine that, at least in some precisely delineated areas, a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 649-650 (concurring in result). Cf. *Prince v. Massachusetts*, 321 U. S. 158.

MR. JUSTICE WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in *Burnside v. Byars*, 363 F.2d 744, 748 (C.A. 5th Cir.1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. [Footnote 1] The Court brought

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this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here, the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion, it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech," which is "akin to *pure speech,'" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions*

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are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, *cf., e.g., Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech — "symbolic" or "pure" — and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In *Cox*

v. Louisiana, 379 U. S. 536, 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked," chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

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Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that, if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education. [Footnote 2]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F.Supp. 971. Holding that the protest was akin to speech, which is protected by the First

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and Fourteenth Amendments, that court held that the school order was "reasonable," and hence constitutional. There was at one time a line of cases holding "reasonableness," as the court saw it, to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, *Meyer v. Nebraska*, 262 U. S. 390(1923), and *Bartels v. Iowa*, 262 U. S. 404 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings, as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court, in *Ferguson v. Skrupa*, 372 U. S. 726, 729, 730, after a thorough review of the old cases, was able to conclude in 1963:

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."

* * * *

"The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience," or that they are

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"unreasonable," "arbitrary," "irrational," "contrary to fundamental *decency,'" or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. West Virginia v. Barnette, 319 U. S. 624, clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First*

applicable to the States, and that the two forbade a State to compel little school children to salute the United States flag when they had religious scruples against doing so. [Footnote 3] Neither Thornhill v. Alabama, 310 U. S. 88; Stromberg v. California, 283 U. S. 359; Edwards

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v. South Carolina, 372 U. S. 229; nor Brown v. Louisiana, 383 U. S. 131, related to school children at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and Thornhill, Edwards, and Brown relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. Cox v. Louisiana, 379 U. S. 536, 555, and Adderley v. Florida, 385 U. S. 39, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the Meyer and Bartels "reasonableness-due process-McReynolds" constitutional test.

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable," and therefore unconstitutional, a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it, or, in legal jargon, that it "shocked the Court's conscience," "offended its sense of justice," or was "contrary to fundamental concepts of the English-speaking world," as the Court has sometimes said. *See, e.g., Rochin v. California*, 342 U. S. 165, and *Irvine v. California*, 347 U. S. 128. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of

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speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. *See, e.g., Cox v. Louisiana*, 379 U. S. 536, 555; *Adderley v. Florida*, 385 U. S. 39.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in *Meyer v. Nebraska, supra*, certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen, not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that, at their age, they need to learn, not teach.

The true principles on this whole subject were, in my judgment, spoken by Mr. Justice McKenna for the Court in *Waugh v. Mississippi University*, 237 U. S. 589, 596-597. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's

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freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause, and as a deprivation of property and of liberty under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the "fervid" pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court, in its next to the last paragraph, made this statement which has complete relevance for us today:

"It is said that the fraternity to which complainant belongs is a moral and, of itself, a disciplinary, force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that

the University was established by the State, and is under the control of the State, and the enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.* It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity." (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "symbolic"

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speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions." Here, the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course, students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens — to be better citizens. Here a very small number of students have crisply and summarily

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refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools — and, indeed, in all schools — will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines, and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools, rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school

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systems [Footnote 4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

MR. JUSTICE HARLAN, dissenting.

I certainly agree that state public school authorities, in the discharge of their responsibilities, are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time, I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns — for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

Footnotes

[Footnote 1]

In *Burnside*, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that, in *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them, and created much disturbance.

[Footnote 2]

Hamilton v. Regents of Univ. of Cal., 293 U. S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. *See, e.g., West Virginia v. Barnette*, 319 U. S. 624 (1943); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (C.A. 5th Cir.1961); *Knight v. State Board of Education*, 200 F.Supp. 174 (D.C. M.D. Tenn.1961); *Dickey v. Alabama State Board of Education*, 273 F.Supp. 613 (D.C. M.D. Ala.1967). *See also* Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595 (1960); Note, Academic Freedom, 81 Harv.L.Rev. 1045 (1968).

[Footnote 3]

The only suggestions of fear of disorder in the report are these:

"A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school, and it was felt that, if any kind of a demonstration existed, it might evolve into something which would be difficult to control."

"Students at one of the high schools were heard to say they would wear armbands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students

"didn't like the way our elected officials were handling things, it should be handled with the ballot box, and not in the halls of our public schools."

[Footnote 4]

The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that

"[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the armband regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents

protesting the war had swept the country. At that time, two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views."

258 F.Supp. at 92-973.

[Footnote 5]

After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that

"we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

[Footnote 6]

In *Hammond v. South Carolina State College*, 272 F.Supp. 947 (D.C. S.C.1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. *Cf. Cox v. Louisiana*, 379 U. S. 536 (1965); *Adderley v. Florida*, 385 U. S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. *Cf. Edwards v. South Carolina*, 372 U. S. 229 (1963); *Brown v. Louisiana*, 383 U. S. 131 (1966).

[Footnote 1]

The petition for certiorari here presented this single question:

"Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

[Footnote 2]

The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A-2, col. 1:

"BELLINGHAM, Mass. (AP) — Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election."

"'I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that, if he is elected, any legal contract entered into by the park commissioner would be void because he is a juvenile.'"

"Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

[Footnote 3]

In *Cantwell v. Connecticut*, 310 U. S. 296, 303-304 (1940), this Court said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[Footnote 4]

Statistical Abstract of the United States (1968), Table No. 578, p. 406.

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CHAPTER OVERVIEW

3: Second Amendment- Regulations

3.1: Military Service- United States v. Cruikshank 92 U.S. 542 (1875)

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3.1: Military Service- United States v. Cruikshank 92 U.S. 542 (1875)

U.S. Supreme Court

United States v. Cruikshank, 92 U.S. 542 (1875)

United States v. Cruikshank

92 U.S. 542

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF LOUISIANA

Syllabus

1. Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual, as well as their collective, rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

2. There is in our political system a government of each of the several States, and a Government of the United States. Each is distinct from the others, and has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of those governments will be different from those he has under the other.

3. The Government of the United States, although it is, within the scope of its powers, supreme and beyond the States, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the States.

4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution. The First Amendment to the Constitution, prohibiting Congress from abridging the right to assemble and petition, was not intended to limit the action of the State governments in respect to their own citizens, but to operate upon the National Government alone. It left the authority of the States unimpaired, added nothing to the already existing powers of the United States, and guaranteed the continuance of the right only against Congressional interference. The people, for their protection in the enjoyment of it, must therefore look to the States, where the power for that purpose was originally placed.

5. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government republican in form implies that right, and an invasion of it presents a case within the sovereignty of the United States.

6. The right to bear arms is not granted by the Constitution; neither is it in any manner dependent upon that instrument for its existence. The Second Amendments means no more than that it shall not be infringed by Congress, and has no other effect than to restrict the powers of the National Government.

7. Sovereignty, for the protection of the rights of life and personal liberty within the respective States, rests alone with the States.

8. The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, and from denying to

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any person within its jurisdiction the equal protection of the laws, but it adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not

deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.

9. In *Minor v. Happersett,* 21 Wall. 178, this Court decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al.*, *supra*, p. 92 U. S. 214, it held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

10. The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States of African descent, therein named, and which, in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the Constitution and law of the United States, to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes, deprive them of their respective several lives and liberty of person without due process of law, prevent and hinder them in the free exercise and enjoyment of their several rights to the full and equal benefit of the law, prevent and hinder them in the free exercise and enjoyment of their several and respective rights to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm and to injure and oppress them because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law by the people of said State — do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right the enjoyment of which the conspirators intended to hinder or prevent was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the alleged offence is not indictable under any act of Congress.

11. The counts of an indictment which, in general language, charge the defendants with an intent to hinder and prevent citizens of the United States of African descent, therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them

respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States do not specify any particular right the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law.

12. In criminal cases prosecuted under the laws of the United

States, the accused has the constitutional right “to be informed of the nature and cause of the accusation.” The indictment must set forth the offence with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species — it must descend to particulars. The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

13. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should therefore state the particulars to inform the

court as well as the accused. It must appear from the indictment that the acts charged will, if proved, support a conviction for the offence alleged.

This was an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement Act (16 Stat. 140), and consisted of thirty-two counts.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten, and intimidate" two citizens of the United States, "of African descent and persons of color," "with the unlawful and felonious intent thereby" them

"to hinder and prevent in their respective free

exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose."

The *second* avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person, without due process of law."

The *fourth* avers an intent to deprive the same persons of the

"free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property"

enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons

"in the exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color"

of the said persons.

The *sixth* avers an intent to hinder and prevent the same persons in

"the free exercise and enjoyment of the several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana."

The *seventh* avers an intent "to put in great fear of bodily harm, injure, and oppress" the same persons, "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons

"in their several and respective free exercise and enjoyment of every, each, all, and singular and several rights and privileges granted and secured"

to them "by the Constitution and laws of the United States."

The next eight counts are a repetition of the first eight, except that, instead of the words "band together," the words "combine, conspire, and confederate together" are used. Three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts.

The parties thus convicted moved in arrest of judgment on the following grounds:

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st May, 1870, entitled "*An Act to enforce the right of citizens of the United States*," &c.

2. Because the matters and things in the said indictment set forth and charged do not constitute offences cognizable in the Circuit Court, and do not come within its power and jurisdiction.

3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutionally reserved rights of the several States.

4. Because the said act, in so far as it creates offences and imposes penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.

5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.

6. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion, the opinions of the judges were divided, that of the presiding judge being that the several counts in question are not sufficient in law, and do not contain charges of criminal matter indictable under the laws of the United States, and that the motion in arrest of judgment should be granted. The case comes up at the instance of the United States, on certificate of this division of opinion.

Sect. 1 of the Enforcement Act declares that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections, without distinction of race, color, or previous servitude.

Sect. 2 provides that if, by the law of any State or Territory, a prerequisite to voting is necessary, equal opportunity for it shall be given to all, without distinction, &c., and any person charged with the duty of furnishing the prerequisite who refuses or knowingly omits to give full effect to this section shall be guilty of misdemeanor.

Sect. 3 provides that an offer of performance in respect to the prerequisite, when proved by affidavit of the claimant, shall be equivalent to performance, and any judge or inspector of election who refuses to accept it shall be guilty, &c.

Sect. 4 provides that any person who, by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs any citizen from qualifying himself to vote, or combines with others to do so, shall be guilty, &c.

Sect. 5 provides that any person who prevents, hinders, controls, or intimidates any person from exercising the right of suffrage, to whom it is secured by the Fifteenth Amendment, or attempts to do so, by bribery or threats of violence, or deprivation of property or employment, shall be guilty, &c.

The sixth section is as follows:

“That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court — the fine not to exceed $5,000 and the imprisonment not to exceed ten years — and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States. ”

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:–

“That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to

prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court — the fine not to exceed $5,000, and the imprisonment not to exceed ten years — and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States."

16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be whether

"the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

The general charge in the first eight counts is that of "banding," and in the second eight that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or

more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases,* 16 Wall. 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction, but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated States. For this reason, the people of the United States,

"in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for

the common defence, promote the general welfare, and secure the blessings of liberty"

to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme, and above the States; but beyond, it has no existence. It was erected for special purposes,

and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments — one State and the other National — but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together, they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: the United States because it discredits the coin, and the State because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship

which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and, within their respective spheres, must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their

"lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose."

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1, 22 U. S. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden, id.*, 22 U. S. 203, subject to State jurisdiction.

Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone. *Barron v. The City of Baltimore,* 7 Pet. 250; *Lessee of Livingston v. Moore, id.,* 551; *Fox v. Ohio,* 5 How. 434; *Smith v. Maryland,* 18 *id.* 76; *Withers v. Buckley,* 20 *id.* 90; *Pervear v. The Commonwealth,* 5 Wall. 479; *Twitchell v. The Commonwealth,* 7 *id.* 321; *Edwards v. Elliott,* 21 *id.* 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth,* 7 Wall. 325, "the scope and application of these amendments are no longer subjects of

discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government republican in form implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in

these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln,* 11 Pet. 139, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy

to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The Fourteenth Amendment prohibits a State from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely,* 4 Wheat. 244, it secures

"the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in

"the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States, and then and there, at that

time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens."

There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything

to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored,

"in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid."

In *Minor v. Happersett,* 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al., supra*, p. 92 U. S. 214, we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this, it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on

account of race, &c., is. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted

"at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to-wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law."

There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duly in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4), but it applies to no case like this.

We are therefore of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth,

and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is

"to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana . . . for the reason that they, . . . being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;"

and in the eighth and sixteenth, to hinder and prevent them

"in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States."

The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire

"to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."

These counts in the indictment charge, in substance that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed

of the nature and cause of the accusation." Amend. VI. In *United States v. Mills,* 7 Pet. 142, this was construed to mean that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States v. Cook,* 17 Wall. 174 that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading that, where the definition of an offence, whether it be at common law or by statute,

"includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition, but it must state the species — it must descend to particulars."

1 Arch.Cr.Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

It is a crime to steal goods and chattels, but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property, but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This because, to make such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court

may see that they are in fact illegal. *State v. Parker*, 43 N. H. 83; *State v. Keach*, 40 Vt. 118; *Alderman v. The People*, 4 Mich. 414; *State v. Roberts*, 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State v. Roberts*), but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea, and the court that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear — that is to say, appears from the indictment, without going further — that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

MR. JUSTICE CLIFFORD dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court.

Power is vested in Congress to enforce by appropriate legislation the prohibition contained in the Fourteenth Amendment of the Constitution, and the fifth section of the Enforcement Act provides to the effect that persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by that amendment, from exercising or in exercising such right by means of bribery or threats; of depriving such person of employment or occupation; or of ejecting such person from rented house, lands, or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family — such person so offending shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided. 16 Stat. 141.

Provision is also made, by sect. 6 of the same act that if two or more persons shall band or conspire together, or go in disguise, upon the public highway, or upon the premises of another, with intent to violate any provision of that act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, and be further punished as therein provided.

More than one hundred persons were jointly indicted at the April Term, 1873, of the Circuit Court of the United States for the District of Louisiana, charged with offences in violation of the provisions of the Enforcement Act. By the record, it appears that the indictment contained thirty-two counts, in two series of sixteen counts each; that the first series were drawn under the fifth and sixth sections of the act; and that the second series were drawn under the seventh section of the same act; and that the latter series

charged that the prisoners are guilty of murder committed by them in the act of violating some of the provisions of the two preceding sections of that act.

Eight of the persons named in the indictment appeared on

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the 10th of June, 1874, and went to trial under the plea of not guilty, previously entered at the time of their arraignment. Three of those who went to trial — to-wit, the three defendants named in the transcript — were found guilty by the jury on the first series of the counts of the indictment, and not guilty on the second series of the counts in the same indictment.

Subsequently, the convicted defendants filed a motion for a new trial, which motion being overruled, they filed a motion in arrest of judgment. Hearing was had upon that motion and, the opinions of the judges of the Circuit Court being opposed, the matter in difference was duly certified to this Court, the question being whether the motion in arrest of judgment ought to be granted or denied.

Two only of the causes of arrest assigned in the motion will be considered in answering the questions certified: (1) because the matters and things set forth and charged in the several counts in question do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the Enforcement Act; (2) because the several counts of the indictment in question are too vague, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and do not set forth any offence defined by the Enforcement Act.

Four other causes of arrest were assigned, but, in the view taken of the case, it will be sufficient to examine the two causes above set forth.

Since the questions were certified into this Court, the parties have been fully heard in respect to all the questions presented for decision in the transcript. Questions not pressed at the argument will not be considered, and, inasmuch as the counsel in behalf of the United States confined their arguments entirely to the thirteenth, fourteenth, and sixteenth counts of the first series in the indictment, the answers may well be limited to these counts, the others being virtually abandoned. Mere introductory allegations will be omitted as unimportant, for the reason that the questions to be answered relate to the allegations of the respective counts describing the offence.

As described in the thirteenth count, the charge is that the

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defendants did, at the time and place mentioned, combine, conspire, and confederated together, between and among themselves, for and with the unlawful and felonious intent and purpose one Levi Nelson and one Alexander Tillman, each of whom being then and there a citizen of the United States, of African descent, and a person of color, unlawfully and feloniously to injure, oppress, threaten, and intimidate, with the unlawful and felonious intent thereby the said persons of color, respectively, then and there to hinder and prevent in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection, granted and secured to them respectively as citizens of the United States and citizens of the State, by reason of their race and color; and because that they, the said persons of color, being then and there citizens of the State and of the United States, were then and there persons of African descent and race, and persons of color, and not white citizens thereof, the same being a right or privilege granted or secured to the said persons of color respectively, in common with all other good citizens of the United States, by the Federal Constitution and the laws of Congress.

Matters of law conceded, in the opinion of the Court, may be assumed to be correct without argument, and, if so, then discussion is not necessary to show that every ingredient of which an offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States v. Cook,* 17 Wall. 174.

Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and, if the offence cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true intent

and meaning of the statute defining the offence. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read,

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may be found in support of that proposition. 2 East, P.C. 1124; *Dord v. People*, 9 Barb. 675; *Ike v. State*, 23 Miss. 525; *State v. Eldridge*, 7 Eng. 608.

Every offence consists of certain acts done or omitted under certain circumstances, and, in the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth. Arch.Cr.Pl., 15th ed., 43.

Persons born on naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof, and the Fourteenth Amendment also provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Congress may, doubtless, prohibit any violation of that provision, and may provide that any person convicted of violating the same shall be guilty of an offence and be subject to such reasonable punishment as Congress may prescribe.

Conspiracies of the kind described in the introductory clause of the sixth section of the Enforcement Act are explicitly forbidden by the subsequent clauses of the same section, and it may be that, if the indictment was for a conspiracy at common law, and was pending in a tribunal having jurisdiction of common law offences, the indictment in its present form might be sufficient even though it contains no definite allegation whatever of any particular overt act committed by the defendants in pursuance of the alleged conspiracy.

Decided cases may doubtless be found in which it is held that an indictment for a conspiracy at common law may be sustained where there is an unlawful agreement between two or more persons to do an unlawful act, or to do a lawful act by unlawful means, and authorities may be referred to which support the proposition that the indictment, if the conspiracy is well pleaded, is sufficient even though it be not alleged that any overt act had been done in pursuance of the unlawful combination.

Suffice it to say, however that the authorities to that effect are opposed by another class of authorities equally respectable, and even more numerous, which decide that the indictment is

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bad unless it is alleged that some overt act was committed in pursuance of the intent and purpose of the alleged conspiracy; and in all the latter class of cases, it is held that the overt act, as well as the unlawful combination, must be clearly and accurately alleged.

Two reasons of a conclusive nature, however, may be assigned which show beyond all doubt that it is not necessary to enter into the inquiry which class of those decisions is correct.

1. Because the common law *is not a source of jurisdiction* in the circuit courts, nor in any other Federal court.

Circuit Courts have no common law jurisdiction of offences of any grade or description, and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal courts. *State v. Wheeling Bridge Co.*, 13 How. 503; *United States v. Hudson et al.*, 7 Cranch 32.

2. Because it is conceded that the offence described in the indictment is an offence created and defined by an act of Congress.

Indictments for offences created and defined by statute must in all cases follow the words of the statute, and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical or where, by necessary implication, other constituents are component parts of the offence, as where the words of the statute defining the offence have a compound signification or are enlarged by what immediately precedes or follows the words describing the offence, and in the same connection. Cases of the kind do arise, as where, in the dissenting opinion in *United States v. Reese et al., supra*, p. 92 U. S. 222, it was held that the words *offer to pay a capitation tax* were so expanded by a succeeding clause of the same sentence that the word "offer" necessarily included readiness to perform what was offered, the provision being that the offer should be equivalent to actual performance if the offer failed to be carried into execution by the wrongful act or omission of the party to whom the offer was made.

Two offences are in fact created and defined by the sixth section of the Enforcement Act, both of which consist of a

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conspiracy with an intent to perpetrate a forbidden act. They are alike in respect to the conspiracy, but differ very widely in respect to the act embraced in the prohibition.

1. Persons, two or more, are forbidden to band or conspire together, or go in disguise upon the public highway, or on the premises of another, *with intent to violate* any provision of the Enforcement Act, which is an act of twenty-three sections.

Much discussion of that clause is certainly unnecessary, as no one of the counts under consideration is founded on it, or contains any allegations describing such an offence. Such a conspiracy with intent to injure, oppress, threaten, or intimidate any person is also forbidden by the succeeding clause of that section, if it be done with intent to prevent or hinder his free exercise and enjoyment of *any right or privilege* granted or secured to him by the Constitution or laws of the United States, or because of having exercised the same. Sufficient appears in the thirteenth count to warrant the conclusion that the grand jury intended to charge the defendants with the second offence created and defined in the sixth section of the Enforcement Act.

Indefinite and vague as the description of the offence there defined, is, it is obvious that it is greatly more so as described in the allegations of the thirteenth count. By the act of Congress, the prohibition is extended to any *right or privilege*granted or secured by the Constitution or laws of Congress, leaving it to the pleader to specify the particular right or privilege which had been invaded in order to give the accusation that certainty which the rules of criminal pleading everywhere require in an indictment; but the pleader in this case, overlooking any necessity for any such specification, and making no attempt to comply with the rules of criminal pleading in that regard, describes the supposed offence in terms much more vague and indefinite than those employed in the act of Congress.

Instead of specifying the particular right or privilege which had been invaded, the pleader proceeds to allege that the defendants, with all the others named in the indictment, did combine, conspire, and confederate together, with the unlawful intent and purpose the said persons of African descent and

persons of color then and there to injure, oppress, threaten, and intimidate, and thereby then and there to hinder and prevent them in the free exercise and enjoyment of the *rights, privileges, and immunities and protection* granted and secured to them as citizens of the United States and citizens of the State, without any other specification of the rights, privileges, immunities, and protection which had been violated or invaded, or which were threatened except what follows — to-wit, the same being a right or privilege granted or secured in common with all other good citizens by the Constitution and laws of the United States.

Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him within the meaning of the sixth amendment of the Constitution.

Valuable rights and privileges almost without number are granted and secured to citizens by the Constitution and laws of Congress, none of which may be with impunity invaded in violation of the prohibition contained in that section. Congress intended by that provision to protect citizens in the enjoyment of all such rights and privileges, but, in affording such protection in the mode there provided, Congress never intended to open the door to the invasion of the rule requiring certainty in criminal pleading, which for ages has been regarded as one of the great safeguards of the citizen against oppressive and groundless prosecutions.

Judge Story says the indictment must charge the time and place and nature and circumstances of the offence with clearness and certainty, so that the party may have full notice of the charge and be able to make his defence with all reasonable knowledge and ability. 2 Story, Const., sect. 1785.

Nothing need be added to show that the fourteenth count is founded upon the same clause in the sixth section of the Enforcement Act as the thirteenth count, which will supersede the necessity of any extended remarks to explain the nature and character of the offence there created and defined. Enough has already been remarked to show that that particular clause of the section was passed to protect citizens in the free exercise and enjoyment of every right or privilege granted

or secured to them by the Constitution and laws of Congress, and to provide for the punishment of those who band or conspire together, in the manner described, to injure, oppress, or intimidate any citizen, to prevent or hinder him from the free exercise and enjoyment of all such rights or privileges, or because of his having exercised any such right or privilege so granted or secured.

What is charged in the fourteenth count is that the defendants did combine, conspire, and confederate the said citizens of African descent and persons of color to injure, oppress, threaten, and intimidate, with intent the said citizens thereby to prevent and hinder in the free exercise and enjoyment of the right and privilege to vote *at any election to be thereafter had and held* according to law by the people of the State, or by the people of the parish, they, the defendants, well knowing that the said citizens were lawfully qualified to vote at any such election thereafter to be had and held.

Confessedly, some of the defects existing in the preceding count are avoided in the count in question — as, for example, the description of the particular right or privilege of the said citizens which it was the intent of the defendants to invade is clearly alleged; but the difficulty in the count is that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be had and held. All that is alleged upon the subject is that it was the intent of the defendants to prevent and hinder the said citizens of African descent and persons of color in the free exercise and enjoyment of the right and privilege to vote *at any election thereafter to be had and held*, according to law, by the people of the State, or by the people of the parish, without any other allegation whatever as to the purpose of the election, or any allegation as to the time and place when and where the election was to be had and held.

Elections thereafter to be held must mean something different from pending elections; but whether the pleader means to charge that the intent and purpose of the alleged conspiracy extended *only* to the next succeeding elections to be held in the State or parish, or to all future elections to be held in the State or parish during the lifetime of the parties, may admit of

a serious question which cannot be easily solved by anything contained in the allegations of the count.

Reasonable certainty, all will agree, is required in criminal pleading; and, if so, it must be conceded, we think, that the allegation in question fails to comply with that requirement. Accused persons, as matter of common justice, ought to have the charge against them set forth in such terms that they may readily understand the nature and character of the accusation in order that they, when arraigned, may know what answer to make to it, and that they may not be embarrassed in conducting their defence; and the charge ought also to be laid in such terms that, if the party accused is put to trial, the verdict and judgment may be pleaded in bar of a second accusation for the same offence.

Tested by these considerations, it is quite clear that the fourteenth count is not sufficient to warrant the conviction and sentence of the accused.

Defects and imperfections of the same kind as those pointed out in the thirteenth count also exist in the sixteenth count, and of a more decided character in the latter count than in the former, conclusive proof of which will appear by a brief examination of a few of the most material allegations of the charge against the defendants. Suffice it to say without entering into details that the introductory allegations of the count are in all respects the same as in the thirteenth and fourteenth counts. None of the introductory allegations alleges that any overt act was perpetrated in pursuance of the alleged conspiracy, but the jurors proceed to present that the unlawful and felonious intent and purpose of the defendants were to prevent and hinder the said citizens of African descent and persons of color, by the means therein described, in the free exercise and enjoyment *of each, every, all, and singular the several rights and privileges* granted and secured to them by the Constitution and laws of the United States in common with all other good citizens, without any attempt to describe or designate any particular right or privilege which it was the purpose and intent of the defendants to invade, abridge, or deny.

Descriptive allegations in criminal pleading are required to be reasonably definite and certain, as a necessary safeguard

to the accused against surprise, misconception, and error in conducting his defence, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of the kind are entitled to respect, but it is obvious that, if such a description of the ingredient of an offence created and defined by an act of Congress is held to be sufficient, the indictment must become a snare to the accused, as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the universal rule that every ingredient of the offence must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offence. Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer or in arrest of judgment.

Certain other causes for arresting the judgment are assigned in the record which deny the constitutionality of the Enforcement Act; but, having come to the conclusion that the indictment is insufficient, it is not necessary to consider that question.

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3.2: Military Service- United States v. Miller 307 U.S. 174 (1939)

U.S. Supreme Court

United States v. Miller, 307 U.S. 174 (1939)

United States v. Miller

No. 696

Argued March 30, 1939

Decided May 15, 1939

307 U.S. 174

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF ARKANSAS

Syllabus

The National Firearms Act, as applied to one indicted for transporting in interstate commerce a 12-gauge shotgun with a barrel less than 18 inches long without having registered it and without having in his possession a stamp-affixed written order for it, as required by the Act, *held:*

1. Not unconstitutional as an invasion of the reserved powers of the States. Citing *Sonzinsky v. United States*, 300 U. S. 506, and Narcotic Act cases. P. 307 U. S. 177.

2. Not violative of the Second Amendment of the Federal Constitution. P. 307 U. S. 178.

The Court cannot take judicial notice that a shotgun having a barrel less than 18 inches long has today any reasonable relation to the preservation or efficiency of a well regulated militia, and therefore cannot say that the Second Amendment guarantees to the citizen the right to keep and bear such a weapon.

26 F.Supp. 1002, reversed.

APPEAL under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment for violation of the National Firearms Act.

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MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

An indictment in the District Court, Western District Arkansas, charged that Jack Miller and Frank Layton

"did unlawfully, knowingly, willfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, bearing identification number 76230, said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934, c. 737, Sec. 4 [§ 5], 48 Stat. 1237), and not having in their possession a stamp-affixed written order for said firearm as provided by Section 1132c, Title 2, United States Code (June 26, 1934, c. 737, Sec. 4, 48 Stat. 1237) and the regulations issued under authority of the said Act of Congress known as the 'National Firearms Act,' approved June 26, 1934, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. [Footnote 1] "

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A duly interposed demurrer alleged: the National Firearms Act is not a revenue measure, but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution — "A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed."

The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

The cause is here by direct appeal.

Considering *Sonzinsky v. United States* (1937), 300 U. S. 506, 300 U. S. 513, and what was ruled in sundry causes arising

under the Harrison Narcotic Act [Footnote 2] — *United States v. Jin Fuey Moy* (1916), 241 U. S. 394, *United States v. Doremus* (1919), 249 U. S. 86, 249 U. S. 94; *Linder v. United States* (1925), 268 U. S. 5; *Alston v. United States* (1927), 274 U. S. 289; *Nigro v. United States* (1928), 276 U. S. 332 — the objection that the Act usurps police power reserved to the States is plainly untenable.

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment, or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys (Tenn.) 154, 158.

The Constitution, as originally adopted, granted to the Congress power —

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

With obvious purpose to assure the continuation and render possible the effectiveness of such forces, the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they

were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia — civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily, when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Blackstone's Commentaries, Vol. 2, Ch. 13, p. 409 points out "that king Alfred first settled a national militia in this kingdom," and traces the subsequent development and use of such forces.

Adam Smith's Wealth of Nations, Book V, Ch. 1, contains an extended account of the Militia. It is there said: "Men of republican principles have been jealous of a standing army as dangerous to liberty."

"In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character, and in this distinction seems to consist the essential difference between those two different species of military force."

"The American Colonies In The 17th Century," Osgood, Vol. 1, ch. XIII, affirms in reference to the early system of defense in New England —

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to

cooperate in the work of defence."

"The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former."

"A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts]."

Also,

"Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals. According to the usage of the times, the infantry of Massachusetts consisted of pikemen and musketeers. The law, as enacted in 1649 and thereafter, provided that each of the former should be armed with a pike, corselet, head-piece, sword, and knapsack. The musketeer should carry a 'good fixed musket,' not under bastard musket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match. The law also required that two-thirds of each company should be musketeers."

The General Court of Massachusetts, January Session 1784, provided for the organization and government of the Militia. It directed that the Train Band should "contain all able bodied men, from sixteen to forty years of age, and the Alarm List, all other men under sixty years of age, . . ." Also,

"That every noncommissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm,"

etc.

By an Act passed April 4, 1786, the New York Legislature directed:

"That every able-bodied Male Person, being

a Citizen of this State, or of any of the United States, and residing in this State, (except such Persons as are hereinafter excepted) and who are of the Age of Sixteen, and under the Age of Forty-five Years, shall, by the Captain or commanding Officer of the Beat in which such Citizens shall reside, within four Months after the passing of this Act, be enrolled in the Company of such Beat. . . . That every Citizen so enrolled and notified shall, within three Months thereafter, provide himself, at his own Expense, with a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, two spare Flints, a Blanket and Knapsack; . . ."

The General Assembly of Virginia, October, 1785, (12 Hening's Statutes) declared,

"The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."

It further provided for organization and control of the Militia, and directed that "All free male persons between the ages of eighteen and fifty years," with certain exceptions, "shall be inrolled or formed into companies." "There shall be a private muster of every company once in two months."

Also that

"Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows: . . . every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each non-commissioned officer and private shall have at every muster one pound of good

powder, and four pounds of lead, including twenty blind cartridges, and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer out of the monies arising on delinquencies. *Provided*, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition ready to be produced whenever called for by his commanding officer. If any private shall make it appear to the satisfaction of the court hereafter to be appointed for trying delinquencies under this act that he is so poor that he cannot purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents."

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seems to afford any material support for the challenged ruling of the court below.

In the margin, some of the more important opinions and comments by writers are cited. [Footnote 3]

We are unable to accept the conclusion of the court below, and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this cause.

[Footnote 1]

Act of June 26, 1934, c. 757, 48 Stat. 1236-1240, 26 U.S.C. § 1132.

"That for the purposes of this Act –"

"(a) The term 'firearm' means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition [The Act of April 10, 1936, c. 169, 49 Stat. 1192 added the words], but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length."

"Sec. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary, and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm."

"Sec. 4. (a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof."

"(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof, with stamps affixed, shall be returned to the applicant."

"(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms."

"Sec. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act."

“Sec. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.”

“Sec. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.”

“Sec. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.”

“Sec. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.”

“Sec. 16. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.”

“Sec. 18. This Act may be cited as the ‘National Firearms Act.'”

[Footnote 2]

Act December 17, 1914, c. 1, 38 Stat. 785; February 24, 1919, c. 18, 40 Stat. 1057.

[Footnote 3]

Concerning The Militia — *Presser v. Illinois*, 116 U. S. 252; *Robertson v. Baldwin*, 165 U. S. 275; *Fife v. State*, 31 Ark. 455; *Jeffers v. Fair*, 33 Ga. 347; *Salina v. Blaksley*, 72 Kan. 230; 83 P. 619; *People v. Brown*, 253 Mich. 537; 235 N.W. 245; *Aymette v. State*, 2 Humphr. (Tenn.) 154; *State v. Duke*, 42 Texas 455; *State v. Workman*, 35 W.Va. 367; 14 S.E. 9; Cooley’s Constitutional Limitations, Vol. 1, p. 729; Story on The Constitution, 5th Ed., Vol. 2, p. 646; Encyclopaedia of the Social Sciences, Vol. X, p. 471, 474.

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3.3: Military Service- District of Columbia v. Heller 554 U.S. 570 (2008) Annotate this Case

OCTOBER TERM, 2007
DISTRICT OF COLUMBIA V. HELLER

SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA et al. *v*. HELLER

certiorari to the united states court of appeals for the district of columbia circuit

No. 07–290. Argued March 18, 2008—Decided June 26, 2008

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 2–53.

(a) The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 2–22.

(b) The prefatory clause comports with the Court's interpretation of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved. Pp. 22–28.

(c) The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment. Pp. 28–30.

(d) The Second Amendment's drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Pp. 30–32.

(e) Interpretation of the Second Amendment by scholars, courts and legislators, from immediately after its ratification through the late 19th century also supports the Court's conclusion. Pp. 32–47.

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States* v. *Cruikshank*, 92 U. S. 542, 553, nor *Presser* v. *Illinois*, 116 U. S. 252, 264–265, refutes the individual-rights interpretation. *United States* v. *Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 47–54.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools

and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Miller*'s holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54–56.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. Pp. 56–64.

478 F. 3d 370, affirmed.

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

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3.4: Federal Regulations v. State Regulations- Presser v. Illinois 116 U.S. 252 (1886)

U.S. Supreme Court

Presser v. Illinois, 116 U.S. 252 (1886)

Presser v. Illinois

Argued November 23-24, 1885

Decided January 4, 1886

116 U.S. 252

ERROR TO THE SUPREME COURT

OF THE STATE OF ILLINOIS

The doctrine that statutes constitutional in part only will be upheld as to what is constitutional if it can he separated from the unconstitutional provisions reasserted.

A state statute providing that all able-bodied male citizens of the state between eighteen and forty-flue, except those exempted, shall be subject to military duty, and shall he enrolled and designated as the state militia, and prohibiting all bodies of men other than the regularly organized volunteer militia of the state and the troops of the United States from associating together as military organizations or drilling or parading with arms in any city of the state without license from the governor as to these provisions is constitutional, and does not infringe the laws of the United States, and it is sustained as to them, although the act contains other provisions, separable from the foregoing, which it was contended infringed upon the powers vested in the United States by the Constitution or upon laws enacted by Congress in pursuance thereof.

The provision in the Second Amendment to the Constitution, that "The right of the people to keep and bear arms shall not be infringed" is a limitation only on the power of Congress and the national government, and not of the states. But in view of the fact that all citizens capable of bearing arms constitute the reserved military force of the national government as well as in view of its general powers, the states cannot prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security.

The provision in the Fourteenth Amendment to the Constitution that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" does not prevent a state from passing such laws to regulate the privileges and immunities of its own citizens as do not abridge their privileges and immunities as citizens of the United States.

Unless restrained by their own constitutions, state legislatures may enact statutes to control and regulate all organizations, drilling, and parading of military bodies and associations except those which are authorized by the militia laws of the United States.

Herman Presser, the plaintiff in error, was indicted on September 24, 1879, in the Criminal Court of Cook County, Illinois, far a violation of the following sections of Art. XI of the Military Code of that state, Act of May 28, 1879, Laws of 1879, 192.

"§ 5. It shall not be lawful for any body of men whatever other than the regular organized volunteer militia of this state and the troops of the United States to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this state without the license of the Governor thereof, which license may at any time be revoked, *and provided further*that students in educational institutions where military science is a part of the course of instruction may, with the consent of the Governor, drill and parade with arms in public under the superintendence of their instructors, and may take part in any regimental or brigade encampment under command of their military instructor, and while so encamped shall be governed by the provisions of this act. They shall be entitled only to transportation and subsistence, and shall report and be subject to the commandant of such encampment, *provided* that nothing herein contained shall be construed so as to prevent benevolent or social organizations from wearing swords."

"§ 6. Whoever offends against the provisions of the preceding section or belongs to or parades with any such unauthorized body of men with arms shall be punished by a fine not exceeding the sum of ten dollars ($10), or by imprisonment in the common jail for a term not exceeding six months, or both."

The indictment charged in substance that Presser, on September 24, 1879, in the County of Cook, in the State of Illinois,

"did unlawfully belong to and did parade and drill in the City of Chicago with an unauthorized body of men with arms who had associated themselves together as a military company and organization without having a license from the governor, and not being a part of or belonging to 'the regular organized volunteer militia' of the State of Illinois or the troops of the United States."

A motion to quash the indictment was overruled. Presser then pleaded not guilty, and, both parties having waived a jury, the case was tried by the court, which found Presser guilty and sentenced him to pay a fine of $10.

The bill of exceptions taken upon the trial set out all the evidence, from which it appeared that Presser was thirty-one years old, a citizen of the United States and of the State of Illinois, and a voter; that he belonged to a society called the "Lehr und Wehr Verein," a corporation organized April 16, 1875, in due form, under chapter 32, Revised Statutes of Illinois, called the "General Incorporation Laws of Illinois," "for the purpose," as expressed by its certificate of association,

"of improving the mental and bodily condition of its members so as to qualify them for the duties of citizens of a republic. Its members shall therefore obtain, in the meetings of the association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises;"

that Presser, in December, 1879, marched at the head of said company, about four hundred in number, in the streets of the City of Chicago, he riding on horseback and in command; that the company was armed with rifles, and Presser with a cavalry sword; that the company had no license from the Governor of Illinois to drill or parade as a part of the militia of the state, and was not a part of the regular organized militia of the state, nor a part of troops of the United States, and had no organization under the militia law of the United States. The evidence showed no other facts. Exceptions were reserved to the ruling of the court upon the motion to quash the indictment, to the finding of guilty, and to the judgment thereon. The case was taken to the Supreme Court of Illinois, where the judgment was affirmed. Thereupon Presser brought the present writ of error for a review of the judgment of affirmance. MR. JUSTICE WOODS delivered the opinion of the Court. After stating the facts in the language reported above, he continued: The position of the plaintiff in error in this Court was that the entire statute under which he was convicted was invalid and void because its enactment was the exercise of a power by the Legislature of Illinois forbidden to the states by the Constitution of the United States. The clauses of the Constitution of the United States referred to in the assignments of error were as follows:

"Art. I, sec. 8. The Congress shall have power . . . to raise and support armies; . . . to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress; . . . to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers,"

&c.

"Art. I, sec. 10. No state shall, without the consent of Congress, keep troops . . . in time of peace."

"Art. II of Amendments. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The plaintiff in error also contended that the enactment of the 5th and 6th sections of Article XI of the Military Code was forbidden by subdivision 3 of section 9, Art. I, which declares "No bill of attainder or *ex post facto* law shall be passed," and by Art. XIV of Amendments, which provides that

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law."

The first contention of counsel for plaintiff in error is that the Congress of the United States having, by virtue of the provisions of Article I of section 8, above quoted, passed the Act of May 8, 1792, entitled "An act more effectually to provide for the national defense by establishing an uniform militia throughout the United States," 1 Stat. 271, the Act of February 28, 1795, "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions," 1 Stat. 424, and the Act of July 22, 1861, "to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," 12 Stat. 268, and other subsequent acts, now forming "Title 16, The Militia," of the Revised Statutes of the United States, the Legislature of

Illinois had no power to pass the act approved May 28, 1879, "to provide for the organization of the state militia," entitled the Military Code of Illinois, under the provisions of which (sections 5 and 6 of Article XI) the plaintiff in error was indicted.

The argument in support of this contention is that the power of organizing, arming, and disciplining the militia being confided by the Constitution to Congress, when it acts upon the subject, and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the state on the same subject.

It is further argued that the whole scope and object of the Military Code of Illinois is in conflict with that of the law of Congress. It is said that the object of the act of Congress is to provide for organizing, arming, and disciplining all the able-bodied male citizens of the states, respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection, and repel invasion, and thereby avoid the necessity for maintaining a large standing army, with which liberty can never be safe, and that, on the other hand, the effect if not object of the Illinois statute is to prevent such organizing, arming, and disciplining of the militia.

The plaintiff in error insists that the act of Congress requires absolutely all able-bodied citizens of the state, between certain ages, to be enrolled in the militia; that the act of Illinois makes the enrollment dependent on the necessity for the use of troops to execute the laws and suppress insurrections, and then leaves it discretionary with the governor by proclamation to require such enrollment; that the act of Congress requires the entire enrolled militia of the state, with a few exemptions made by it and which may be made by state laws, to be formed into companies, battalions, regiments, brigades, and divisions; that every man shall be armed and supplied with ammunition; provides a system of discipline and field exercises for companies, regiments, &c., and subjects the entire militia of the state to the call of the President to enforce the laws, suppress insurrection, or repel invasion, and provides for the punishment of the militia officers and men who refuse obedience to his orders. On the other hand, it is said that the state law makes it unlawful for any of its able-bodied citizens, except eight thousand, called the "Illinois National Guard," to associate themselves together as a military company or to drill or parade with arms without the license of the governor, and declares that no military company shall leave the state with arms and equipments without his consent; that even the eight thousand men styled the "Illinois National Guard" are not enrolled or organized as required by the act of Congress, nor are they subject to the call of the President, but they constitute a military force sworn to serve in the military service of the state, to obey the orders of the governor, and not to leave the state without his consent, and that, if the state act is valid, the national act providing for organizing, arming, and disciplining the militia is of no force in the State of Illinois, for the Illinois act, so far from being in harmony with the act of Congress, is an insurmountable obstacle to its execution. We have not found it necessary to consider or decide the question thus raised as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid even if the other sections of the act were invalid. For it is a settled rule "that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable."

Packet Co. v. Keokuk, 95 U. S. 80; *Penniman's Case*, 103 U. S. 714, 103 U. S. 717; *Unity v. Burrage*, 103 U. S. 459. *See also Trademark Cases*, 100 U. S. 82.

We are of opinion that this rule is applicable in this case. The first two sections of Article I of the Military Code provide that all able-bodied male citizens of the state between the ages of 18 and 45 years, except those exempted, shall be subject to military duty, and be designated the "Illinois state Militia," and declare how they shall be enrolled and under what circumstances. The residue of the Code, except the two sections on which the indictment against the plaintiff in error is based, provides for a volunteer active militia, to consist of not more than eight thousand officers and men, declares how it shall be enlisted and brigaded, and the term of service of its officers and men; provides for brigade generals and their staffs, for the organization of the requisite battalions and companies and the election of company officers; provides for inspections, parades, and encampments, arms and armories, rifle practice, and courts-martial; provides for the pay of the officers and men, for medical service, regimental bands, books of instructions and maps; contains provisions for levying and collecting a military fund by taxation, and directs how it shall be expended, and appropriates $25,000 out of the Treasury, in advance of the collection of the military fund, to be used for the purposes specified in the Military Code.

It is plain from this statement of the substance of the Military Code that the two sections upon which the indictment against the plaintiff in error is based may be separated from the residue of the Code and stand upon their own independent provisions. These sections might have been left out of the Military Code and put in an act by themselves, and the act thus constituted and the residue of the Military Code would have been coherent and sensible acts. If it be conceded that the entire Military Code, except these

sections, is unconstitutional and invalid for the reasons stated by the plaintiff in error, these sections are separable, and, put in an act by themselves, could not be considered as forbidden by the clauses of the Constitution having reference to the militia or to the clause forbidding the states, without the consent of Congress, to keep troops in time of peace. There is no such connection between the sections which prohibit any body of men, other than the organized militia of the state and the troops of the United States, from associating as a military company and drilling with arms in any city or Town of the state, and the sections which provide for the enrollment and organization of the state militia, as makes it impossible to declare one, without declaring both, invalid.

This view disposes of the objection to the judgment of the Supreme Court of Illinois, which judgment was in effect that the legislation on which the indictment is based is not invalid by reason of the provisions of the Constitution of the United States which vest Congress with power to raise and support armies, and to provide for calling out, organizing, arming, and disciplining the militia, and governing such part of them as may be employed in the service of the United States, and that provision which declares that "no state shall, without the consent of Congress, . . . keep troops . . . in time of peace."

We are next to inquire whether the 5th and 6th sections of Article XI of the Military Code are in violation of the other provisions of the Constitution of the United States relied on by the plaintiff in error. The first of these is the Second Amendment, which declares: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the national government, and not upon that of the state. It was so held by this Court in the case of *United States v. Cruikshank*, 92 U. S. 542, 92 U. S. 553, in which THE CHIEF JUSTICE, in delivering the judgment of the Court, said that the right of the people to keep and bear arms

"is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to what is called in *City of New York v. Miln,* 11 Pet. 102, 36 U. S. 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

See also Barron v. Baltimore, 7 Pet. 243; *Fox v. State,* 5 How. 410; *Twitchell v. Commonwealth,* 7 Wall. 321, 74 U. S. 327; *Jackson v. Wood*, 2 Cowen 819; *Commonwealth v. Purchase*, 2 Pick. 521; *United States v. Cruikshank*, 1 Woods 308; *North Carolina v. Newsom*, 5 Iredell 250; *Andrews v. State*, 3 Heiskell 165; *Fife v. State*,31 Ark. 455.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But as already stated, we think it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois under which he was indicted are an invasion of that clause of the first section of the Fourteenth Amendment to the Constitution of the United States which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is therefore pertinent what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of Article XI of the Military Code of Illinois?

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is therefore had he a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company and to drill and parade with arms in the towns and cities of the state? If the plaintiff in error has any such

privilege, he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred. For, as was said by this Court in *United States v. Cruikshank*, 92 U. S. 542, 92 U. S. 551, 92 U. S. 560, the government of the United States, although it is

"within the scope of its powers supreme and above the states, . . . can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction. . . . All that cannot be so granted or so secured are left to the exclusive protection of the state. "We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which upon any pretense could be said to have any relation whatever to his right to associate with others as a military company is found in the First Amendment, which declares that

"Congress shall make no laws . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances."

This is a right which it was held in *United States v. Cruikshank*, above cited, was an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to unless the purpose of the assembly was to petition the government for a redress of grievances.

The right voluntarily to associate together as a military company or organization or to drill or parade with arms without and independent of an act of Congress or law of the state authorizing the same is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system, they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.

In the case of *New York v. Miln,* 11 Pet. 102, 36 U. S. 139, this Court said:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated,"

namely by the Constitution and laws of the United States. *See also Gibbons v. Ogden,* 9 Wheat. 1, 22 U. S. 203; *Gilman v. Philadelphia,* 3 Wall. 713; *License Tax Cases,* 5 Wall. 462; *United States v. Dewitt,* 9 Wall. 41; *United States v. Cruikshank,* 92 U. S. 542. These considerations and authorities sustain the power exercised by the Legislature of Illinois in the enactment of sections 5 and 6 of Article XI of the Military Code.

The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty, or property without due process of law, or that it is a bill of attainder or *ex post facto* law is so clearly untenable as to require no discussion.

It is next contended by the plaintiff in error that sections 5 and 6 of Article XI of the Military Code, under which he was indicted, are in conflict with the acts of Congress for the organization of the militia. But this position is based on what seems to us to be an unwarranted construction of the sections referred to. It is clear that their object was to forbid voluntary military associations, unauthorized by law, from organizing or drilling and parading with arms in the cities or towns of the state, and not to interfere with the organization, arming and drilling of the militia under the authority of the acts of Congress. If the object and effect of the

sections were in irreconcilable conflict with the acts of Congress, they would, of course, be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons v. Bedford,* 3 Pet. 433; *Grenada County Supervisors v. Brogden*, 112 U. S. 261; *Marshall v. Grimes*, 41 Miss. 27. If we yielded to this contention of the plaintiff in error, we should render the sections in valid by giving them a strained construction, which would make them antagonistic to the law of Congress. We cannot attribute to the legislature, unless compelled to do so by its plain words, a purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States. We are therefore of opinion that, fairly construed, the sections of the Military Code referred to do not conflict with the laws of Congress on the subject of the militia.

The plaintiff in error further insists that the organization of the Lehr und Wehr Verein as a corporate body under the general corporation law of the State of Illinois was in effect a license from the governor within the meaning of section 5 of Article XI of the Military Code, and that such corporate body fell within the exception of the same section "of students in educational institutions where military science is a part of the course of instruction."

In respect to these points, we have to say that they present no federal question. It is not, therefore, our province to consider or decide them. *Murdock v. Memphis,* 20 Wall. 590.

All the federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.

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3.5: Federal Regulation v. State Regulation- McDonald v. Chicago 561 U.S. 742 (2010)

OCTOBER TERM, 2009
MCDONALD V. CHICAGO

SUPREME COURT OF THE UNITED STATES

McDONALD et al. *v*. CITY OF CHICAGO, ILLINOIS, et al.

certiorari to the united states court of appeals for the seventh circuit

No. 08–1521. Argued March 2, 2010—Decided June 28, 2010

Two years ago, in *District of Columbia* v. *Heller*, 554 U. S. ___, this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down a District of Columbia law that banned the possession of handguns in the home. Chicago (hereinafter City) and the village of Oak Park, a Chicago suburb, have laws effectively banning handgun possession by almost all private citizens. After *Heller*, petitioners filed this federal suit against the City, which was consolidated with two related actions, alleging that the City's handgun ban has left them vulnerable to criminals. They sought a declaration that the ban and several related City ordinances violate the Second and Fourteenth Amendments. Rejecting petitioners' argument that the ordinances are unconstitutional, the court noted that the Seventh Circuit previously had upheld the constitutionality of a handgun ban, that *Heller* had explicitly refrained from opining on whether the Second Amendment applied to the States, and that the court had a duty to follow established Circuit precedent. The Seventh Circuit affirmed, relying on three 19th-century cases—*United States* v. *Cruikshank*, 92 U. S. 542, *Presser* v. *Illinois*, 116 U. S. 252, and *Miller* v. *Texas*, 153 U. S. 535—which were decided in the wake of this Court's interpretation of the Fourteenth Amendment's Privileges or Immunities Clause in the *Slaughter-House Cases*, 16 Wall. 36.

Held: The judgment is reversed, and the case is remanded.

567 F. 3d 856, reversed and remanded.

Justice Alito delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, concluding that the Fourteenth Amendment incorporates the Second Amendment right, recognized in *Heller,* to keep and bear arms for the purpose of self-defense. Pp. 5–9, 11–19, 19–33.

(a) Petitioners base their case on two submissions. Primarily, they argue that the right to keep and bear arms is protected by the Privileges or Immunities Clause of the Fourteenth Amendment and that the *Slaughter-House Cases'* narrow interpretation of the Clause should now be rejected. As a secondary argument, they contend that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right. Chicago and Oak Park (municipal respondents) maintain that a right set out in the Bill of Rights applies to the States only when it is an indispensable attribute of *any* " 'civilized' " legal system. If it is possible to imagine a civilized country that does not recognize the right, municipal respondents assert, that right is not protected by due process. And since there are civilized countries that ban or strictly regulate the private possession of handguns, they maintain that due process does not preclude such measures. Pp. 4–5.

(b) The Bill of Rights, including the Second Amendment, originally applied only to the Federal Government, not to the States, see, *e.g.*, *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 247, but the constitutional Amendments adopted in the Civil War's aftermath fundamentally altered the federal system. Four years after the adoption of the Fourteenth Amendment, this Court held in the *Slaughter-House Cases*, that the Privileges or Immunities Clause protects only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," 16 Wall., at 79, and that the fundamental rights predating the creation of the Federal Government were not protected by the Clause, *id.*, at 76. Under this narrow reading, the Court held that the Privileges or Immunities Clause protects only very limited rights. *Id.*, at 79–80. Subsequently, the Court held that the Second Amendment applies only to the Federal Government in *Cruikshank*, 92 U. S. 542, *Presser*, 116 U. S. 252, and *Miller*, 153 U. S. 535, the decisions on which the Seventh Circuit relied in this case. Pp. 5–9.

(c) Whether the Second Amendment right to keep and bear arms applies to the States is considered in light of the Court's precedents applying the Bill of Rights' protections to the States. Pp. 11–19.

(1) In the late 19th century, the Court began to hold that the Due Process Clause prohibits the States from infringing Bill of Rights protections. See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516. Five features of the approach taken during the ensuing era are noted. First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship. See *Twining* v. *New Jersey*, 211 U. S. 78, 99. Second, the Court explained that the only rights due process protected against state infringement were those "of such a nature that they are included in the conception of due process of law."*Ibid*. Third, some cases during this era "can be seen as having asked … if a civilized system could be imagined that would not accord the particular protection" asserted therein. *Duncan* v. *Louisiana*, 391 U. S. 145, 149, n. 14. Fourth, the Court did not hesitate to hold that a Bill of Rights guarantee failed to meet the test for Due Process Clause protection, finding, *e.g.*, that freedom of speech and press qualified, *Gitlow* v. *New York*, 268 U. S. 652, 666; *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, but the grand jury indictment requirement did not, *Hurtado*, *supra.*Finally, even when such a right was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from those provided against abridgment by the Federal Government. Pp. 11–13.

(2) Justice Black championed the alternative theory that §1 of the Fourteenth Amendment totally incorporated all of the Bill of Rights' provisions, see, *e.g.*, *Adamson* v. *California*, 332 U. S. 46, 71–72 (Black, J., dissenting), but the Court never has embraced that theory. Pp. 13–15.

(3) The Court eventually moved in the direction advocated by Justice Black, by adopting a theory of selective incorporation by which the Due Process Clause incorporates particular rights contained in the first eight Amendments. See, *e.g.*, *Gideon* v. *Wainright*, 372 U. S. 335, 341. These decisions abandoned three of the characteristics of the earlier period. The Court clarified that the governing standard is whether a particular Bill of Rights protection is fundamental to our Nation's particular scheme of ordered liberty and system of justice. *Duncan*, *supra*, at 149, n. 14. The Court eventually held that almost all of the Bill of Rights' guarantees met the requirements for protection under the Due Process Clause. The Court also held that Bill of Rights protections must "all … be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Malloy* v. *Hogan*, 378 U. S. 1, 10. Under this approach, the Court overruled earlier decisions holding that particular Bill of Rights guarantees or remedies did not apply to the States. See, *e.g.*, *Gideon*, *supra*, which overruled *Betts* v. *Brady*, 316 U. S. 455. Pp. 15–19.

(d) The Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. Pp. 19–33.

(1) The Court must decide whether that right is fundamental to the Nation's scheme of ordered liberty, *Duncan* v. *Louisiana*, 391 U. S. 145, 149, or, as the Court has said in a related context, whether it is "deeply rooted in this Nation's history and tradition," *Washington* v. *Glucksberg*, 521 U. S. 702, 721. *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is "the central component" of the Second Amendment right. 554 U. S., at ___, ___. Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid*., the Court found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id*., at ___, ___–___. It thus concluded that citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id*., at ___. *Heller* also clarifies that this right is "deeply rooted in this Nation's history and traditions," *Glucksberg*, *supra*, at 721. *Heller* explored the right's origins in English law and noted the esteem with which the right was regarded during the colonial era and at the time of the ratification of the Bill of Rights. This is powerful evidence that the right was regarded as fundamental in the sense relevant here. That understanding persisted in the years immediately following the Bill of Rights' ratification and is confirmed by the state constitutions of that era, which protected the right to keep and bear arms. Pp. 19–22.

(2) A survey of the contemporaneous history also demonstrates clearly that the Fourteenth Amendment's Framers and ratifiers counted the right to keep and bear arms among those fundamental rights necessary to the Nation's system of ordered liberty. Pp. 22–33.

(i) By the 1850's, the fear that the National Government would disarm the universal militia had largely faded, but the right to keep and bear arms was highly valued for self-defense. Abolitionist authors wrote in support of the right, and attempts to disarm "Free-Soilers" in "Bloody Kansas," met with outrage that the constitutional right to keep and bear arms had been taken from the people. After the Civil War, the Southern States engaged in systematic efforts to disarm and injure African Americans, see *Heller*, *supra*, at ___. These injustices prompted the 39th Congress to pass the Freedmen's Bureau Act of 1866 and the Civil Rights Act of 1866 to

protect the right to keep and bear arms. Congress, however, ultimately deemed these legislative remedies insufficient, and approved the Fourteenth Amendment. Today, it is generally accepted that that Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act. See *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375, 389. In Congressional debates on the proposed Amendment, its legislative proponents in the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Evidence from the period immediately following the Amendment's ratification confirms that that right was considered fundamental. Pp. 22–31.

(ii) Despite all this evidence, municipal respondents argue that Members of Congress overwhelmingly viewed §1 of the Fourteenth Amendment as purely an antidiscrimination rule. But while §1 does contain an antidiscrimination rule, *i.e.*, the Equal Protection Clause, it can hardly be said that the section does no more than prohibit discrimination. If what municipal respondents mean is that the Second Amendment should be singled out for special—and specially unfavorable—treatment, the Court rejects the suggestion. The right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner. Pp. 30–33.

Justice Alito, joined by The Chief Justice, Justice Scalia, and Justice Kennedy, concluded, in Parts II–C, IV, and V, that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right recognized in *Heller*. Pp. 10–11, 33–44.

(a) Petitioners argue that that the Second Amendment right is one of the "privileges or immunities of citizens of the United States." There is no need to reconsider the Court's interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* because, for many decades, the Court has analyzed the question whether particular rights are protected against state infringement under the Fourteenth Amendment's Due Process Clause. Pp. 10–11.

(b) Municipal respondents' remaining arguments are rejected because they are at war with *Heller*'s central holding. In effect, they ask the Court to hold the right to keep and bear arms as subject to a different body of rules for incorporation than the other Bill of Rights guarantees. Pp. 33–40.

(c) The dissents' objections are addressed and rejected. Pp. 41–44.

Justice Thomas agreed that the Fourteenth Amendment makes the Second Amendment right to keep and bear arms that was recognized in *District of Columbia* v. *Heller*, 554 U. S. ___, fully applicable to the States. However, he asserted, there is a path to this conclusion that is more straightforward and more faithful to the Second Amendment's text and history. The Court is correct in describing the Second Amendment right as "fundamental" to the American scheme of ordered liberty, *Duncan* v. *Louisiana*, 391 U. S. 145, 149, and "deeply rooted in this Nation's history and traditions," *Washington* v. *Glucksberg*, 521 U. S. 702, 721. But the Fourteenth Amendment's Due Process Clause, which speaks only to "process," cannot impose the type of substantive restraint on state legislation that the Court asserts. Rather, the right to keep and bear arms is enforceable against the States because it is a privilege of American citizenship recognized by §1 of the Fourteenth Amendment, which provides, *inter alia:* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In interpreting this language, it is important to recall that constitutional provisions are " 'written to be understood by the voters.' " *Heller*, 554 U. S., at ___. The objective of this inquiry is to discern what "ordinary citizens" at the time of the Fourteenth Amendment's ratification would have understood that Amendment's Privileges or Immunities Clause to mean. *Ibid.* A survey of contemporary legal authorities plainly shows that, at that time, the ratifying public understood the Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. Pp. 1–34.

Alito, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, II–D, III–A, and III–B, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined, and an opinion with respect to Parts II–C, IV, and V, in which Roberts, C. J., and Scalia and Kennedy, JJ., join. Scalia, J., filed a concurring opinion. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed a dissenting opinion. Breyer, J., filed a dissenting opinion, in which Ginsburg and Sotomayor, JJ., joined.

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CHAPTER OVERVIEW

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4.1: Weeks v. United States 232 U.S. 383 (1914)

U.S. Supreme Court

Weeks v. United States, 232 U.S. 383 (1914)

Weeks v. United States

No. 461

Argued December 2, 3, 1913

Decided February 24,1914

232 U.S. 383

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF MISSOURI

Syllabus

Under the Fourth Amendment, Federal courts and officers are under such limitations and restraints in the exercise of their power and authority as to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

The protection of the Fourth Amendment reaches all alike, whether accused of crime or not; and the duty of giving it force and effect is obligatory on all entrusted with the enforcement of Federal laws.

The tendency of those executing Federal criminal laws to obtain convictions by means of unlawful seizures and enforced confessions in violation of Federal rights is not to be sanctioned by the courts which are charged with the support of constitutional rights.

The Federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the purposes of evidence against the accused his letters and correspondence seized in his house during his absence and without his authority by a United States marshal holding no warrant for his arrest or for the search of his premises.

While the efforts of courts and their officials to bring the guilty to punishment are praiseworthy, they are not to be aided by sacrificing the great fundamental rights secured by the Constitution.

While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence, may be justified, and a collateral issue will not be raised to ascertain the source of competent evidence, *Adams v. New York*,192 U. S. 585, that rule does not justify the retention of letters seized in violation of the protection given by the Fourth Amendment where an application in the cause for their return has been made by the accused before trial.

The court has power to deal with papers and documents in the possession of the District Attorney and other officers of the court and to direct their return to the accused if wrongfully seized.

Where letters and papers of the accused were taken from his premises by an official of the United States, acting under color of office but without any search warrant and in violation of the constitutional rights of accused under the Fourth Amendment, and a seasonable application for return of the letters and papers has been refused and they are used in evidence over his objection, prejudicial error is committed, and the judgment should be reversed.

The Fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the Federal Government and its agencies. *Boyd v. United States*,116 U. S. 616.

The facts, which involve the validity under the Fourth Amendment of a verdict and sentence and the extent to which the private papers of the accused taken without search warrant can be used as evidence against him, are stated in the opinion. MR. JUSTICE DAY delivered the opinion of the court:

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the district court of the United States for the western district of Missouri, containing nine counts. The seventh count, upon which a conviction was had,

charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day, police officers returned with the marshal, who thought he might find additional evidence and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelops found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant. The defendant filed in the cause before the time for trial the following petition:

"Petition to Return Private Papers, Books, and Other Property."

"Now comes defendant and states that he is a citizen and resident of Kansas City, Missouri, and that he resides, owns, and occupies a home at 1834 Penn street in said city:"

"That, on the 21st day of December, 1911, while plaintiff was absent at his daily vocation, certain officers of the government, whose names are to plaintiff unknown, unlawfully and without warrant or authority so to do, broke open the door to plaintiff's said home and seized all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home, and this in violation of §§ 11 and 23 to the Constitution of Missouri, and of the 4th and Fifth Amendments to the Constitution of the United States;"

"That the district attorney, marshal, and clerk of the United States court for the western district of Missouri took the above-described property so seized into their possession, and have failed and refused to return to defendant portion of same, to-wit:"

"One (1) leather grip, value about $7; one (1) tin box valued at $3; one (1) Pettis county, Missouri, bond, value $500; three (3) mining stock certificates which defendant is unable to more particularly describe, valued at $12,000; and certain stock certificates in addition thereto, issued by the San Domingo Mining, Loan, & Investment Company; about $75 in currency; one (1) newspaper published about 1790, an heirloom; and certain other property which plaintiff is now unable to describe."

"That said property is being unlawfully and improperly held by said district attorney, marshal, and clerk, in violation of defendant's rights under the Constitution of the United States and the state of Missouri."

"That said district attorney purposes to use said books, letters, papers, certificates of stock, etc., at the trial of the above-entitled cause, and that, by reason thereof and of the facts above set forth, defendant's rights under the amendments aforesaid to the Constitutions of Missouri and the United States have been and will be violated unless the court order the return prayed for;"

"Wherefore, defendant prays that said district attorney, marshal, and clerk be notified, and that the court direct and order said district attorney, marshal, and clerk, to return said property to said defendant."

Upon consideration of the petition, the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order, the district attorney returned part of the property taken and retained the remainder, concluding a list of the latter with the statement that

"all of which last above described property is to be used in evidence in the trial of the above-entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and Fifth Amendments to the Constitution of the United States, which objection was overruled by the court. Among the papers retained and put in evidence were a number of lottery tickets and statements with reference to the lottery, taken at the first visit of the police to the defendant's room, and a number of letters written to the defendant in respect to the lottery, taken by the marshal upon his search of defendant's room.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and Fifth Amendments to the Constitution of the United States. We shall deal with the 4th Amendment, which provides:

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

The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for the court in *Boyd v. United States*, 116 U. S. 616. As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, make against them. Such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. *See* 2 Watson, Const. 1414 *et seq.* Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers. Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution said:

"The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen."

"Accordingly," says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect,

"no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon."

In *Ex parte Jackson*, 96 U. S. 727, 96 U. S. 733, this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that, consistently with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures, such matter could only be opened and examined upon warrants issued on oath or affirmation, particularly describing the thing to be seized, "as is required when papers are subjected to search in one's own household."

In the *Boyd* case, *supra*, after citing Lord Camden's judgment in *Entick v. Carrington*,19 Howell's State Trials 1029, Mr. Justice Bradley said (630):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

In *Bram v. United States*, 168 U. S. 532, this court, in speaking by the present Chief Justice of *Boyd's Case*, dealing with the Fourth and Fifth Amendments, said (544):

"It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of

struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

What, then, is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the government always recognized under English and American law to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop.Criminal Procedure § 211; Wharton, Crim. Plead. & Practice 8th ed. § 60; *Dillon v. O'Brien*, 16 Cox C.C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained — of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused. The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well or other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the Fourth and Fifth Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established be years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and, under color of his office, undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In *Adams v. New York*, 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. (*Boyd Case*, *supra*) To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances — that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court, the first of which is *Adams v. New York*, *supra*. In that case, the plaintiff in error had been convicted in the Supreme Court of the State of New York for having in his possession certain gambling paraphernalia used in the game known as policy, in violation of the Penal Code of New York. At the trial, certain papers, which had been seized by police

officers executing a search warrant for the discovery and seizure of policy slips, and which had been found in addition to the policy slips, were offered in evidence over his objection. The conviction was affirmed by the court of appeals of New York (176 N.Y. 351), and the case was brought here for alleged violation of the Fourth and Fifth Amendments to the Constitution of the United States. Pretermitting the question whether these Amendments applied to the action of the states, this court proceeded to examine the alleged violations of the Fourth and Fifth Amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, was competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for is was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and, in effect, that the same were incidentally seized in the lawful execution of a warrant, and not in the wrongful invasion of the home of a citizen and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, § 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.

The same point had been ruled in *People v. Adams*, 176 N.Y. 351, from which decision the case was brought to this court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held they were, they were admissible in evidence at the trial, the court saying (p. 358):

“The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence.”

This doctrine thus laid down by the New York Court of Appeals and approved by this Court, that a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to *State v. Turner,* 136 Am. St. Rep. 129, 135 *et seq.*After citing numerous cases, the editor says:

“The underlying principle of all these decisions obviously is that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence which are material and properly offered in evidence. *People v. Adams, supra.* Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.”

It is therefore evident that the *Adams Case* affords no authority for the action of the court in this case, when applied to in due season for the return of papers seized in violation of the Constitutional Amendment. The decision in that case rests upon incidental seizure made in the execution of a legal warrant, and in the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent in a criminal case, comes.

The government also relies upon *Hale v. Henkel,* 201 U. S. 43, in which the previous cases of *Boyd v. United States, Adams v. New York, supra; 154 U. S. S. 397*  Commerce Commission v. Brimson, *154 U. S. 447*, *and* Interstate Commerce Commission v. Baird, *194 U. S. 25*, *are reviewed, and wherein it was held that a subpoena* duces tecum@ requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies, located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment, and it was there stated that (201 U.S. p. 201 U. S. 76)

“an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum*, against which the person, be he individual or corporation, is entitled to protection.”

If such a seizure under the authority of a warrant supposed to be legal constitutes a violation of the constitutional protection, *a fortiori* does the attempt of an officer of the United States, the United States marshal, acting under color of his office, without even the sanction of a warrant, constitute an invasion of the rights within the protection afforded by the Fourth Amendment.

Another case relied upon is *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, in which it was held that the seizure by the United States marshal in a copyright case of certain pictures under a writ of replevin did not constitute an unreasonable search and seizure. The other case from this court relied upon is *Holt v. United States*, 218 U. S. 245, in which it was held that testimony tending to show that a certain blouse which was in evidence as incriminating him, had been put upon the prisoner, and fitted him, did not violate his constitutional right. We are at a loss to see the application of these cases to the one in hand.

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in *Wise v. Henkel*, 220 U. S. 556. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early, as well as later, decisions of the courts. 1 Bishop on Criminal Procedure § 210; *Rex v. Barnett*,3 C. & P. 600; *Rex v. Kinsey*, 7 C. & P. 447; *United States v. Mills*, 185 Fed. 318; *United States v. McHie*, 194 Fed. 894, 898.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that, having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court — under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. *Boyd* case, 116 U.S., *supra, and see Twining v. New Jersey*, 211 U. S. 78 It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

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4.2: Mapp v. Ohio 367 U.S. 643 (1961) Annotate this Case

U.S. Supreme Court

Mapp v. Ohio, 367 U.S. 643 (1961)

Mapp v. Ohio

No. 236

Argued March 29, 1961

Decided June 19, 1961

367 U.S. 643

APPEAL FROM THE SUPREME COURT OF OHIO

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. [Footnote 1] As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St. 427-428, 166 N.E.2d 387, 388.

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On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance, but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened [Footnote 2] and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent"

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in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St. at 430, 166 N.E.2d at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice,"'" but

the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St. at 431, 166 N.E.2d at 389-390.

The State says that, even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. Colorado*, 338 U. S. 25 (1949), in which this Court did indeed hold "that, in a prosecution in a State court for a State crime, the Fourteenth Amend-

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ment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. On this appeal, of which we have noted probable jurisdiction, 364 U.S. 868, it is urged once again that we review that holding. [Footnote 3]

I

Seventy-five years ago, in *Boyd v. United States*, 116 U. S. 616, 630 (1886), considering the Fourth [Footnote 4] and Fifth Amendments as running "almost into each other" [Footnote 5] on the facts before it, this Court held that the doctrines of those Amendments

"apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers,

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that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

The Court noted that

"constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong. 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638. Less than 30 years after *Boyd*, this Court, in *Weeks v. United States*, 232 U. S. 383 (1914), stated that

"the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . , and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At pp. 391-392.

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Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." At p. 393.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." At pp. 398. Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that, "in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." *Wolf v. Colorado*, *supra*, at 28. This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required–even if judicially implied–deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., *Silverthorne Lumber Co. v. United States*, 251 U.

S. 385, 392 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ," *Weeks v. United States*, *supra*, at 392, and that such evidence "shall not be used at all." *Silverthorne Lumber Co. v. United States*, *supra*, at 392.

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There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*–and its later paraphrase in *Wolf*–to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. In *Byars v. United States*, 273 U. S. 28 (1927), a unanimous Court declared that "the doctrine [cannot] . . . be tolerated *under our constitutional system*, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." At pp. 29-30 (emphasis added). The Court, in *Olmstead v. United States*, 277 U. S. 438 (1928), in unmistakable language restated the *Weeks* rule:

"The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." At p. 462.

In *McNabb v. United States*, 318 U. S. 332 (1943), we note this statement:

"[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd v. United States* . . . *Weeks v. United States*. . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly mag-

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nified' . . . or 'who have been unlawfully held incommunicado without advice of friends or counsel.' . . ." At pp. 339-340.

Significantly, in *McNabb*, the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue, [for] . . . [t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." At pp. 340-341.

II

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. Colorado*, *supra*, again for the first time, [Footnote 6] discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

"[W]e have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment." At pp. 28.

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in the concept of ordered liberty' and, as such, enforceable against the States through the Due Process Clause," *cf. Palko v. Connecticut*, 302 U. S. 319 (1937), and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." 338 U.S. at 27-29. The Court's reasons for not considering essential to the

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right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive" (At pp. 29); and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of

evidence." At pp. 31-32. While, in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. *See Elkins v. United States*, 364 U. S. 206, Appendix, pp. 224-232 (1960). Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." *People v. Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955). In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the

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right to privacy." [Footnote 7] 338 U.S. at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been

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recognized by this Court since *Wolf*. *See Irvine v. California*, 347 U. S. 128, 137 (1954).

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). There, Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." 242 N.Y. at 22, 150 N.E. at 588. However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, *Elkins v. United States*, *supra;* the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, *Jones v. United States*, 362 U. S. 257, 266-267 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, *Rea v. United States*, 350 U. S. 214(1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine." *United States v. Rabinowitz*, 339 U. S. 56, 63 (1950).

It therefore plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

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III

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [*Weeks*] rule." *Irvine v. California*, *supra*, at 134. There again, it was said:

"Never until June of 1949 did this Court hold the basic search and seizure prohibition in any way applicable to the states under the Fourteenth Amendment." *Ibid.*

And only last Term, after again carefully reexamining the *Wolf* doctrine in *Elkins v. United States*, *supra*, the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (At pp. 212) until the announcement in *Wolf* "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the *Weeks* case. At pp. 213. At the same time, the Court pointed out, "the underlying constitutional doctrine which *Wolf* established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested. . . ." *Ibid.* The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only

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courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then, just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches–state or federal–it was

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logically and constitutionally necessary that the exclusion doctrine–an essential part of the right to privacy–be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but, in reality, to withhold its privilege and enjoyment. Only last year, the Court itself recognized that the purpose of the exclusionary rule "is to deter–to compel respect for the constitutional guaranty in the only effectively available way–by removing the incentive to disregard it." *Elkins v. United States*, *supra*, at 217.

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf v. Colorado*, *supra*, at 27. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers v. Richmond*, 365 U. S. 534 (1961). And nothing could be more certain than that, when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that,

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as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" [Footnote 8] in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram v. United States*, 168 U. S. 532, 543-544 (1897). They express "supplementing phases of the same constitutional purpose to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U. S. 487, 489-490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence–the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. *Cf. Rochin v. California*, 342 U. S. 165, 173 (1952).

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Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.

Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus, the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins*, "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between

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state and federal courts." 364 U.S. at 221. Such a conflict, hereafter needless, arose this very Term in *Wilson v. Schnettler*, 365 U. S. 381 (1961), in which, and in spite of the promise made by *Rea*, we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In nonexclusionary States, federal officers, being human, were by it invited to, and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as *Rea* and *Schnettler*, each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller v. United States*, 357 U. S. 301, 313 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars v. United States*, 273 U. S. 28 (1927); *Lustig v. United States*, 338 U. S. 74 (1949).

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There are those who say, as did Justice (then Judge) Cardozo, that, under our constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. at 21, 150 N.E. at 587. In some cases, this will undoubtedly be the result. [Footnote 9] But, as was said in *Elkins*, "there is another consideration–the imperative of judicial integrity." 364 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U. S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year, this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. *Elkins v. United States*, *supra*, at 218. The Court noted that

"The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a cen-

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tury; yet it has not been suggested either that the Federal Bureau of Investigation [Footnote 10] has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting, but seemingly inexorable." *Id.* at 218-219.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. [Footnote 11] Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than

that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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MR. JUSTICE BLACK, concurring.

For nearly fifty years, since the decision of this Court in *Weeks v. United States*, [Footnote 1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In *Wolf v. Colorado*, decided in 1948, however, this Court held that, "in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." [Footnote 2] I concurred in that holding on these grounds:

"For reasons stated in my dissenting opinion in *Adamson v. California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment, but is a judicially created rule of evidence which Congress might negate." [Footnote 3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am

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extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that, when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies, but actually requires, the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem, [Footnote 4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd v. United States.*[Footnote 5] There, the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." [Footnote 6] It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case. [Footnote 7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd*doctrine, though perhaps not required by the express language of the Constitution, strictly construed, is amply justified from an historical standpoint, soundly based in reason,

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and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights–an approach well set out by Mr. Justice Bradley in the *Boyd* case:

"[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [Footnote 8]

The case of *Rochin v. California*, [Footnote 9] which we decided three years after the *Wolf* case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rutledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the *Rochin* case, three police officers, acting with

neither a judicial warrant nor probable cause, entered Rochin's home for the purpose of conducting a search, and broke down the door to a bedroom occupied by Rochin and his wife. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules. They immediately seized him and took him in handcuffs to a hospital, where the capsules

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were recovered by use of a stomach pump. Investigation showed that the capsules contained morphine, and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency. . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that, in order to convict a man, the police cannot extract by force what is in his mind, but can extract what is in his stomach." [Footnote 10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit of constitutional differentiation," [Footnote 11] and the case was reversed on the ground that these methods had violated the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] a sense of justice'" and fails to "respect certain decencies of civilized conduct." [Footnote 12]

I concurred in the reversal of the *Rochin* case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination

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applicable to the States and that, given a broad, rather than a narrow, construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak. [Footnote 13] In reaching this conclusion, I cited and relied on the *Boyd* case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in the minority, for only MR. JUSTICE DOUGLAS and I rejected the flexible and uncertain standards of the "shock the conscience test" used in the majority opinion. [Footnote 14]

Two years after *Rochin*, in *Irvine v. California*, [Footnote 15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court in that case demonstrate the utter confusion and uncertainty that had been brought about by the *Wolf* and *Rochin* decisions. In concurring, MR. JUSTICE CLARK emphasized the unsatisfactory nature of the Court's "shock the conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell–other than by guesswork–just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that, when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. [Footnote 16] "

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Only one thing emerged with complete clarity from the *Irvine* case–that is that seven Justices rejected the "shock the conscience" constitutional standard enunciated in the *Wolf* and *Rochin* cases. But even this did not lessen the confusion in this area of the law, because the continued existence of mutually inconsistent precedents, together with the Court's inability to settle upon a majority opinion in the *Irvine* case, left the situation at least as uncertain as it had been before. [Footnote 17] Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock the conscience" standard of the *Wolf* and *Rochin* cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case. I fully agree with Mr. Justice Bradley's opinion that the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of liberty, and that both are entitled to a liberal, rather than a niggardly, interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law, and I am

persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case, and to join the Court's judgment and opinion, which are in accordance with that constitutional doctrine.

MR. JUSTICE DOUGLAS, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure. The police entered a home

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forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home who was wanted for questioning in connection with a recent bombing." [Footnote 1] To the appellant's question, however, they replied only that they wanted to question her, and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene, and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant, but the officer refused to let her see it, although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper

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from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper; [Footnote 2] breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and piece of furniture while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession [Footnote 3] of four little pamphlets, a couple of photographs, and a little pencil doodle–all of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appellant's

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dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant–and a friend of hers–said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For, in Ohio, evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution, at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d at 388, syllabus 2; *State v. Lindway*, 131 Ohio St. 166, 2 N.E.2d 490. This evidence would have been inadmissible in a federal prosecution. *Weeks v. United States*, 232 U. S. 383; *Elkins v. United States*, 364 U. S. 206. For, as stated in the former decision, "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their

power and authority, under limitations and restraints. . . ." *Id.* 391-392. It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in *Wolf v. Colorado*, 338 U. S. 25, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the *Weeks* case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But, with all respect, it was not the voice of reason or principle.

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As stated in the *Weeks* case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 U.S. at 393.

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, *Wolf v. Colorado*, at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet, as Mr. Justice Murphy said in *Wolf v. Colorado*, at 42, "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action, and how meagre the relief even if the citizen prevails. 338 U.S. 42-44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, *Wolf v. Colorado*, in practical effect, reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. *See* 338 U.S. at 47.

Wolf v. Colorado, *supra*, was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which *Wolf* imported into the law. *See*

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Stefanelli v. Minard, 342 U. S. 117; *Rea v. United States*, 350 U. S. 214; *Elkins v. United States*, *supra; Monroe v. Pape*, 365 U. S. 167. It is an appropriate case because the facts it presents show–as would few other cases–the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

It is also an appropriate case in the narrower and more technical sense. The issues of the illegality of the search and the admissibility of the evidence have been presented to the state court, and were duly raised here in accordance with the applicable Rule of Practice. [Footnote 4] The question was raised in the notice of appeal, the jurisdictional statement and in appellant's brief on the merits. [Footnote 5] It is true that argument was mostly directed to another issue in the case, but that is often the fact. *See Rogers v. Richmond*, 365 U. S. 534, 535-540. Of course, an earnest advocate of a position always believes that, had he only an additional opportunity for argument, his side would win. But, subject to the sound discretion of a court, all argument must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here." *Elkins v. United States*, *supra*, 216.

Moreover, continuance of *Wolf v. Colorado* in its full vigor breeds the unseemly shopping around of the kind revealed in *Wilson v. Schnettler*, 365 U. S. 381. Once evidence, inadmissible in a federal court, is admissible in

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a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that, undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does not have the force of reason behind it.

Memorandum of MR. JUSTICE STEWART.

Agreeing fully with Part I of MR. JUSTICE HARLAN's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of MR. JUSTICE HARLAN, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting.

In overruling the *Wolf* case, the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that, I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

I

From the Court's statement of the case, one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would, of course, face us with the need for reexamining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and

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pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code, making criminal the *mere* knowing possession or control of obscene material, [Footnote 1] and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. [Footnote 2] That was the principal issue which was decided by the Ohio Supreme Court, [Footnote 3] which was tendered by appellant's Jurisdictional Statement, [Footnote 4] and which was briefed [Footnote 5] and argued [Footnote 6] in this Court.

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In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect, for the views of the majority, and recognizing that *stare decisis* carries dif-

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ferent weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for reexamining *Wolf*.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For, in overruling *Wolf*, the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) [Footnote 7] and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, [Footnote 8] surely presents a Constitutional

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question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of *Wolf*, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the *Wolf* case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "nonexclusionary" aspect, *Wolf* did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States." *People v. Defore*, 242 N.Y. 13, 20, 150 N.E. 585, 587.

Though, of course, not reflecting the full measure of this continuing reliance, I find that, during the last three Terms, for instance, the issue of the inadmissibility of illegally state-obtained evidence appears on an average of about fifteen times per Term just in the *in forma pauperis* cases summarily disposed of by us. This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf*, and that were we determined to reexamine that doctrine, we would not lack future opportunity.

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argu-

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ment is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one, to be sure, with explicit misgivings. [Footnote 9] I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purpose,s the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

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II

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States*, 232 U. S. 383, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, *cf. Wolf v. Colorado*, 338 U.S. at 39-40 (concurring opinion), I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment, and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States. [Footnote 10]

This reasoning ultimately rests on the unsound premise that, because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 U.S. at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty,"

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and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment, as such, is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out (338 U.S. at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (*Id.* at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in *Wolf*

of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a preexisting legal context on which both interpreting decisions and enabling statutes must at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable"–say in a tort action against state officers–we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But, in this instance, more than that is involved, for here we are reviewing not a determination that what the state police did was Constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could Constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy," (338 U.S. at 28), *compare Marcus v. Search Warrants*, *post*, p. 717, what the Court is now doing is to impose

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upon the States not only federal substantive standards of "search and seizure", but also the basic federal remedy for violation of those standards. For I think it entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing.

First, it is said that "the factual grounds upon which *Wolf* was based" have since changed, in that more States now follow the Weeks exclusionary rule than was so at the time *Wolf* was decided. While that is true, a recent survey indicates that, at present, one-half of the States still adhere to the common law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. Berman and Oberst, Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure, 55 N.W.L.Rev. 525, 532-533. But, in any case, surely all this is beside the point, as the majority itself indeed seems to recognize. Our concern here, as it was in *Wolf*, is not with the desirability of that rule, but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary

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widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, the *Weeks* exclusionary rule. For us, the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view, this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the *Weeks* rule on the States makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid "*needless conflict between state and federal courts.'" Indeed, the majority now finds an incongruity*

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in *Wolf's* discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is, for me, the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the *Weeks* rule and its extensions in such cases as *Rea*, *Elkins*, and *Rios* [Footnote 11] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here, we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment, but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance, the California Supreme Court did in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, with reference to procedures in the California courts, or as this Court did in *Weeks* for the lower federal courts.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically, a case will have been tried in a trial court, tested in some final appel-

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late court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds, we deal then with a finished product in the creation of which we are allowed no hand, and our task, far from being one of over-all supervision, is, speaking generally, restricted to a determination of whether the prosecution was constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the *Weeks* rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the *Weeks* rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of *Wolf* is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a statement which is procured during

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a period of illegal detention, *McNabb v. United States*, 318 U. S. 332, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such statements. Indeed, it would seem the Court laid at rest the very argument now made by the majority when, in *Lisenba v. California*, 314 U. S. 219, a state-coerced confession case, it said (at 235):

"It may be assumed [that the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process, and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it."

"But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the constitutional question we must decide. . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that, in requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "Ours is the accusatorial, as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices

borrowed by the Star Chamber from the Continent whereby the accused was interrogated in secret for hours on end." *Watts v. Indiana*, 338 U. S. 49, 54. *See Rogers v. Richmond*, 365 U. S. 534, 541. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart

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from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed., 1824), c. 46, § 34. That this is a *procedural right*, and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right, all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is, in fact, an opinion only for the *judgment* overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself (*see ante*, p. 661), but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (*see ante* pp. 662-665). [Footnote 12] On that score I need only say that whatever the validity of

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the "Fourth-Fifth Amendment" correlation which the *Boyd* case (116 U.S. 616) found, *see* 8 Wigmore, Evidence (3d ed.1940), § 2184, we have only very recently again reiterated the long-established doctrine of this Court that the Fifth Amendment privilege against self-incrimination is not applicable to the States. *See Cohen v. Hurley*, 366 U. S. 117.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But, in the last analysis, I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case, I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Footnotes

[Footnote 1]

The statute provides in pertinent part that

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture. . . ."

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

[Footnote 2]

A police officer testified that "we did pry the screen door to gain entrance"; the attorney on the scene testified that a policeman "tried . . . to kick in the door" and then "broke the glass in the door and somebody reached in and opened the door and let them in"; the appellant testified that "[t]he back door was broken."

[Footnote 3]

Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition, and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*.

[Footnote 4]

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

[Footnote 5]

The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in *Entick v. Carrington*, 19 Howell's State Trials 1029, the *Boyd* court drew heavily. Lord Camden had noted, at 1073:

"It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem that search for evidence is disallowed upon the same principle. There too, the innocent would be confounded with the guilty."

[Footnote 6]

See, however, National Safe Deposit Co. v. Stead, 232 U. S. 58 (1914), and *Adams v. New York*, 192 U. S. 585 (1904).

[Footnote 7]

Less than half of the States have any criminal provisions relating directly to unreasonable searches and seizures. The punitive sanctions of the 23 States attempting to control such invasions of the right of privacy may be classified as follows:

Criminal Liability of Affiant for Malicious Procurement of Search Warrant.–Ala.Code, 1958, Tit. 15, § 99; Alaska Comp.Laws Ann., 1949, § 66-7-15; Ariz.Rev.Stat.Ann., 1956, § 13-1454; Cal.Pen.Code § 170; Fla.Stat., 1959, § 933.16; Ga.Code Ann., 1953, § 27-301; Idaho Code Ann., 1948, § 18-709; Iowa Code Ann., 1950, § 751.38; Minn.Stat.Ann., 1947, § 613.54; Mont.Rev.Codes Ann., 1947, § 94-35-122; Nev.Rev.Stat. § 199.130, 199.140; N.J.Stat.Ann., 1940, § 33:1-64; N.Y.Pen.Law § 1786, N.Y.Code Crim.Proc. § 811; N.C.Gen.Stat., 1953, § 15-27 (applies to "officers" only); N.D.Century Code Ann., 1960, § 12-17-08, 29-29-18; Okla.Stat., 1951, Tit. 21, § 585, Tit. 22, § 1239; Ore.Rev.Stat. § 141.990; S.D.Code, 1939 (Supp. 1960), § 34.9904; Utah Code Ann., 1953, 77-54-21.

Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit.–N.C.Gen.Stat., 1953, § 15-27; Va.Code Ann., 1960 Replacement Volume, § 19.1-89.

Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant.–Fla.Stat.Ann., 1944, § 933.17; Iowa Code Ann., 1950, § 751.39; Minn.Stat.Ann., 1947, § 613.54; Nev.Rev.Stat. § 199.450; N.Y.Pen.Law § 1847, N.Y.Code Crim.Proc. § 812; N.D.Century Code Ann., 1960, § 12-17-07, 29-29-19; Okla.Stat., 1951, Tit. 21, § 536, Tit. 22, § 1240; S.D.Code, 1939 (Supp. 1960), § 34.9905; Tenn.Code Ann., 1955, § 40-510; Utah Code Ann., 1953, § 77-54-22.

Criminal Liability of Officer for Search with Invalid Warrant or no Warrant.–Idaho Code Ann., 1948, § 18-703; Minn.Stat.Ann., 1947, § 613.53, 621.17; Mo.Ann.Stat., 1953, § 558.190; Mont.Rev.Codes Ann., 1947, § 94-3506; N.J.Stat.Ann., 1940, § 33:1-65; N.Y.Pen.Law § 1846; N.D. Century Code Ann., 1960, § 12-17-06; Okla.Stat.Ann., 1958, Tit. 21, § 535; Utah Code Ann., 1953, § 76-28-52; Va.Code Ann., 1960 Replacement Volume, § 19.1-88; Wash.Rev.Code § 10.79.040, 10.79.045.

[Footnote 8]

But compare Waley v. Johnston, 316 U. S. 101, 104, and *Chambers v. Florida*, 309 U. S. 227, 236, *with Weeks v. United States*, 232 U. S. 383, and *Wolf v. Colorado*, 338 U. S. 25.

[Footnote 9]

As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns v. Ohio*, 360 U. S. 252, *Griffin v. Illinois*, 351 U. S. 12, and *Herman v. Claudy*, 350 U. S. 116. In those cases, the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

[Footnote 10]

See the remarks of Mr. Hoover, Director of the Federal Bureau of Investigation, FBI Law Enforcement Bulletin, September, 1952, pp. 1-2, quoted in *Elkins v. United States*, 364 U. S. 206, 218-219, note 8.

[Footnote 11]

Cf. Marcus v. Search Warrant, post, p. 717.

[Footnote 1]

232 U.S. 383, decided in 1914.

[Footnote 2]

338 U.S. 25, 33.

[Footnote 3]

Id. at 39-40.

[Footnote 4]

The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. *See Feldman v. United States*, 322 U. S. 487, 502-503 (dissenting opinion); *Frank v. Maryland*, 359 U. S. 360, 374-384 (dissenting opinion).

[Footnote 5]

116 U.S. 616.

[Footnote 6]

Id. at 633.

[Footnote 7]

338 U.S. at 47-48.

[Footnote 8]

116 U.S. at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison:

"If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."

I Annals of Congress 439 (1789).

[Footnote 9]

342 U.S. 165.

[Footnote 10]

Id. at 173.

[Footnote 11]

Id. at 172.

[Footnote 12]

Id. at 172, 173

[Footnote 13]

Id. at 174-177

[Footnote 14]

For the concurring opinion of MR. JUSTICE DOUGLAS *see id.* at 177-179.

[Footnote 15]

347 U.S. 128.

[Footnote 16]

Id. at 138.

[Footnote 17]

See also United States v. Rabinowitz, 339 U. S. 56, 66-68 (dissenting opinion).

[Footnote 1]

This "confidential source" told the police, in the same breath, that "there was a large amount of policy paraphernalia being hidden in the home."

[Footnote 2]

The purported warrant has disappeared from the case. The State made no attempt to prove its existence, issuance or contents, either at the trial or on the hearing of a preliminary motion to suppress. The Supreme Court of Ohio said:

"There is, in the record, considerable doubt as to whether there ever was *any*warrant for the search of defendant's home. . . . Admittedly . . . there was no warrant authorizing a search . . . for any 'lewd, or lascivious book . . . print, [or] picture.'"

170 Ohio St. 427, 430, 166 N.E.2d 387, 389. (Emphasis added.)

[Footnote 3]

Ohio Rev.Code, § 2905.34:

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture . . . or drawing . . . of an indecent or immoral nature. . . . Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

[Footnote 4]

"The notice of appeal . . . shall set forth the questions presented by the appeal. . . . Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court."

Rule 10(2)(c), Rules of the Supreme Court of the United States.

[Footnote 5]

"Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution . . . ?"

[Footnote 1]

The material parts of that law are quoted in note 1 of the Court's opinion *Ante*, p. 643.

[Footnote 2]

In its note 3 *ante*, p. 646, the Court, it seems to me, has turned upside down the relative importance of appellant's reliance on the various points made by him on this appeal.

[Footnote 3]

See 170 Ohio St. 427, 166 N.E.2d 387. Because of the unusual provision of the Ohio Constitution requiring "the concurrence of at least all but one of the judges" of the Ohio Supreme Court before a state law is held unconstitutional (except in the case of affirmance of a holding of unconstitutionality by the Ohio Court of Appeals), Ohio Const., Art. IV, § 2, the State Supreme Court was compelled to uphold the constitutionality of § 2905.34 despite the fact that four of its seven judges thought the statute offensive to the Fourteenth Amendment.

[Footnote 4]

Respecting the "substantiality" of the federal questions tendered by this appeal, appellant's Jurisdictional Statement contained the following:

"The Federal questions raised by this appeal are substantial for the following reasons: "

"The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual"

"to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional rights of the individual"

"(Justice Herbert's dissenting Opinion, Appendix 'A'). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code [the latter two Sections providing exceptions to the coverage of § 2905.34 and related provisions of Ohio's obscenity statutes] are read together, . . . they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the defendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions."

[Footnote 5]

The appellant's brief did not urge the overruling of *Wolf*. Indeed, it did not even cite the case. The brief of the appellee merely relied on *Wolf* in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as *amici*, did, in one short concluding paragraph of its argument, "request" the Court to reexamine and overrule *Wolf*, but without argumentation. I quote in full this part of their brief:

"This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf v. Colorado*, 338 U. S. 25. It is our purpose by this paragraph to respectfully request that this Court reexamine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."

[Footnote 6]

Counsel for appellant on oral argument, as in his brief, did not urge that *Wolf* be overruled. Indeed, when pressed by questioning from the bench whether he was not, in fact, urging us to overrule *Wolf*, counsel expressly disavowed any such purpose.

[Footnote 7]

"2905.37 LEGITIMATE PUBLICATIONS NOT OBSCENE."

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

" 3767.01(c)"

"This section and sections 2905.34, . . . 2905.37 . . . of the Revised Code shall not affect . . . any newspaper, magazine, or other publication entered as second class matter by the post office department."

[Footnote 8]

The Ohio Supreme Court, in its construction of § 2905.34, controlling upon us here, refused to import into it any other exceptions than those expressly provided by the statute. *See* note 7, *supra*. Instead, it held that "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty. . . ."

[Footnote 9]

See Wolf v. Colorado, 338 U.S. at 39-40; *Irvine v. California*, 347 U. S. 128, 133-134, and at 138-139. In the latter case, decided in 1954, Mr. Justice Jackson, writing for the majority, said (At pp. 134): "We think that the *Wolf* decision should not be overruled, for the reasons so persuasively stated therein." *Compare Schwartz v. Texas*, 344 U. S. 199, and *Stefanelli v. Minard*, 342 U. S. 117, in which the *Wolf* case was discussed and in no way disapproved. *And see Pugach v. Dollinger*, 365 U. S. 458, which relied on *Schwartz.*

[Footnote 10]

Actually, only four members of the majority support this reasoning. *See* pp. 685-686, *infra*.

[Footnote 11]

Rea v. United States, 350 U. S. 214; *Elkins v. United States*, 364 U. S. 206; *Rios v. United States*, 364 U. S. 253.

[Footnote 12]

My Brother STEWART concurs in the Court's judgment on grounds which have nothing to do with *Wolf.*

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4.3: Wolf v. Colorado 338 U.S. 25 (1949)

U.S. Supreme Court

Wolf v. Colorado, 338 U.S. 25 (1949)

Wolf v. Colorado

Nos. 17 and 18

Argued October 19, 1948

Decided June 27, 1949

338 U.S. 25

CERTIORARI TO THE SUPREME COURT OF COLORADO

Syllabus

In a prosecution in a state court for a state crime, the Fourteenth Amendment of the Federal Constitution does not forbid the admission of relevant evidence even though obtained by an unreasonable search and seizure. Pp. 338 U. S. 25-33.

(a) Arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment. Pp. 338 U. S. 27-28.

(b) While the doctrine of *Weeks v. United States*, 232 U. S. 383, making evidence secured in violation of the Fourth Amendment inadmissible in federal courts, is adhered to, it is not imposed on the States by the Fourteenth Amendment. Pp. 338 U. S. 28-33.

117 Colo. 279, 321, 187 P.2d 926, 928, affirmed.

Judgments of conviction in two criminal prosecutions in a state court were sustained by the State Supreme Court against claims of denial of rights under the Federal Constitution. 117 Colo. 279, 321, 187 P.2d 926, 928. This Court granted certiorari. 333 U.S. 879. *Affirmed*, p. 338 U. S. 33.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States*, 232 U. S. 383? The Supreme Court of Colorado has sustained convictions in which such evidence was admitted, 117 Col. 279, 187 P.2d 926; 117 Col. 321, 187 P.2d 928, and we brought the cases here. 333 U.S. 879.

Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution, and thereby incorporates them, has been rejected by this Court again and again, after impressive consideration. *See, e.g., Hurtado v. California*, 110 U. S. 516; *Twining v. New Jersey*, 211 U. S. 78; *Brown v. Mississippi*, 297 U. S. 278; *Palko v. Connecticut*, 302 U. S. 319. Only the other day, the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. *Adamson v. California*, 332 U. S. 46. The issue is closed.

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in *Palko v. Connecticut*, *supra*, 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead. In rejecting the suggestion that the Due Process Clause incorporated the original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that Court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty." 302 U.S. at 302 U. S. 325.

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty, but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn, but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." *Davidson v. New Orleans*, 96 U. S. 97, 96 U. S. 104. This was the Court's insight when first called upon to consider the problem; to this insight, the Court has, on the whole, been faithful as case after case has come before it since *Davidson v. New Orleans* was decided.

The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in "the concept of ordered liberty," and, as such, enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

In *Weeks v. United States*, *supra*, this Court held that, in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then, it has been frequently applied, and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that, in fact, most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.

"I. Before the *Weeks* decision, 27 States had passed on the admissibility of evidence obtained by unlawful search and seizure."

" (a) Of these, 26 States opposed the *Weeks* doctrine. (*See* Appendix, Table A.)"

" (b) Of these, 1 State anticipated the *Weeks* doctrine. (Table B.)"

"II. Since the *Weeks* decision, 47 States all told have passed on the *Weeks* doctrine. (Table C.)"

" (a) Of these, 20 passed on it for the first time."

"~ (1) Of the foregoing States, 6 followed the *Weeks* doctrine. (Table D.)"

"~ (2) Of the foregoing States, 14 rejected the *Weeks* doctrine. (Table E.)"

" (b) Of these, 26 States reviewed prior decisions contrary to the *Weeks* doctrine."

"~ (1) Of these, 10 States have followed *Weeks*, overruling or distinguishing their prior decisions. (Table F.)"

"~ (2) Of these, 16 States adhered to their prior decisions against *Weeks*. (Table G.)"

” (c) Of these, 1 State repudiated its prior formulation of the *Weeks* doctrine. (Table H.)”

“III. As of today, 31 States reject the *Weeks* doctrine, 16 States are in agreement with it. (Table I.) ”

“IV. Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible. (Table J.)”

The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. [Footnote 1] Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that, in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice (then Judge) Cardozo in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585. [Footnote 2] We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures, but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

We hold, therefore, that, in a prosecution in a State court for a State crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress, under its legislative powers, were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. Problems of a converse character, also not before us, would be presented should Congress, under § 5 of the Fourteenth Amendment, undertake to enforce the rights there guaranteed by attempting to make the *Weeks* doctrine binding upon the States.

Affirmed.

[Footnote 1]

The common law provides actions for damages against the searching officer, *e.g.*, *Entick v. Carrington*, 2 Wils. 275, 19 How.St.Tr. 1029; *Grumon v. Raymond*, 1 Conn. 40; *Sandford v. Nichols*, 13 Mass. 286; *Halsted v. Brice*, 13 Mo. 171; *Hussey v. Davis*, 58 N.H. 317; *Reed v. Lucas*, 42 Texas 529; against one who procures the issuance of a warrant maliciously and without probable cause, *e.g.*, *Gulsby v. Louisville & N. R. Co.*,167 Ala. 122, 52 So. 392; *Whitson v. May*, 71 Ind. 269; *Kretabiel v. Henkle*, 152 Iowa 604, 129 N.W. 945; *Olson v. Tvete*, 46 Minn. 225, 48 N.W. 914; *Boeger v. Langenberg*,97 Mo. 390, 11 S.W. 223; *Doane v. Anderson*, 60 Hun 586, 15 N.Y.S. 459; *Shall v. Minneapolis, St. P. & S.S. M. R. Co.*, 156 Wis.195, 145 N.W. 649; against a magistrate who has acted without jurisdiction in issuing a warrant, *e.g.*, *Williams v. Kozak*, 280 F. 373 (C.A.4th Cir.); *Grumon v. Raymond*, 1 Conn. 40; *Kennedy v. Terrill*, Hardin (Ky.) 490; *Shaw v. Moon*, 117 Ore. 558, 245 P. 318, and against persons assisting in the execution of an illegal search, *e.g.*, *Hebrew v. Pulis*, 73 N.J.L. 621, 625, 64 A. 121, 122; *Cartwright v. Canode*, 138 S.W. 792 (Tex.Civ.App.), *aff’d*, 106 Texas 502, 171 S.W. 696. One may also without liability use force to resist an unlawful search. *E.g.*, *Commonwealth v. Martin*, 105 Mass. 178; *State v. Mann*, 27 N.C. 45.

Statutory sanctions in the main provide for the punishment of one maliciously procuring a search warrant or willfully exceeding his authority in exercising it. *E.g.*,18 U.S.C. (1946 ed.) §§ 630, 631; Ala.Code, Tit. 15, § 99 (1940); Ariz.Code Ann. § 44-3513 (1939); Fla.Stat.Ann. §§ 933.16, 933.17 (1944); Iowa Code §§ 751.38, 751.39 (1946); Mont.Rev.Code Ann. §§ 10948, 10952 (1935); Nev.Comp.Laws §§ 10425, 10426 (1929); N.Y.Crim.Code §§ 811, 812, N.Y.Penal Law §§ 1786, 1847; N.D.Rev.Code §§ 12-1707, 12-1708 (1943); Okla.Stat.Ann., Tit. 21, §§ 536, 585, Tit. 22, §§ 1239, 1240 (1937); Ore.Comp.Laws Ann. § 26-1717 (1940); S.D.Code §§ 13.1213, 13.1234, 34.9904, 34.9905 (1939); Tenn.Code Ann. § 1 1905 (1934). Some statutes more broadly penalize unlawful searches. *E.g.*, 18 U.S.C. (1946 ed.) § 53a; Idaho Code Ann. §§ 17-1004, 17-1024 (1932); Minn.Stat. §§ 613.54, 621.17 (1945); Va.Code Ann. § 4822d (Michie, 1942); Wash.Rev.Stat.Ann. §§ 2240-1, 2240-2. Virginia also makes punishable one who issues a general search warrant or a warrant unsupported by affidavit. Va.Code Ann. § 4822e (Michie, 1942). A few States have

provided statutory civil remedies. *See, e.g.,* Ga.Code Ann. § 27-301 (1935); Ill.Rev.Stat., c. 38, § 698 (Smith-Hurd, 1935); Miss.Code Ann. § 1592 (1942). And in one State, misuse of a search warrant may be an. abuse of process punishable as contempt of court. *See* Mich.Stat.Ann. § 27.511 (1938).

[Footnote 2]

"We hold, then, with the defendant that the evidence against him was the outcome of a trespass. The officer might have been resisted, or sued for damages, or even prosecuted for oppression (Penal Law, §§ 1846, 1847). He was subject to removal or other discipline at the hands of his superiors. These consequences are undisputed. The defendant would add another. We must determine whether evidence of criminality, procured by an act of trespass, is to be rejected as incompetent for the misconduct of the trespasser. . . ."

"Those judgments [*Weeks v. United States* and cases which followed it] do not bind us, for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States. Even though not binding, they merit our attentive scrutiny. . . ."

"In so holding [*i.e.,* that evidence procured by unlawful search is not incompetent], we are not unmindful of the argument that, unless the evidence is excluded, the statute becomes a form, and its protection an illusion. This has a strange sound when the immunity is viewed in the light of its origin and history. The rule now embodied in the statute was received into English law as the outcome of the prosecution of Wilkes and Entick. . . . Wilkes sued the messengers who had ransacked his papers, and recovered a verdict of £ 4,000 against one and £ 1,000 against the other. Entick, too, had a substantial verdict. . . . We do not know whether the public, represented by its juries, is today more indifferent to its liberties than it was when the immunity was born. If so, the change of sentiment without more does not work a change of remedy. Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case [176 N.Y. 351, 68 N.E. 636] strikes a balance between opposing interests."

242 N.Y. at 19, 20, 24-25, 150 N.E. at 586-87, 587, 588-89.

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APPENDIX

In the case of jurisdictions which have decided more than one case in point, the following Tables cite only the leading case.

TABLE A

STATES WHICH OPPOSED THE WEEKS DOCTRINE

BEFORE THE WEEKS CASE HAD BEEN DECIDED

ALA. *Shields v. State,* 104 Ala. 35, 16 So. 85.

ARK. *Starchman v. State,* 62 Ark. 538, 36 S.W. 940.

CONN. *State v. Griswold,* 67 Conn. 290, 34 A. 1046.

GA. *Williams v. State,* 100 Ga. 511, 28 S.E. 624.

IDAHO *State v. Bond,* 12 Idaho 424, 439, 86 P. 43, 47.

ILL. *Siebert v. People,* 143 Ill. 571, 583, 32 N.E. 431, 434.

KAN. *State v. Miller,* 63 Kan. 62, 64 P. 1033.

ME. *See State v . Gorham,* 65 Me. 270, 272.

MD. *Lawrence v. State,* 10.3 *Id.* 17,:35, 63 A. 96, 103.

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MASS. *Commonwealth v. Dana*, 2 Metc. 329.

MICH. *People v. Aldorfer*, 164 Mich. 676, 130 N. w. 351.

MINN. *State v. Strait*, 94 Minn. 384, 102 N. w. 913.

MO. *State v. Pomeroy*, 130 Mo. 489, 32 S.W. 1002.

MONT. *See State v. Fuller*, 34 Mont. 12, 19, 85 P. 369, 373.

NEB. *Geiger v. State*, 6 Neb. 545.

N.H. *State v. Flynn*, 36 N.H. 64.

N.Y. *People v. Adams*, 176 N.Y. 351, 68 N.E. 636.

N.C. *State v. Wallace*, 162 N.C. 622, 78 S.E. l.

OKLA. *Silva v. State*, 6 Okla.Cr. 97, 116 P. 199.

ORE. *State v. McDaniel*, 39 Ore. 161, 169-70, 65 P. 520, 523.

S.C. *State v. Atkinson*, 40 S,C. 363, 371, 18 S.E. 1021, 1024.

S.D. *State v. Madison*, 23 S.D. 584, 591, 122 N.W. 647, 650.

TENN. *Cohn v. State*, 120 Tenn. 61, 109 S.W. 1149.

VT. *State v. Mathers*, 64 Vt. 101, 23 A. 590.

WASH. *State v. Royce*, 38 Wash. 111, 80 P. 268.

W.VA. *See State v. Edwards*, 51 W.Va. 220, 229, 41 S.E. 429, 432-33.

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TABLE B

STATE WHICH HAD FORMULATED THE *WEEKS* DOCTRINE

BEFORE THE *WEEKS* DECISION

IOWA *State v. Sheridan*, 121 Iowa 164, 96 N. w. 730.

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TABLE C

STATES WHICH HAVE PASSED ON THE WEEKS DOCTRINE

SINCE THE WEEKS CASE WAS DECIDED

Every state except Rhode Island. *But see State v. Lorenzo*, 72 R.I. 175 48 A.2d 407 (holding that defendant had consented to the search, but that, even if he had not, and even if the federal rule applied, the evidence was admissible because no timely motion to suppress had been made).

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TABLE D

STATES WHICH PASSED ON THE WEEKS DOCTRINE FOR THE FIRST TIME

AFTER THE WEEKS DECISION, AND, IN SO DOING, FOLLOWED IT

FLA. *Atz v. Andrews*, 84 Fla. 43, 94 SO. 329.

IND. *Flum v. State*, 193 Ind. 585, 141 N.E. 353.

KY. *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860.

MISS. *Tucker v. State*, 128 Miss. 211, 90 So. 845.

WIS. *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89.

WYO. *State v. George*, 32 Wyo 223, 231 P. 683.

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TABLE E

STATES WHICH PASSED ON THE WEEKS DOCTRINE FOR THE FIRST TIME AFTER THE WEEKS DECISION, AND, IN SO, DOING REJECTED IT.

ARIZ. *Argetakis v. State*, 24 Ariz. 599, 212 P. 372.

CALIF. *People v. Mayen*, 188 Calif.237, 205 P. 435 (adopting the general rule but distinguishing the cases then decided by this Court on the ground that they apply only when a timely motion for return of the property seized has been made).

COLO. *Massantonio v. People*, 77 Colo. 392, 236 P. 1019.

DEL. *State v. Chuchola*, 32 Del. 133, 120 A. 212 (distinguishing this Court's decisions).

LA. *State v. Fleckinger*, 152 La. 337, 93 So. 115. The constitutional convention of 1921 refused to adopt an amendment incorporating the federal rule. *See State v. Eddins*, 161 La. 240, 108 So. 468.

NEV. *State v. Chin Gim*, 47 Nev. 431, 224 P. 798.

N.J. *State v. Black*, 5 N.J.Misc. 48, 135 A. 685.

N.M. *State v. Dillon*, 34 N.M. 366, 281 P. 474.

N.D. *State v. Fahn*, 53 N.D. 203, 205 N.W. 67.

OHIO *State v. Lindusay*, 131 Ohio St. 166, 2 N.E.2d 490.

PA. *Commonwealth v. Dabbierio*, 290 Pa. 174, 138 A. 679.

TEX. *Welchek v. State*, 93 Tex.Cr.Rep. 271, 247 S.W. 524. In 1925, a statute changed the rule by providing that "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State

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of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." Texas Laws 1925, c. 49, as amended, 2 Vernon's Tex.Stat., 1948 (Code of Crim.Proc.), Art. 727a.

UTAH *State v. Aime*, 62 Utah 476, 220 P. 704.

VA. *Hall v. Commonwealth*, 138 Va. 727, 121 S.E. 154.

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TABLE F

STATES WHICH, AFTER THE WEEKS DECISION, OVERRULED OR DISTINGUISHED PRIOR CONTRARY DECISIONS

IDAHO Idaho expressly refused to follow the *Weeks* decision in *State v. Myers*, 36 Idaho 396, 211 P. 440, but repudiated the *Myers* case and adopted the federal rule in *State v. Arregi*, 44 Idaho 43, 254 P. 788.

ILL. After two cases following the former state rule, Illinois adopted the federal rule in *People v. Castree*, 311 Ill. 392, 143 N.E. 112.

MICH. *People v. Marchausen*, 204 Mich. 559, 171 N.W. 557 (distinguishing earlier cases on the ground that, in them, no preliminary motion to suppress had been made).

MO. *State v. Graham*, 295 Mo. 695, 247 S.W.194, supported the old rule in a dictum, but the federal rule was adopted in *State v. Owens*, 302 Mo. 348 259 S.W. 100 (distinguishing earlier cases on the ground that, in them, no preliminary motion to dismiss had been made).

MONT. *State ex rel. King v. District Court*, 70 Mont. 191, 224 P.862.

OKLA. *Gore v. State*, 24 Okla.Cr. 394, 218 P. 545.

S.D. *State v. Gooder*, 57 S.D. 619, 234 N.W. 610. *But cf.* S.D.Laws 1935, c. 96, now S.D.Code § 34.1102 (1939), amending Rev.Code 1919, § 4606 (all evidence admissible

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under a valid search warrant is admissible notwithstanding defects in the issuance of the warrant).

TENN. *Hughes v. State*, 145 Tenn. 544, 238 S.W. 588 (distinguishing *Cohn v. State*, *supra*, Table A).

WASH. *State v. Gibbons*, 118 Wash. 171, 203 P. 390.

W.VA. *State v. Andrews*, 91 W.Va. 720 114 S.E. 257 (distinguishing earlier cases).

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TABLE G

STATES WHICH, AFTER THE WEEKS DECISION, REVIEWED PRIOR CONTRARY DECISIONS, AND, IN SO DOING, ADHERED TO THOSE DECISIONS.

ALA. *Banks v. State*, 207 Ala. 179, 93 SO. 293.

ARK. *Benson v. State*, 149 Ark. 633, 233 S.W. 758.

CONN. *State v. Reynolds*, 101 Conn. 224, 125 A. 636.

GA. *Jackson v. State*, 156 Ga. 647, 1 19 S.E. 525.

KAN. *State v. Johnson*, 116 Kan. 58, 226 P. 245.

ME. *State v. Schoppe*, 113 Me. 10, 16, 92 A. 867, 869 (alternative holding, not noticing *Weeks*).

MD. *Meisinger v. State*, 155 Md.195, 141 A. 536, 142 A.190. *But cf.* Md.Laws 1929, c.194, as amended, Md.Code Ann., Art. 35, § 5 (1947 Supp.) (in trial of misdemeanors, evidence obtained by illegal search and seizure is inadmissible).

MASS. *Commonwealth v. Wilkins*, 243 Mass. 356, 138 N.E. 11.

MINN. *State v. Pluth*, 157 Minn. 145, 195 N.W. 789.

NEB. *Billings v. State*, 109 Neb. 596, 191 N.W. 721.

N.H. *State v. Agalos*, 79 N.H. 241, 242, 107 A. 314, 315 (not noticing *Weeks*).

N.Y. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585; *People v. Richter's Jewelers*, 291 N.Y. 161, 169, 51 N.E.2d 690, 693 (holding that adoption of Amendment to State Con-

stitution in same language as Civil Rights Law construed in the *Defore* case is not occasion for changing interpretation, especially since proceedings of the convention which framed the amendment show that no change was intended).

N.C. *State v. Simmons*, 183 N.C. 684, 110 S.E. 591 (distinguishing between evidentiary articles and *corpus delicti*).

ORE. *See State v. Folkes*, 174 Ore. 568, 588-89, 150 P.2d 17, 25. *But see State v. Laundy*, 103 Ore. 443, 493-95, 204 P. 958, 974-75.

S.C. After granting a motion to return illegally seized property in *Blacksburg v. Beam*, 104 S.C. 146, 88 S.E. 441, South Carolina reaffirmed its agreement with the general rule in *State v. Green*, 121 S.C. 230, 114 S.E. 317.

VT. *State v. Stacy*, 104 Vt. 379, 401, 160 A. 257, 266.

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TABLE H

STATE WHICH HAS REPUDIATED ITS PRIOR FORMULATION

OF THE WEEKS DOCTRINE

IOWA *State v. Rowley,* 197 Iowa 977, 195 N.W. 881 (withdrawing

earlier opinion in 187 N.W. 7).

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TABLE I

SUMMARY OF PRESENT POSITION OF STATES WHICH HAVE

PASSED ON THE WEEKS DOCTRINE

(a) States that reject *Weeks:*

Ala. Ariz. Ark., Calif., Colo. Conn. Del., Ga. Iowa, Kan. La. Me., Md. Mass. Minn., Neb., Nev., N.H. N.J. N.M., N.Y. N.C. N.D., Ohio, Ore. Pa. S.C. Texas, Utah, Vt., Va.

(b) States that are in agreement with *Weeks:*

Fla., Idaho, Ill., Ind. Ky., Mich. Miss., Mo. Mont., Okla., S.D. Tenn. Wash., W.Va. Wis., Wyo.

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TABLE J

JURISDICTIONS OF THE UNITED KINGDOM AND THE BRITISH COMMONWEALTH

OF NATIONS WHICH HAVE HELD ADMISSIBLE EVIDENCE OBTAINED BY

I

LLEGAL SEARCH AND SEIZURE

AUSTRALIA *Miller v. Noblet,* [1927] S.A.S.R. 385.

CANADA

ALTA. *Rex v. Nelson,* [1922] 2 W.W.R. 381, 69 D.L.R. 180.

MAN. *Rec v. Duroussel,* 41 Man. 15, [1933] 2 D.L.R. 446.

ONT. *Regina v. Doyle,* 12 Ont. 347.

SASK. *Rex v. Kostachuk,* 24 Sask. 485, 54 Can. C.C. 189.

ENGLAND *See Elias v. Pasmore,* [1934] 2 K.B. 164.

INDIA

ALL. *Ali Ahmad Khan v. Emperor,* 81 I.C. 615(1).

CAL. *Baldeo Bin v. Emperor,* 142 I.C. 639.

RANG. *Chwa Hum Htive v. Emperor,* 143 I.C. 824.

SCOTLAND *See Hodgson v. Macpherson,* [1913] S.C.(J.) 68, 73.

MR. JUSTICE BLACK, concurring.

In this case, petitioner was convicted of a crime in a state court on evidence obtained by a search and seizure conducted in a manner that this Court has held "unreasonable," and therefore in violation of the Fourth Amendment. And under a rule of evidence adopted by this Court, evidence so obtained by federal officers cannot be used against defendants in federal courts. For reasons stated in my dissenting opinion in *Adamson v. California,* 332 U. S. 46, 332 U. S. 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I

should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures,", but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment, but is a judicially created rule of evidence which Congress might negate. *See McNabb v. United States*, 318 U. S. 332. This leads me to concur in the Court's judgment of affirmance.

It is not amiss to repeat my belief that the Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states. The Fourth Amendment was designed to protect people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers. Such protection is an essential in a free society. And I am unable to agree that the protection of people from over-zealous or ruthless state officers is any less essential in a country of "ordered liberty" than is the protection of people from over-zealous or ruthless federal officers. Certainly there are far more state than federal enforcement officers and their activities, up to now, have more frequently and closely touched the intimate daily lives of people than have the activities of federal officers. A state officer's "knock at the door . . . as a prelude to a search, without authority of law," may be, as our experience shows, just as ominous to "ordered liberty" as though the knock were made by a federal officer.

MR. JUSTICE DOUGLAS, dissenting.

I believe, for the reasons stated by MR. JUSTICE BLACK in his dissent in *Adamson v. California*, 332 U. S. 46, 332 U. S. 68, that the Fourth Amendment is applicable to the States. I agree with MR. JUSTICE MURPHY that the evidence obtained in violation of it must be excluded in state prosecutions as well as in federal prosecutions, since, in absence of that rule of evidence, the Amendment would have no effective sanction. I also agree with him that, under that test, this evidence was improperly admitted, and that the judgments of conviction must be reversed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE joins, dissenting.

It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong. Of course, I agree with the Court that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment. *See* my dissenting views, and those of MR. JUSTICE BLACK, in *Adamson v. California*, 332 U. S. 46, 332 U. S. 68, 123. Quite apart from the blanket application of the Bill of Rights to the States, a devotee of democracy would ill-suit his name were he to suggest that his home's protection against unlicensed governmental invasion was not "of the very essence of a scheme of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325. It is difficult for me to understand how the Court can go this far and yet be unwilling to make the step which can give some meaning to the pronouncements it utters.

Imagination and zeal may invent a dozen methods to give content to the commands of the Fourth Amendment. But this Court is limited to the remedies currently available. It cannot legislate the ideal system. If we would attempt the enforcement of the search and seizure clause in the ordinary case today, we are limited to three devices: judicial exclusion of the illegally obtained evidence; criminal prosecution of violators, and civil action against violators in the action of trespass.

Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case, their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all.

This has been perfectly clear since 1914, when a unanimous Court decided *Weeks v. United States*, 232 U. S. 383, 232 U. S. 393. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense," we said,

"the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

"It reduces the Fourth Amendment to a form of words." Holmes, J., for the Court, in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 251 U. S. 392.

Today, the Court wipes those statements from the books with its bland citation of "other remedies." Little need be said concerning the possibilities of criminal prosecution. Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered. [Footnote 2/1] But there is an appealing ring in another alternative. A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home. Why not put the old writ to a new use? When the Court cites cases permitting the action, the remedy seems complete.

But what an illusory remedy this is if, by "remedy," we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment. The appealing ring softens when we recall that, in a trespass action, the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages — a penny, or a dollar. Are punitive damages possible? Perhaps. But a few states permit none, whatever the circumstances. [Footnote 2/2] In those that do, the plaintiff must show the real ill will or malice of the defendant, [Footnote 2/3] and surely it is not unreasonable to assume that one in honest pursuit of crime bears no malice toward the search victim. If that burden is carried, recovery may yet be defeated by the rule that there must be physical damages before punitive damages may be awarded. [Footnote 2/4] In addition, some states limit punitive damages to the actual expenses of litigation. *See* 61 Harv.L.Rev. 113, 119-120. Others demand some arbitrary ratio between actual and punitive damages before a verdict may stand. *See* Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1180-1181. Even assuming the ill will of the officer, his reasonable grounds for belief that the home he searched harbored evidence of crime is admissible in mitigation of punitive damages. *Gamble v. Keyes*, 35 S.D. 644, 153 N.W. 888; *Simpson v. McCaffrey*, 13 Ohio 508. The bad reputation of the plaintiff is likewise admissible. *Banfill v. Byrd*, 122 Miss. 288, 84 So. 227. If the evidence seized was actually used at a trial, that fact has been held a complete justification of the search, and a defense against the trespass action. *Elias v. Pasmore* [1934] 2 K.B. 164. And even if the plaintiff hurdles all these obstacles and gains a substantial verdict, the individual officer's finances may well make the judgment useless — for the municipality, of course, is not liable without its consent. Is it surprising that there is so little in the books concerning trespass actions for violation of the search and seizure clause?

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

If proof of the efficacy of the federal rule were needed, there is testimony in abundance in the recruit training programs and in service courses provided the police in states which follow the federal rule. [Footnote 2/5] St. Louis, for example, demands extensive training in the rules of search and seizure, with emphasis upon the ease with which a case may collapse if it depends upon evidence obtained unlawfully. Current court decisions are digested and read at roll calls. The same general pattern prevails in Washington, D.C. [Footnote 2/6] In Dallas, officers are thoroughly briefed and instructed that "the courts will follow the rules very closely, and will detect any frauds." [Footnote 2/7] In Milwaukee, a stout volume on the law of arrest and search and seizure is made the basis of extended instruction. [Footnote 2/8] Officer preparation in the applicable rules in Jackson, Mississippi, has included the lectures of an Associate Justice of the Mississippi Supreme Court. The instructions on evidence and search and seizure given to trainees in San Antonio carefully note the rule of exclusion in Texas, and close with this statement:

"Every police officer should know the laws and the rules of evidence. Upon knowledge of these facts determines whether the . . . defendant will be convicted or acquitted. . . . When you investigate a case . . . , remember throughout your investigation that only admissible evidence can be used."

But in New York City, we are informed simply that "copies of the State Penal Law and Code of Criminal Procedure" are given to officers, and that they are "kept advised" that illegally obtained evidence may be admitted in New York courts. In Baltimore, a "Digest of Laws" is distributed, and it is made clear that the statutory section excluding evidence

"is limited in its application to the trial of misdemeanors. . . . It would appear . . . that . . . evidence illegally obtained may still be admissible in the trial of felonies."

In Cleveland, recruits and other officers are told of the rules of search and seizure, but

"instructed that it is admissible in the courts of Ohio. The Ohio Supreme Court has indicated very definitely and clearly that Ohio belongs to the 'admissionist' group of states when evidence obtained by an illegal search is presented to the court."

A similar pattern emerges in Birmingham, Alabama.

The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy. There are apparent exceptions to the contrast — Denver, for example, appears to provide as comprehensive a series of instructions as that in Chicago, although Colorado permits introduction of the evidence, and Illinois does not. And, so far as we can determine from letters, a fairly uniform standard of officer instruction appears in other cities, irrespective of the local rule of evidence. But the

examples cited above serve to ground an assumption that has motivated this Court since the *Weeks* case: that this is an area in which judicial action has positive effect upon the breach of law, and that, without judicial action, there are simply no effective sanctions presently available.

I cannot believe that we should decide due process questions by simply taking a poll of the rules in various jurisdictions, even if we follow the *Palko* "test." Today's decision will do inestimable harm to the cause of fair police methods in our cities and states. Even more important, perhaps, it must have tragic effect upon public respect for our judiciary. For the Court now allows what is indeed shabby business: lawlessness by officers of the law.

Since the evidence admitted was secured in violation of the Fourth Amendment, the judgment should be reversed.

[Footnote 2/1]

See Pound, Criminal Justice in America (New York, 1930):

"Under our legal system, the way of the prosecutor is hard, and the need of 'getting results' puts pressure upon prosecutors to . . . indulge in that lawless enforcement of law which produces a vicious circle of disrespect for law."

P. 186.

And note the statement of the Wickersham Commission, with reference to arrests: ". . . in case of persons of no influence or little or no means, the legal restrictions are not likely to give an officer serious trouble." II National Commission on Law Observance and Enforcement, Report on Criminal Procedure (1931), p. 19.

[Footnote 2/2]

See McCormick, Damages, § 78. *See* Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual*, 22 Harv.L.Rev. 419.

[Footnote 2/3]

Id., § 79. *See Fennemore v. Armstrong*, 29 Del. 35, 96 A. 204.

[Footnote 2/4]

"It is a well settled and almost universally accepted rule in the law of damages that a finding of exemplary damages must be predicated upon a finding of actual damages."

17 Iowa L.Rev. 413, 414. This appears to be in overstatement. *See* McCormick, *supra*, § 83; Restatement IV, Torts, § 908, comment *c*.

[Footnote 2/5]

The material which follows is gleaned from letters and other material from Commissioners of Police and Chiefs of Police in twenty-six cities. Thirty-eight large cities in the United States were selected at random, and inquiries directed concerning the instructions provided police on the rules of search and seizure. Twenty-six replies have been received to date. Those of any significance are mentioned in the text of this opinion. The sample is believed to be representative, but it cannot, of course, substitute for a thoroughgoing comparison of present-day police procedures by a completely objective observer. A study of this kind would be of inestimable value.

[Footnote 2/6]

E.g., Assistant Superintendent Truscott's letter to the Washington Police Force of January 3, 1949, concerning *McDonald v. United States*, 335 U. S. 451.

[Footnote 2/7]

Recently, lectures have included two pages of discussion of the opinions in *Harris v. United States*, 331 U. S. 145.

[Footnote 2/8]

Chief of Police John W. Polcyn notes, in a Foreword to the book, that officers were often not properly informed with respect to searches and seizures before thoroughgoing instruction was undertaken. One of their fears was that of

"losing their cases in court only because they neglected to do what they might have done with full legal sanction at the time of the arrest, or did what they had no legal right to do at such time."

MR. JUSTICE RUTLEDGE, dissenting.

"Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Similarly, one should not reject a piecemeal wisdom, merely because it hobbles toward the truth with backward glances. Accordingly, although I think that all "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," *Adamson v. California*,332 U. S. 46, dissenting opinion at 332 U. S. 124, I welcome the fact that the Court, in its slower progress toward this goal, today finds the substance of the Fourth Amendment "to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, . . . valid as against the states." *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325.

But I reject the Court's simultaneous conclusion that the mandate embodied in the Fourth Amendment, although binding on the states, does not carry with it the one sanction — exclusion of evidence taken in violation of the Amendment's terms — failure to observe which means that "the protection of the Fourth Amendment . . . might as well be stricken from the Constitution." *Weeks v. United States*, 232 U. S. 383, 232 U. S. 393. For I agree with my brother MURPHY's demonstration that the Amendment without the sanction is a dead letter. Twenty-nine years ago, this Court, speaking through Justice Holmes, refused to permit the Government to subpoena documentary evidence which it had stolen, copied and then returned, for the reason that such a procedure "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 251 U. S. 392. But the version of the Fourth Amendment today held applicable to the states hardly rises to the dignity of a form of words; at best, it is a pale and frayed carbon copy of the original, bearing little resemblance to the Amendment the fulfillment of whose command I had heretofore thought to be "an indispensable need for a democratic society." *Harris v. United States*, 331 U. S. 145, dissenting opinion at 331 U. S. 161.

I also reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment. I had thought that issue settled by this Court's invalidation on dual grounds, in *Boyd v. United States*, 116 U. S. 616, of a federal statute which, in effect ,required the production of evidence thought probative by Government counsel — the Court there holding the statute to be "obnoxious to the prohibition of the Fourth Amendment of the Constitution, as well as of the Fifth." *Id.* at 116 U. S. 632.*See Adams v. New York*, 192 U. S. 585, 192 U. S. 597, 192 U. S. 598. The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established. *See Olmstead v. United States*, 277 U. S. 438, 277 U. S. 462. It is too late, in my judgment, to question it now. We apply it today in *Lustig v. United States*, *post*, p. 338 U. S. 74.

As Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment, so I think state legislators and judges — if subject to the Amendment, as I believe them to be — may not lend their offices to the admission in state courts of evidence thus seized. Compliance with the Bill of Rights betokens more than lip service.

The Court makes the illegality of this search and seizure its inarticulate premise of decision. I acquiesce in that premise, and think the convictions should be reversed.

MR. JUSTICE MURPHY joins in this opinion.

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4.4: Schmerber v. California 384 U.S. 757 (1966)

U.S. Supreme Court

Schmerber v. California, 384 U.S. 757 (1966)

Schmerber v. California

No. 658

Argued April 25, 1966

Decided June 20, 1966

384 U.S. 757

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Syllabus

Petitioner was hospitalized following an accident involving an automobile which he had apparently been driving. A police officer smelled liquor on petitioner's breath and noticed other symptoms of drunkenness at the accident scene and at the hospital, placed him under arrest, and informed him that he was entitled to counsel, that he could remain silent, and that anything he said would be used against him. At the officer's direction, a physician took a blood sample from petitioner despite his refusal on advice of counsel to consent thereto. A report of the chemical analysis of the blood, which indicated intoxication, was admitted in evidence over objection at petitioner's trial for driving while intoxicated. Petitioner was convicted, and the conviction was affirmed by the appellate court, which rejected his claims of denial of due process, of his privilege against self-incrimination, of his right to counsel, and of his right not to be subjected to unreasonable searches and seizures.

Held:

1. *Breithaupt v. Abram*, 352 U. S. 432, in which a claim of denial of due process of law was rejected in a similar situation is controlling as to the due process aspect. Pp. 384 U. S. 759-760.

2. The privilege against self-incrimination is not available to an accused in a case such as this, where there is not even a shadow of compulsion to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. Pp. 384 U. S. 760-765

3. Petitioner's limited claim, that he was denied his right to counsel by virtue of the withdrawal of blood over his objection on his counsel's advice is rejected, since he acquired no right merely because counsel advised that he could assert one. Pp.384 U. S. 765-766.

4. In view of the substantial interests in privacy involved, petitioner's right to be free of unreasonable searches and seizures applies to the withdrawal of his blood, but, under the facts in this case, there was no violation of that right. Pp. 384 U. S. 766-772.

(a) There was probable cause for the arrest, and the same facts as established probable cause justified the police in requiring

Page 384 U. S. 758

petitioner to submit to a test of his blood alcohol content. In view of the time required to bring petitioner to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant, and the clear indication that, in fact, evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest. Pp. 384 U. S. 770-771.

(b) The test chosen to measure petitioner's blood alcohol level was a reasonable one, since it was an effective means of determining intoxication, imposed virtually no risk, trauma or pain, and was performed in a reasonable manner by a physician in a hospital. P. 384 U. S. 771.

Affirmed.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. [Footnote 1] He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving. [Footnote 2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that, in that circumstance, the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction. [Footnote 3] In view of constitutional decisions since we last considered these issues in *Breithaupt v. Abram*, 352 U. S. 432 — *see Escobedo v. Illinois*, 378 U. S. 478; *Malloy v. Hogan*, 378 U. S. 1, and *Mapp v. Ohio*, 367 U. S. 643 — we granted certiorari. 382 U.S. 971. We affirm.

I

THE DUE PROCESS CLAUSE CLAIM

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment.

There, however, the driver was unconscious at the time the blood was withdrawn, and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that, under such circumstances, the withdrawal did not offend "that *sense of justice' of which we spoke in Rochin v. California, 342 U. S. 165." 352 U.S. at 352 U. S. 435. Breithaupt thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case [Footnote 4] or in supervening events persuades us that this aspect of Breithaupt should be overruled.*

II

THE PRIVILEGE AGAINST SELF-INCRIMINATION CLAIM

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing *Twining v. New Jersey*, 211 U. S. 78. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by *Malloy v. Hogan*, 378 U. S. 1,378 U. S. 8. We there held that

"[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will,

and to suffer no penalty . . . for such silence."

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, [Footnote 5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that, in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself." [Footnote 6]

If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In *Miranda v. Arizona*, *ante*, at 384 U. S. 460, the Court said of the interests protected by the privilege:

"All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through

"the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"

Ibid. The leading case in this Court is *Holt v. United States*, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

218 U.S. at 218 U. S. 252-253. [Footnote 7]

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. [Footnote 8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 562.

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. [Footnote 9] Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III

THE RIGHT TO COUNSEL CLAIM

This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV

THE SEARCH AND SEIZURE CLAIM

In *Breithaupt*, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of *Wolf v. Colorado*, 338 U. S. 25. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled *Wolf* in that respect, holding in *Mapp v. Ohio*, 367 U. S. 643, that the exclusionary rule adopted for federal prosecutions in *Weeks v. United States*, 232 U. S. 383, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf*, we recognized "[t]he security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society." 338 U.S. at 338 U. S. 27. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.

Because we are dealing with intrusions into the human body, rather than with state interferences with property relationships or private papers — "houses, papers, and effects" — we write on a clean slate. Limitations on the kinds of property which may be seized under warrant, [Footnote 10] as distinct from the procedures for search and the permissible scope of search, [Footnote 11] are not instructive in this context. We begin with the assumption that, once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol contest, the Fourth Amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor. [Footnote 12] The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There, he noticed similar symptoms of drunkenness. He thereupon informed petitioner

"that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence."

While early cases suggest that there is an unrestricted

"right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime,"

Weeks v. United States, 232 U. S. 383, 232 U. S. 392; *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors — first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, *United States v. Rabinowitz*, 339 U. S. 56, 339 U. S. 72-73 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. *People v. Chiagles*, 237 N.Y. at 197-198, 142 N.E. at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in

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human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search

"be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. United States, 333 U. S. 10, 333 U. S. 13-14; *see also Aguilar v. Texas*, 378 U. S. 108, 378 U. S. 110-111. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston v. United States*, 376 U. S. 364, 376 U. S. 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. *See Breithaupt v. Abram*, 352 U.S. at 352 U. S. 436, n. 3. Such tests are a commonplace in these days of periodic physical examination, [Footnote 13] and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "Breathalyzer" test petitioner refused, *see* n 9, *supra*. We need not decide whether such wishes would have to be respected. [Footnote 14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment — for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

[Footnote 1]

California Vehicle Code § 23102(a) provides, in pertinent part, "It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway. . . ." The offense is a misdemeanor.

[Footnote 2]

Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

[Footnote 3]

This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeal was denied. *See Edwards v. California*, 314 U. S. 160.

[Footnote 4]

We

"cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest."

Breithaupt v. Abram, 352 U.S. at 352 U. S. 441. (WARREN, C.J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. *Compare* the discussion at 384 U. S. *infra.*

[Footnote 5]

A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or headshake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

[Footnote 6]

Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness."

"[A]s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation. . . ."

Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 584-585. 8 Wigmore, Evidence § 2252 (McNaughton rev. 1961).

[Footnote 7]

Compare Wigmore's view,

"that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence."

8 Wigmore, Evidence § 2263 (McNaughton rev. 1961). California adopted the Wigmore formulation in *People v. Trujillo*, 32 Cal.2d 105, 194 P.2d 681 (1948); with specific regard to blood tests, *see People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8 (1953); *People v. Duroncelay*, 48 Cal.2d 766, 312 P.2d 690 (1957). Our holding today, however, is not to be understood as adopting the Wigmore formulation.

[Footnote 8]

The cases are collected in 8 Wigmore, Evidence § 2265 (McNaughton rev. 1961). *See also United States v. Chibbaro*, 361 F.2d 365 (C.A.3d Cir. 1966); *People v. Graves*, 64 Cal.2d 208, 49 Cal.Rptr. 386, 388, 411 P.2d 114, 116 (1966); Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand.L.Rev. 485 (1957).

[Footnote 9]

This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test — products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. *See* text at n 13 *infra.*

Petitioner has raised a similar issue in this case in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California*, 380 U. S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, *see Miranda v. Arizona*, *ante* at 384 U. S. 468, n. 37. Since trial here was conducted after our decision in *Malloy v. Hogan*, *supra*,making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

[Footnote 10]

See, e.g., Gouled v. United States, 255 U. S. 298; *Boyd v. United States*, 116 U. S. 616; *contra*, *People v. Thayer*, 63 Cal.2d 635, 47 Cal.Rptr. 780, 408 P.2d 108 (1965); *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 54 Geo.L.J. 593 (1966).

[Footnote 11]

See, e.g. Silverman v. United States, 365 U. S. 505; *Abel v. United States*, 362 U. S. 217,362 U. S. 235; *United States v. Rabinowitz*, 339 U. S. 56.

[Footnote 12]

California law authorizes a peace officer to arrest

"without a warrant . . . [w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Cal.Penal Code § 836.3. Although petitioner was ultimately prosecuted for a misdemeanor he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal.Vehicle Code § 23101. California's test of probable cause follows the federal standard. *People v. Cockrell*, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965).

[Footnote 13]

The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service, as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance, and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Breithaupt v. Abram, 352 U.S. at 352 U. S. 436.

[Footnote 14]

See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup.Ct.Rev. 75, 82-83.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

In joining the Court's opinion, I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that, apart from this consideration, the case in no way implicates the Fifth Amendment. *Cf.* my dissenting opinion and that of MR. JUSTICE WHITE in *Miranda v. Arizona*, *ante*, pp. 384 U. S. 504, 384 U. S. 526.

MR. CHIEF JUSTICE WARREN, dissenting.

While there are other important constitutional issues in this case, I believe it is sufficient for me to reiterate my dissenting opinion in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, as the basis on which to reverse this conviction.

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MR. JUSTICE BLACK with whom MR. JUSTICE DOUGLAS joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that

"the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense."

To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that

". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

(Footnote omitted.) I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

In the first place, it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project, which proved to be successful, was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision, as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amendment goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as *Boyd v.*

United States,116 U. S. 616, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content, but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation, blood, of course, is not oral testimony given by an accused, but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, at page 384 U. S. 764, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence" like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses which are essentially testimonial." And, in explanation of its fears, the Court goes on to warn that

"To compel a person to submit to testing [by lie detectors, for example] in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.'*Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 562."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against compulsory self-incrimination the broad and liberal construction that *Counselman*and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in *Boyd v. United States*, *supra*, which Professor Wigmore criticized severely, *see* 8 Wigmore, Evidence, § 2264 (3d ed. 1940), pp. 366-373, makes that one among the greatest constitutional decisions of this Court. In that case, 116 U.S. at 116 U. S. 634-635, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the law,

". . . are within the reason of criminal proceedings for all the purposes of . . . that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . . within the meaning of the fifth amendment to the constitution. . . . *"

Obviously, the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this, the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

"A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Boyd v. United States, *supra*, at 116 U. S. 635.

The Court went on to say, at 116 U. S. 637, that to require

"an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself."

The Court today departs from the teachings of *Boyd.* Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference, I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in *Miranda v. Arizona*, *ante*, p. 384 U. S. 436. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact, I think the interpretive constitutional philosophy used in *Miranda*, unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-incrimination a broad and liberal construction in line with the wholesome admonitions in the *Boyd* case. The closing sentence in the Fifth Amendment section of the Court's opinion in the present case is enough by itself, I think, to expose the unsoundness of what the Court here holds. That sentence reads:

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds. "

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons, as well as those set out in concurring opinions of BLACK and DOUGLAS, JJ., in *Rochin v. California*, 342 U. S. 165, 342 U. S. 174, 342 U. S. 177, and my concurring opinion in *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 661, and the dissenting opinions in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, 352 U. S. 442, I dissent from the Court's holding and opinion in this case.

* A majority of the Court applied the same constitutional interpretation to the search and seizure provisions of the Fourth Amendment over the dissent of Mr. Justice Miller, concurred in by Chief Justice Waite.

MR. JUSTICE DOUGLAS, dissenting.

I adhere to the views of THE CHIEF JUSTICE in his dissent in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, and to the views I stated in my dissent in that case (*id.*, 352 U. S. 442), and add only a word.

We are dealing with the right of privacy which, since the *Breithaupt* case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights.*Griswold v. Connecticut*, 381 U. S. 479. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. *Id.*, 381 U. S. 484. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons." *Ibid.* No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.

MR. JUSTICE FORTAS, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. *Cf.* CHIEF JUSTICE WARREN's dissenting opinion in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440.

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4.5: Sibron v. New York 392 U.S. 40 (1968)

U.S. Supreme Court

Sibron v. New York, 392 U.S. 40 (1968)

Sibron v. New York

No. 63

Argued December 11-12, 1967

Decided June 10, 1968*

392 U.S. 40

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Syllabus

In No. 63, a New York police officer on patrol observed during an eight-hour period a man (appellant Sibron), whom he did not know and had no information about, in conversation with six or eight persons whom the officer knew as narcotics addicts. Later, the officer saw Sibron in a restaurant with three more known addicts. The officer on none of these occasions overheard any conversation or saw anything pass between Sibron and the others. Later, the officer ordered Sibron outside the restaurant, where the officer said, "You know what I am after." When Sibron reached into his pocket, the officer reached into the same pocket and found some envelopes containing heroin. Sibron was charged with the unlawful possession of the heroin. The trial court rejected Sibron's motion to suppress the heroin as illegally seized, holding that the officer had probable cause to make the arrest and to seize the heroin. Thereafter, Sibron pleaded guilty, preserving his right to appeal the evidentiary ruling. Sibron, who was precluded from obtaining bail pending appeal, completed service of his six-month sentence roughly two months before it was physically possible for him to present his case on appeal. His conviction was affirmed by the intermediate state appellate court and then by the New York Court of Appeals. In this Court, the State initially sought to justify the search on the basis of New York's ""stop and frisk"" law, N.Y.Code Crim.Proc. § 180-a, which the New York Court of Appeals apparently viewed as authorizing the search. That law provides that a "police officer may stop any person abroad in a public place whom he reasonably suspects is committing . . ." certain crimes "and may demand . . . his name, address and an explanation of his actions," and when the officer "suspects that he is in danger . . . , he may search such person for a dangerous weapon." After this Court noted probable jurisdiction the county District Attorney confessed error. In No. 74, an officer, at home in the apartment where he had lived for 12 years, heard a noise at the door. Through the peephole,

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he saw two strangers (appellant Peters and another) tiptoeing furtively about the hallway. He called the police, dressed, and armed himself with his service revolver. He observed the two still engaged in suspicious maneuvers and, believing that they were attempting a burglary, the officer pursued them, catching Peters by the collar in the apartment hallway. Peters said that he had been visiting a girlfriend, whom he declined to identify. The officer patted Peters down for weapons, and discovered a hard object which he thought might be a knife but which turned out to be a container with burglar's tools, for the possession of which Peters was later charged. The trial court denied Peters' motion to suppress that evidence, refusing to credit Peters' testimony that he had been visiting a girlfriend and finding that the officer had the requisite "reasonable suspicion" under § 180-a to stop and question Peters and to "frisk" him for a dangerous weapon in the apartment hallway, which the court found was a "public place," within the meaning of the statute. Peters then pleaded guilty, preserving his right to appeal the rejection of his motion to suppress. The intermediate appellate court affirmed, as did the New York Court of Appeals, which held the search justified under § 180-a. The parties on both sides contend that the principal issue in both cases is the constitutionality of § 180-a "on its face."

Held:

1. Sibron's completion of service of his sentence does not moot his appeal. Pp. 392 U. S. 50-58.

(a) A State may not effectively deny a convict access to its appellate courts until his release and then argue that his case has been mooted by his failure to do what it has prevented him from doing. P. 392 U. S. 52.

(b) Even though Sibron was a multiple offender, he "had a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States*, 329 U. S. 211 (1946), followed; *St. Pierre v. United States*, 319 U. S. 41 (1943), qualified. Pp. 392 U. S. 55-58.

2. A confession of error, though entitled to great weight, does not relieve this Court from making its own examination of the record of a case where a conviction has been erroneously obtained, particularly where a judgment of the State's highest court interpreting a state statute is challenged on constitutional grounds and the confession of error has been made by a local official, rather than by an official authorized to speak for the State as a whole. Pp. 392 U. S. 58-59.

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3. Since the question in this Court is not whether the search (or seizure) was authorized by § 180-a, but whether it was reasonable under the Fourth Amendment, the Court does not pass upon the facial constitutionality of the statute. Pp. 392 U. S. 59-62.

4. In No. 63, the heroin was illegally seized, and therefore inadmissible in evidence. Pp. 392 U. S. 62-66.

(a) The search of Sibron cannot be justified as incident to a lawful arrest, since no probable cause existed before the search. Pp. 392 U. S. 62-63.

(b) There were no adequate grounds for the officer to search Sibron for weapons, since the officer had no reason to believe that Sibron was armed and dangerous, and even if there arguably had been such a justification, there was no initial limited exploration for arms before the officer thrust his hand into Sibron's pocket. *Terry v. Ohio*, *ante*, p. 392 U. S. 1, distinguished. Pp. 392 U. S. 63-65.

5. In No. 74, the search was reasonable, and the evidence seized was admissible. Pp. 392 U. S. 66-67.

(a) The search of Peters was incident to a lawful arrest under the Fourth Amendment. Pp. 392 U. S. 66-67.

(b) The "arrest" of Peters had taken place before the search, and, after the arrest, the officer had authority to search Peters. P. 392 U. S. 67.

(c) The incident search, which was limited in scope, was justified by the need to seize weapons as well as the need to prevent destruction of evidence of the crime. P. 392 U. S. 67.

No. 63, 18 N.Y.2d 603, 219 N.E.2d 196, reversed; No. 74, 18 N.Y.2d 238, 219 N.E.2d 595, affirmed.

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MR CHIEF JUSTICE WARREN delivered the opinion of the Court.

These are companion cases to No. 67, *Terry v. Ohio*, *ante*, p. 392 U. S. 1, decided today. They present related questions under the Fourth and Fourteenth Amendments, but the cases arise in the context of New York's ""stop and frisk"" law, N.Y.Code Crim.Proc. § 180-a. This statute provides:

"1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions."

"2. When a police officer has stopped a person for questioning pursuant to this section and reasonably

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suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The appellants, Sibron and Peters, were both convicted of crimes in New York state courts on the basis of evidence seized from their persons by police officers. The Court of Appeals of New York held that the evidence was properly admitted, on the ground that the searches which uncovered it were authorized by the statute.*People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (memorandum); *People v. Peters*, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966). Sibron and Peters have appealed their convictions to this Court, claiming that § 180-a is unconstitutional on its face and as construed and applied, because the searches and seizures which it was held to have authorized violated their rights under the Fourth Amendment, made applicable

to the States by the Fourteenth.*Mapp v. Ohio*, 367 U. S. 643 (1961). We noted probable jurisdiction, 386 U. S. 954(1967); 386 U.S. 980 (1967), and consolidated the two cases for argument with No. 67.

The facts in these cases may be stated briefly. Sibron, the appellant in No. 63, was convicted of the unlawful possession of heroin. [Footnote 1] He moved before trial to suppress

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the heroin seized from his person by the arresting officer, Brooklyn Patrolman Anthony Martin. After the trial court denied his motion, Sibron pleaded guilty to the charge, preserving his right to appeal the evidentiary ruling. [Footnote 2] At the hearing on the motion to suppress, Officer Martin testified that, while he was patrolling his beat in uniform on March 9, 1965, he observed Sibron "continually from the hours of 4:00 P. M. to 12:00, midnight . . . in the vicinity of 742 Broadway." He stated that, during this period of time, he saw Sibron in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts. The officer testified that he did not overhear any of these conversations, and that he did not see anything pass between Sibron and any of the others. Late in the evening, Sibron entered a restaurant. Patrolman Martin saw Sibron speak with three more known addicts inside the restaurant. Once again, nothing was overheard and nothing was seen to pass between Sibron and the addicts. Sibron sat down and ordered pie and coffee, and, as he was eating, Patrolman Martin approached him and told him to come outside. Once outside, the officer said to Sibron, "You know what I am after." According to the officer, Sibron "mumbled something and reached into his pocket." Simultaneously, Patrolman Martin thrust his hand into the same pocket, discovering several glassine envelopes, which, it turned out, contained heroin.

The State has had some difficulty in settling upon a

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theory for the admissibility of these envelopes of heroin. In his sworn complaint, Patrolman Martin stated:

"As the officer approached the defendant, the latter being in the direction of the officer and seeing him, he did put his hand in his left jacket pocket and pulled out a tinfoil envelope and did attempt to throw same to the ground. The officer, never losing sight of the said envelope, seized it from the def[endan]t's left hand, examined it, and found it to contain ten glascine [*sic*] envelopes with a white substance alleged to be Heroin."

This version of the encounter, however, bears very little resemblance to Patrolman Martin's testimony at the hearing on the motion to suppress. In fact, he discarded the abandonment theory at the hearing. [Footnote 3] Nor did the officer ever seriously suggest that he was in fear of bodily harm and that he searched Sibron in self-protection to find weapons. [Footnote 4]

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The prosecutor's theory at the hearing was that Patrolman Martin had probable cause to believe that Sibron was in possession of narcotics because he had seen him conversing with a number of known addicts over an eight-hour period. In the absence of any knowledge on Patrolman Martin's part concerning the nature of the intercourse between Sibron and the addicts, however, the trial court was inclined to grant the motion to suppress. As the judge stated,

"All he knows about the unknown men: they are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights."

The prosecutor, however, reminded the judge that Sibron had admitted on the stand, in Patrolman Martin's absence, that he had been talking to the addicts about narcotics. Thereupon, the trial judge changed his mind and ruled that the officer had probable cause for an arrest.

Section 180-a, the ""stop and frisk"" statute, was not mentioned at any point in the trial court. The Appellate Term of the Supreme Court affirmed the conviction without opinion. In the Court of Appeals of New York, Sibron's case was consolidated with the *Peters* case, No. 74. The Court of Appeals held that the search in *Peters* was justified under the statute, but it wrote no opinion in Sibron's case. The dissents of Judges Fuld and Van Voorhis, however, indicate that the court rested its holding on § 180-a. At any rate, in its Brief in Opposition

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to the Jurisdictional Statement in this Court, the State sought to justify the search on the basis of the statute. After we noted probable jurisdiction, the District Attorney for Kings County confessed error.

Peters, the appellant in No. 74, was convicted of possessing burglary tools under circumstances evincing an intent to employ them in the commission of a crime. [Footnote 5] The tools were seized from his person at the time of his arrest, and like Sibron, he made a pretrial motion to suppress them. When the trial court denied the motion, he too pleaded guilty, preserving his right to appeal. Officer Samuel Lasky of the New York City Police Department testified at the hearing on the motion that he was at home in his apartment in Mount Vernon, New York, at about 1 p.m. on July 10, 1964. He had just finished taking a shower and was drying himself when he heard a noise at his door. His attempt to investigate was interrupted by a telephone call, but when he returned and looked through the peephole into the hall, Officer Lasky saw "two men tiptoeing out of the alcove toward the stairway." He immediately called the police, put on some civilian clothes and armed himself with his service revolver. Returning to the peephole, he saw "a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway." Officer Lasky testified that he had lived in the 120-unit building for 12 years and that he did not recognize either of the men as tenants. Believing that he had happened upon the two men in the course of an attempted burglary, [Footnote 6]

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Officer Lasky opened his door, entered the hallway and slammed the door loudly behind him. This precipitated a flight down the stairs on the part of the two men, [Footnote 7] and Officer Lasky gave chase. His apartment was located on the sixth floor, and he apprehended Peters between the fourth and fifth floors. Grabbing Peters by the collar, he continued down another flight in unsuccessful pursuit of the other man. Peters explained his presence in the building to Officer Lasky by saying that he was visiting a girlfriend. However, he declined to reveal the girlfriend's name, on the ground that she was a married woman. Officer Lasky patted Peters down for weapons, and discovered a hard object in his pocket. He stated at the hearing that the object did not feel like a gun, but that it might have been a knife. He removed the object from Peters' pocket. It was an opaque plastic envelope, containing burglar's tools.

The trial court explicitly refused to credit Peters' testimony that he was merely in the building to visit his girlfriend. It found that Officer Lasky had the requisite "reasonable suspicion" of Peters under § 180-a to stop him and question him. It also found that Peters' response was "clearly unsatisfactory," and that, "under

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the circumstances, Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed." It held that the hallway of the apartment building was a "public place" within the meaning of the statute. The Appellate Division of the Supreme Court affirmed without opinion. The Court of Appeals also affirmed, essentially adopting the reasoning of the trial judge, with Judges Fuld and Van Voorhis dissenting separately.

I

At the outset, we must deal with the question whether we have jurisdiction in No. 63. It is asserted that, because Sibron has completed service of the six-month sentence imposed upon him as a result of his conviction, the case has become moot under *St. Pierre v. United States*, 319 U. S. 41 (1943). [Footnote 8] We have concluded that the case is not moot.

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In the first place, it is clear that the broad dictum with which the Court commenced its discussion in *St. Pierre* — that "the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate," (319 U.S. at 319 U. S. 42) — fails to take account of significant qualifications recognized in *St. Pierre* and developed in later cases. Only a few days ago, we held unanimously that the writ of habeas corpus was available to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had been released before this Court could adjudicate his claims. *Carafas v. LaVallee*, 391 U. S. 234 (1968). On numerous occasions in the past, this Court has proceeded to adjudicate the merits of criminal cases in which the sentence had been fully served or the probationary period during which a suspended sentence could be reimposed had terminated. *Ginsberg v. New York*, 390 U. S. 629 (1968); *Pollard v. United States*, 352 U. S. 354 (1957); *United States v. Morgan*, 346 U. S. 502 (1954); *Fiswick v. United States*, 329 U. S. 211 (1946). Thus, mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court.

St. Pierre itself recognized two possible exceptions to its "doctrine" of mootness, and both of them appear to us to be applicable here. The Court stated that "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence," noting also that, because the petitioner's conviction was for contempt, and because his controversy with the Government was a continuing one, there was a good chance that there would be "ample opportunity to review" the important question presented on the merits in a future proceeding. 319 U.S. at 319 U. S. 43. This

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was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional right. [Footnote 9] There was no way for Sibron to bring his case here before his six-month sentence expired. By statute, he was precluded from obtaining bail pending appeal, [Footnote 10] and, by virtue of the inevitable delays of the New York court system, he was released less than a month after his newly appointed appellate counsel had been supplied with a copy of the transcript, and roughly two months before it was physically possible to present his case to the first tier in the state appellate court system. [Footnote 11] This was true despite the fact that he took all steps to perfect his appeal in a prompt, diligent, and timely manner.

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process — in the context of prosecutions for "minor" offenses which carry only short sentences. [Footnote 12] We do not believe that the Constitution contemplates that

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people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of such cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre* clearly recognized, a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing. [Footnote 13]

The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where "under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which

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has . . . been satisfied." 319 U.S. at 319 U. S. 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later, in *Fiswick v. United States*, 329 U. S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of "moral turpitude" even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that, if the petitioner should in the future decide he wanted to become an American citizen, he might have difficulty proving that he was of "good moral character." *Id.* at 329 U. S. 222. [Footnote 14]

The next case which dealt with the problem of collateral consequences was *United States v. Morgan*, 346 U. S. 502 (1954). There, the convict had probably been subjected to a higher sentence as a recidivist by a state court on account of the old federal conviction which he sought to attack. But, as the dissent pointed out, there was no indication that the recidivist increment would be removed from his state sentence upon invalidation of the federal conviction, *id.* at 346 U. S. 516, n. 4, and the Court chose to rest its holding that the case was not moot upon

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a broader view of the matter. Without canvassing the possible disabilities which might be imposed upon Morgan or alluding specifically to the recidivist sentence, the Court stated:

"Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties; civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid."

Id. at 346 U. S. 512-513.

Three years later, in *Pollard v. United States*, 352 U. S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and, in effect, presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick* and a statement that "convictions may entail collateral legal disadvantages in the future," *id.* at 352 U. S. 358, the Court concluded that "[t]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do, in fact, entail adverse collateral legal consequences. [Footnote 15] The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness." *Parker v. Ellis*, 362 U. S. 574, 362 U. S. 577 (1960) (dissenting opinion).

This case certainly meets that test for survival. Without pausing to canvass the possibilities in detail, we note that New York expressly provides by statute that Sibron's conviction may be used to impeach his character should he choose to put it in issue at any future

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criminal trial, N.Y.Code Crim.Proc. § 393-c, and that it must be submitted to a trial judge for his consideration in sentencing should Sibron again be convicted of a crime, N.Y.Code Crim.Proc. § 482. There are doubtless other collateral consequences. Moreover, we see no relevance in the fact that Sibron is a multiple offender. Morgan was a multiple offender, *see* 346 U.S. at 346 U. S. 503-504, and so was Pollard, *see* 352 U.S. at 352 U. S. 355-357. A judge or jury faced with a question of character, like a sentencing judge, may be inclined to forgive or at least discount a limited number of minor transgressions, particularly if they occurred at some time in the relatively distant past. [Footnote 16] It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. [Footnote 17] And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record. The question of the validity of a criminal conviction can arise in many contexts, *compare Burgett v. Texas*, 389 U. S. 109 (1967), and the sooner the issue is fully litigated, the better for all concerned. It is always preferable to litigate a matter

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when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action. *Cf. Peyton v. Rowe*, 391 U. S. 54, 391 U. S. 64(1968). [Footnote 18]

None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case. There is nothing abstract, feigned, or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the "impact of actuality" [Footnote 19] to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

St. Pierre v. United States, supra, must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not

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the case here. Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick v. United States, supra,* at 329 U. S. 222. The case is not moot.

II

We deal next with the confession of error by the District Attorney for Kings County in No. 63. Confessions of error are, of course, entitled to and given great weight, but they do not "relieve this Court of the performance of the judicial function."*Young v. United States*, 315 U. S. 257, 315 U. S. 258 (1942). It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we

noted in *Young*, "our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." 315 U.S. at 315 U. S. 259. *See also Marino v. Ragen*, 332 U. S. 561 (1947). This consideration is entitled to special weight where, as in this case, we deal with a judgment of a State's highest court interpreting a state statute which is challenged on constitutional grounds. The need for such authoritative declarations of state law in sensitive constitutional contexts has been the very reason for the development of the abstention doctrine by this Court. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941). Such a judgment is the final product of a sovereign judicial system, and is deserving of respectful treatment by this Court. Moreover, in this case, the confession of error on behalf of the entire state executive and judicial branches is made not by a state official, but by the elected legal officer of one political subdivision within the State. The District Attorney for Kings County seems to have come late to the opinion that this conviction violated Sibron's constitutional

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rights. For us to accept his view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution. We turn to the merits.

III

The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of § 180-a "on its face." We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of § 180-a next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case. In this respect, it is quite different from the question of the adequacy of the procedural safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances. *See Berger v. New York*, 388 U. S. 41 (1967). No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment. *E.g., Aguilar v. Texas*, 378 U. S. 108 (1964); *Giordenello v. United States*, 357 U. S. 480 (1958). This Court held last Term in *Berger v. New York, supra*, that N.Y.Code Crim Proc. § 813-a, which established a procedure for the issuance of search warrants to permit electronic eavesdropping, failed to

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embody the safeguards demanded by the Fourth and Fourteenth Amendments.

Section 180-a, unlike § 813-a, deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to "stop" people, "demand" explanations of them and "search [them] for dangerous weapon[s]" in certain circumstances upon "reasonable suspicion" that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of § 180-a are not the categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations. [Footnote 20] New York is, of course, free to develop its own

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law of search and seizure to meet the needs of local law enforcement, *see Ker v. California*, 374 U. S. 23, 374 U. S. 34 (1963), and, in the process, it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure

"is not whether the search [or seizure] was authorized by state law. The question is, rather, whether the search was reasonable under the Fourth Amendment. Just as a search authorized by State law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one."

Cooper v. California, 386 U. S. 58, 386 U. S. 61 (1967).

Accordingly, we make no pronouncement on the facial constitutionality of § 180-a. The constitutional point

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with respect to a statute of this peculiar sort, as the Court of Appeals of New York recognized, is "not so much . . . the language employed as . . . the conduct it authorizes." *People v. Peters*, 18 N.Y.2d 238, 245, 219 N.E.2d 595, 599, 273 N.Y.S.2d 217, 222 (1966). We have held today in *Terry v. Ohio*, *ante*, p. 392 U. S. 1, that police conduct of the sort with which § 180-a deals must be judged under the Reasonable Search and Seizure Clause of the Fourth Amendment. The inquiry under that clause may differ sharply from the inquiry set up by the categories of § 180-a. Our constitutional inquiry would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the searches and seizures which underlie these two convictions.

Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron, and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed

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until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *E.g.*, *Henry v. United States*, 361 U. S. 98 (1959); *Johnson v. United States*, 333 U. S. 10, 333 U. S. 16-17 (1948). Thus, the search cannot be justified as incident to a lawful arrest.

If Patrolman Martin lacked probable cause for an arrest, however, his seizure and search of Sibron might still have been justified at the outset if he had reasonable grounds to believe that Sibron was armed and dangerous. *Terry v. Ohio*, *ante*, p.392 U. S. 1. We are not called upon to decide in this case whether there was a "seizure" of Sibron inside the restaurant antecedent to the physical seizure which accompanied the search. The record is unclear with respect to what transpired between Sibron and the officer inside the restaurant. It is totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation. In any event, this deficiency in the record is immaterial, since Patrolman Martin obtained no new information in the interval between his initiation of the encounter in the restaurant and his physical seizure and search of Sibron outside.

Although the Court of Appeals of New York wrote no opinion in this case, it seems to have viewed the search here as a self-protective search for weapons and to have affirmed on the basis of § 180-a, which authorizes such a search when the officer "reasonably suspects that he is in danger of life or limb." The Court of Appeals has, at any rate, justified searches during field interrogation on the ground that

"[t]he answer to the question propounded by the policeman may be a

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bullet; in any case, the exposure to danger could be very great."

People v. Rivera, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964), *cert. denied*, 37 U.S. 978 (1965). But the application of this reasoning to the facts of this case proves too much. The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous. *Terry v. Ohio*, *supra*. Patrolman Martin's testimony reveals no such facts. The suspect's mere act of talking with a number of known narcotics addicts over an eight-hour period no more gives rise to reasonable fear of life or limb on the part of the police officer than it justifies an arrest for committing a crime. Nor did Patrolman Martin urge that, when Sibron put his hand in his pocket, he feared that he was going for a weapon and acted in self-defense. His opening statement to Sibron — "You know what I am after" — made it abundantly clear that he sought narcotics, and his testimony at the hearing left no doubt that he thought there were narcotics in Sibron's pocket. [Footnote 21]

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Even assuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth

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Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

V

We think it is equally clear that the search in Peters' case was wholly reasonable under the Constitution. The Court of Appeals of New York held that the search was made legal by § 180-a, since Peters was "abroad in a public place," and since Officer Lasky was reasonably suspicious of his activities and, once he had stopped Peters, reasonably suspected that he was in danger of life or limb, even though he held Peters at gun point. This may be the justification for the search under state law. We think, however, that, for purposes of the Fourth Amendment, the search was properly incident to a lawful arrest. By the time Officer Lasky caught up with Peters on the stairway between the fourth and fifth floors of the apartment building, he had probable cause to arrest him for attempted burglary. The officer heard strange noises at his door which apparently led him to believe that someone sought to force entry. When he investigated these noises, he saw two men, whom he had never seen before in his 12 years in the building, tiptoeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And when Officer Lasky entered the hallway, the men fled down the stairs. It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, [Footnote 22] deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors

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to be considered in the decision to make an arrest. *Brinegar v. United States*, 338 U. S. 160 (1949); *Husty v. United States*, 282 U. S. 694 (1931), *see Henry v. United States*,361 U. S. 98, 361 U. S. 103 (1959).

As we noted in Sibron's case, a search incident to a lawful arrest may not precede the arrest and serve as part of its justification. It is a question of fact precisely when, in each case, the arrest took place. *Rios v. United States*, 364 U. S. 253, 364 U. S. 261-262 (1960). And while there was some inconclusive discussion in the trial court concerning when Officer Lasky "arrested" Peters, it is clear that the arrest had, for purposes of constitutional justification, already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly "seized" him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. *See Henry v. United States*, *supra*, at 361 U. S. 103. At that point he had the authority to search Peters, and the incident search was obviously justified

"by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime."

Preston v. United States, 376 U. S. 364, 376 U. S. 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons. While patting down his outer clothing, Officer Lasky discovered an object in his pocket which might have been used as a weapon. He seized it and discovered it to be a potential instrument of the crime of burglary.

We have concluded that Peters' conviction fully comports with the commands of the Fourth and Fourteenth Amendments, and must be affirmed. The conviction in

No. 63, however, must be reversed, on the ground that the heroin was unconstitutionally admitted in evidence against the appellant.

It is so ordered.

* Together with No. 74, *Peters v. New York*, argued on December 12, 1967, also on appeal from the same court.

[Footnote 1]

N.Y.Pub.Health Law § 3305 makes the unauthorized possession of any narcotic drug unlawful, and §§ 1751 and 1751-a of the N.Y.Penal Law of 1909, then in effect, made the grade of the offense depend upon the amount of the drugs found in the possession of the defendant. The complaint in this case originally charged a felony, but the trial court granted the prosecutor's motion to reduce the charge on the ground that "the Laboratory report will indicate a misdemeanor charge." Sibron was convicted of a misdemeanor and sentenced to six months in jail.

[Footnote 2]

N.Y.Code Crim.Proc. § 81-c provides that an order denying a motion to suppress evidence in a criminal case

"may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

[Footnote 3]

Patrolman Martin stated several times that he put his hand into Sibron's pocket and seized the heroin before Sibron had any opportunity to remove his own hand from the pocket. The trial court questioned him on this point:

"Q. Would you say at that time that he reached into his pocket and handed the packets to you? Is that what he did, or did he drop the packets?"

"A. He did not drop them. *I do not know what his intentions were.* He pushed his hand into his pocket."

"MR. JOSEPH [Prosecutor]: You intercepted it; didn't you, Officer?"

"THE WITNESS: Yes."

(Emphasis added.)

It is, of course, highly unlikely that Sibron, facing the officer at such close quarters, would have tried to remove the heroin from his pocket and throw it to the ground in the hope that he could escape responsibility for it.

[Footnote 4]

The possibility that Sibron, who never, so far as appears from the record, offered any resistance, might have posed a danger to Patrolman Martin's safety was never even discussed as a potential justification for the search. The only mention of weapons by the officer in his entire testimony came in response to a leading question by Sibron's counsel, when Martin stated that he "thought he [Sibron] might have been" reaching for a gun. Even so, Patrolman Martin did not accept this suggestion by the opposition regarding the reason for his action; the discussion continued upon the plain premise that he had been looking for narcotics all the time.

[Footnote 5]

N.Y.Pen.Law of 1909, § 408, made the possession of such tools under such circumstances a misdemeanor for first offenders and a felony for all those who have "been previously convicted of any crime." Peters was convicted of a felony under this section.

[Footnote 6]

Officer Lasky testified that, when he called the police immediately before leaving his apartment, he "told the Sergeant at the desk that two burglars were on my floor."

[Footnote 7]

Officer Lasky testified that, when he emerged from his apartment, "I slammed the door, I had my gun, and I ran down the stairs after them." A sworn affidavit of the Assistant District Attorney, which was before the trial court when it ruled on the motion to

suppress, stated that, when apprehended, Peters was "fleeing down the steps of the building." The trial court explicitly took note of the flight of Peters and his companion as a factor contributing to Officer Lasky's "reasonable suspicion" of them:

"We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girlfriend, and, when observed by another tenant, to rapidly descend by stairway in the presence of elevators."

[Footnote 8]

The first suggestion of mootness in this case came upon oral argument, when it was revealed for the first time that appellant had been released. This fact did not appear in the record, despite the fact that the release occurred well over two years before the case was argued here. Nor was mootness hinted at by the State in its Brief in Opposition to the Jurisdictional Statement in this Court — where it took the position that the decision below was so clearly right that it did not merit further review — or in its brief on the merits — in which it conceded that the decision below clearly violated Sibron's constitutional rights and urged that it was an aberrant interpretation which should not impair the constitutionality of the New York statute. Following the suggestion of mootness on oral argument, moreover, the State filed a brief in which it amplified its views as to why the case should be held moot, but added the extraordinary suggestion that this Court should ignore the problem and pronounce upon the constitutionality of a statute in a case which has become moot. Normally in these circumstances we would consider ourselves fully justified in foreclosing a party upon an issue; however, since the question goes to the very existence of a controversy for us to adjudicate, we have undertaken to review it.

[Footnote 9]

Cf. Fay v. Noia, 372 U. S. 391, 372 U. S. 424 (1963):

"[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

[Footnote 10]

See N.Y.Code Crim.Proc. § 555 subd. 2.

[Footnote 11]

Sibron was arrested on March 9, 1965, and was unable to make bail before trial because of his indigency. He thus remained in jail from that time until the expiration of his sentence (with good time credit) on July 10, 1965. He was convicted on April 23. His application for leave to proceed *in forma pauperis* was not granted until May 14, and his assigned appellate counsel was not provided with a transcript until June 11. The Appellate Term of the Supreme Court recessed on June 7 until September. Thus, Sibron was released well before there had been any opportunity even to argue his case in the intermediate state appellate court. A decision by the Court of Appeals of New York was not had until July 10, 1966, the anniversary of Sibron's release.

[Footnote 12]

Cf., e.g., Thompson v. City of Louisville, 362 U. S. 199 (1960).

[Footnote 13]

In *St. Pierre*, the Court noted that the petitioner could have taken steps to preserve his case, but that "he did not apply to this Court for a stay or a supersedeas." 319 U.S. at 319 U. S. 43. Here however, it is abundantly clear that there is no procedure of which Sibron could have availed himself to prevent the expiration of his sentence long before this Court could hear his case. A supersedeas from this Court is a purely ancillary writ, and may issue only in connection with an appeal actually taken. *Ex parte Ralston*, 119 U. S. 613 (1887); Sup.Ct.Rule 18; *see* R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 435, at 883 (R. Wolfson & P. Kurland ed., 1951). At the time Sibron completed service of his sentence, the only judgment outstanding was the conviction itself, rendered by the Criminal Court of the City of New York, County of Kings. This Court had no jurisdiction to hear an appeal from that judgment, since it was not rendered by the "highest court of a State in which a decision could be had," 28 U.S.C. § 1257, and there could be no warrant for interference with the orderly appellate processes of the state courts. Thus, no supersedeas could have issued. Nor could this Court have ordered Sibron admitted to bail before the expiration of his sentence, since the offense was not bailable, 18 U.S.C. § 3144; *see* n 10, *supra*. Thus, this case is distinguishable from *St. Pierre*

in that Sibron "could not have brought his case to this Court for review before the expiration of his sentence." 319 U.S. at 319 U. S. 43.

[Footnote 14]

Compare Ginsberg v. New York, 390 U. S. 629, 390 U. S. 633, n. 2 (1968), where this Court held that the mere possibility that the Commissioner of Buildings of the Town of Hempstead, New York, might "in his discretion" attempt in the future to revoke a license to run a luncheonette because of a single conviction for selling relatively inoffensive "girlie" magazines to a 16-year-old boy was sufficient to preserve a criminal case from mootness.

[Footnote 15]

See generally Note, 53 Va.L.Rev. 403 (1967).

[Footnote 16]

We do not know from the record how many convictions Sibron had, for what crimes, or when they were rendered. At the hearing, he admitted to a 1955 conviction for burglary and a 1957 misdemeanor conviction for possession of narcotics. He also admitted that he had other convictions, but none were specifically alluded to.

[Footnote 17]

We note that there is a clear distinction between a general impairment of credibility, to which the Court referred in *St. Pierre*, *see* 319 U.S. at 319 U. S. 43, and New York's specific statutory authorization for use of the conviction to impeach the "character" of a defendant in a criminal proceeding. The latter is a clear legal disability deliberately and specifically imposed by the legislature.

[Footnote 18]

This factor has clearly been considered relevant by the Court in the past in determining the issue of mootness. *See Fiswick v. United States*, 329 U. S. 211, 329 U. S. 221-222 (1946).

[Footnote 19]

Frankfurter, A Note on Advisory Opinions, 37 Harv.L.Rev. 1002, 1006 (1924). *See also Parker v. Ellis*, 362 U. S. 574, 362 U. S. 592-593 (1960) (dissenting opinion).

[Footnote 20]

It is not apparent, for example, whether the power to "stop" granted by the statute entails a power to "detain" for investigation or interrogation upon less than probable cause, or, if so, what sort of durational limitations upon such detention are contemplated. And while the statute's apparent grant of a power of compulsion indicates that many "stops" will constitute "seizures," it is not clear that all conduct analyzed under the rubric of the statute will either rise to the level of a "seizure" or be based upon less than probable cause. In No. 74, the *Peters* case, for example, the New York courts justified the seizure of appellant under § 180-a, but we have concluded that there was, in fact, probable cause for an arrest when Officer Lasky seized Peters on the stairway. *See infra* at 392 U. S. 66. In any event, a pronouncement by this Court upon the abstract validity of § 180-a's "stop" category would be most inappropriate in these cases, since we have concluded that neither of them presents the question of the validity of a seizure of the person for purposes of interrogation upon less than probable cause.

The statute's other categories are equally elastic, and it was passed too recently for the State's highest court to have ruled upon many of the questions involving potential intersections with federal constitutional guarantees. We cannot tell, for example, whether the officer's power to "demand" of a person an "explanation of his actions" contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the "stop" is "custodial."*Compare Miranda v. Arizona*, 384 U. S. 436 (1966). There are, moreover, substantial indications that the statutory category of a "search for a dangerous weapon" may encompass conduct considerably broader in scope than that which we approved in *Terry v. Ohio*, *ante*, p. 392 U. S. 1. *See infra* at 392 U. S. 65-66. *See also People v. Taggart*, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967). At least some of the activity apparently permitted under the rubric of searching for dangerous weapons may thus be permissible under the Constitution only if the "reasonable suspicion" of criminal activity rises to the level of probable cause. Finally, it is impossible to tell whether the standard of "reasonable suspicion" connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth

Amendment. *Compare Terry v. Ohio, supra, with People v. Taggart, supra.* In this connection, we note that the searches and seizures in both *Sibron* and *Peters* were upheld by the Court of Appeals of New York as predicated upon "reasonable suspicion," whereas we have concluded that the officer in *Peters* had probable cause for an arrest, while the policeman in *Sibron* was not possessed of any information which would justify an intrusion upon rights protected by the Fourth Amendment.

[Footnote 21]

It is argued in dissent that this Court has in effect overturned factual findings by the two courts below that the search in this case was a self-protective measure on the part of Patrolman Martin, who thought that Sibron might have been reaching for a gun. It is true, as we have noted, that the Court of Appeals of New York apparently rested its approval of the search on this view. The trial court, however, made no such finding of fact. The trial judge adopted the theory of the prosecution at the hearing on the motion to suppress. This theory was that there was probable cause to arrest Sibron for some crime having to do with narcotics. The fact which tipped the scales for the trial court had nothing to do with danger to the policeman. The judge expressly changed his original view and held the heroin admissible upon being reminded that Sibron had admitted on the stand that he spoke to the addicts about narcotics. This admission was not relevant on the issue of probable cause, and we do not understand the dissent to take the position that, prior to the discovery of heroin, there was probable cause for an arrest.

Moreover, Patrolman Martin himself never at any time put forth the notion that he acted to protect himself. As we have noted, this subject never came up, until, on redirect examination, defense counsel raised the question whether Patrolman Martin thought Sibron was going for a gun. *See* n 4, *supra.* This was the only reference to weapons at any point in the hearing, and the subject was swiftly dropped. In the circumstances, an unarticulated "finding" by an appellate court which wrote no opinion, apparently to the effect that the officer's invasion of Sibron's person comported with the Constitution because of the need to protect himself, is not deserving of controlling deference.

[Footnote 22]

See n 7, *supra.*

MR. JUSTICE DOUGLAS, concurring in No. 63.

Officer Martin testified that, on the night in question, he observed appellant Sibron continually from 4 p.m. to 12 midnight, and that, during that eight-hour period, Sibron conversed with different persons each personally known to Martin as narcotics addicts. When Sibron entered a restaurant, Martin followed him inside where he observed Sibron talking to three other persons also personally known to Martin as narcotics addicts. At that point, he approached Sibron and asked him to come outside. When Sibron stepped out, Martin said, "You know what I am after." Sibron then reached inside his pocket, and, at the same time, Martin reached into the same pocket and discovered several glassine envelopes which were found to contain heroin. Sibron was subsequently convicted of unlawful possession of heroin.

Consorting with criminals may in a particular factual setting be a basis for believing that a criminal project is underway. Yet talking with addicts, without more, rises no higher than suspicion. That is all we have here, and if it is sufficient for a "seizure" and a "search," then there is no such thing as privacy for this vast group of "sick" people.

MR. JUSTICE DOUGLAS, concurring in No. 74

Officer Lasky testified that he resided in a multiple-dwelling apartment house in Mount Vernon, New York. His apartment was on the sixth floor. At about 1 in the afternoon, he had just stepped out of the shower and was drying himself when he heard a noise at his door. Just then his phone rang and he answered the call.

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After hanging up, he looked through the peephole of his door and saw two men, one of whom was appellant, tiptoeing out of an alcove toward the stairway. He phoned his headquarters to report this occurrence, and then put on some clothes and proceeded back to the door. This time he saw a tall man tiptoeing away from the alcove, followed by appellant, toward the stairway. Lasky came out of his apartment, slammed the door behind him, and then gave chase, gun in hand, as the two men began to run down the stairs. He apprehended appellant on the stairway between the fourth and fifth floors, and asked what he was doing in the building. Appellant replied that he was looking for a girlfriend, but refused to give her name, saying that she was a married woman. Lasky then "frisked" appellant for a weapon, and discovered in his right pants pocket a plastic envelope. The envelope contained a tension

bar, 6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge. Appellant was subsequently convicted for possession of burglary tools.

I would hold that, at the time Lasky seized appellant, he had probable cause to believe that appellant was on some kind of burglary or housebreaking mission.* In my view, he had probable cause to seize appellant, and accordingly to conduct a limited search of his person for weapons.

* *See* N.Y. Pen.Code §§ 140.20, 140.25 (1967).

MR. JUSTICE WHITE, concurring.

I join Parts I-IV of the Court's opinion. With respect to appellant Peters, I join the affirmance of his conviction not because there was probable cause to arrest, a question I do not reach, but because there was probable cause to stop Peters for questioning, and thus to frisk him for dangerous weapons. *See* my concurring

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opinion in *Terry v. Ohio*, *ante*, p. 392 U. S. 34. While patting down Peters' clothing, the officer "discovered an object in his pocket which might have been used as a weapon." *Ante* at 392 U. S. 67. That object turned out to be a package of burglar's tools. In my view, those tools were properly admitted into evidence.

MR. JUSTICE FORTAS, concurring.

1. I would construe *St. Pierre v. United States*, 319 U. S. 41 (1943), in light of later cases, to mean that a criminal case is moot if it appears that no collateral legal consequences will be imposed on the basis of the challenged conviction. (*Cf.*majority opinion, *ante* at 392 U. S. 57-58.)

2. I join without qualification in the Court's judgment and opinion concerning the standards to be used in determining whether § 180-a, as applied to particular situations, is constitutional. But I would explicitly reserve the possibility that a statute purporting to authorize a warrantless search might be so extreme as to justify our concluding that it is unconstitutional "on its face," regardless of the facts of the particular case. To the extent that the Court's opinion may indicate the contrary, I disagree. (*Cf.* majority opinion, *ante* at 392 U. S. 59-62.)

3. In Sibron's case (No. 63), I would conclude that we find nothing in the record of this case or pertinent principles of law to cause us to disregard the confession of error by counsel for Kings County. I would not discourage confessions of error, nor would I disregard them. (*Cf.* majority opinion, pt. II, *ante* at 392 U. S. 58-59.)

MR. JUSTICE HARLAN, concurring in the result.

I fully agree with the results the Court has reached in these cases. They are, I think, consonant with and dictated by the decision in *Terry v. Ohio*, *ante*, p. 392 U. S. 1. For reasons I do not understand, however, the Court has declined to rest the judgments here upon the principles

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of *Terry*. In doing so, it has, in at least one particular, made serious inroads upon the protection afforded by the Fourth and Fourteenth Amendments.

The Court is, of course, entirely correct in concluding that we should not pass upon the constitutionality of the New York "stop and frisk" law "on its face." The statute is certainly not unconstitutional on its face — that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it "constitutional on its face" if that expression means that any action now or later thought to fall within the terms of the statute is, *ipso facto*, within constitutional limits as well. No statute, state or federal, receives any such imprimatur from this Court.

This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street police work. Without giving *carte blanche* to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry*, a right to stop may indeed be premised on reasonable suspicion, and does not require probable cause, and hence the New York formulation is, to that extent, constitutional. This does not mean that suspicion need not be "reasonable" in the constitutional as well as the statutory

sense. Nor does it mean that this Court has approved more than a momentary stop, or has indicated what questioning may constitutionally occur during a stop, for the cases before us do not raise these questions. [Footnote 2/1]

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Turning to the individual cases, I agree that the conviction in No. 63, Sibron, should be reversed, and would do so upon the premises of *Terry.* At the outset, I agree that sufficient collateral legal consequences of Sibron's conviction have been shown to prevent this case from being moot, and I agree that the case should not be reversed simply on the State's confession of error.

The considerable confusion that has surrounded the "search" or "frisk" of Sibron that led to the actual recovery of the heroin seems to me irrelevant for our purposes. Officer Martin repudiated his first statement, which might conceivably have indicated a theory of "abandonment," *see ante* at 392 U. S. 45-46. No matter which of the other theories is adopted, it is clear that there was at least a forcible frisk, comparable to that which occurred in *Terry,* which requires constitutional justification.

Since carrying heroin is a crime in New York, probable cause to believe Sibron was carrying heroin would also have been probable cause to arrest him. As the Court says, Officer Martin clearly had neither. Although Sibron had had conversations with several known addicts, he had done nothing, during the several hours he was under surveillance, that made it "probable" that he was either carrying heroin himself or engaging in transactions with these acquaintances.

Nor were there here reasonable grounds for a *Terry*-type "stop" short of an arrest. I would accept, as an adequate general formula, the New York requirement that the officer must "reasonably suspect" that the person he stops "is committing, has committed or is about to commit a felony." N.Y.Code Crim.Proc. § 180-a. "On its face," this requirement is, if anything, more stringent than the requirement stated by the Court in *Terry:*

"where a police officer observes unusual conduct which leads him reasonably to conclude, in light of his experience, that criminal activity may be afoot. . . . "

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Ante at 392 U. S. 30. The interpretation of the New York statute is, of course, a matter for the New York courts, but any particular stop must meet the *Terry*standard as well.

The forcible encounter between Officer Martin and Sibron did not meet the *Terry*reasonableness standard. In the first place, although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended. That was the case in *Terry,* but it palpably was not the case here. For eight continuous hours, up to the point when he interrupted Sibron eating a piece of pie, Officer Martin apparently observed not a single suspicious action and heard not a single suspicious word on the part of Sibron himself or any person with whom he associated. If anything, that period of surveillance pointed away from suspicion.

Furthermore, in *Terry,* the police officer judged that his suspect was about to commit a violent crime and that he had to assert himself in order to prevent it. Here there was no reason for Officer Martin to think that an incipient crime, or flight, or the destruction of evidence would occur if he stayed his hand; indeed, there was no more reason for him to intrude upon Sibron at the moment when he did than there had been four hours earlier, and no reason to think the situation would have changed four hours later. While no hard and fast rule can be drawn, I would suggest that one important factor, missing here, that should be taken into account in determining whether there are reasonable grounds for a forcible intrusion is whether there is any need for immediate action.

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For these reasons, I would hold that Officer Martin lacked reasonable grounds to intrude forcibly upon Sibron. In consequence, the essential premise for the right to conduct a self-protective frisk was lacking. *See* my concurring opinion in *Terry, ante,*p. 392 U. S. 31. I therefore find it unnecessary to reach two further troublesome questions. First, although I think that, as in *Terry,* the right to frisk is automatic when an officer lawfully stops a person suspected of a crime whose nature creates a substantial likelihood that he is armed, it is not clear that suspected possession of narcotics falls into this category. If the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so. Second, I

agree with the Court that, even where a self-protective frisk is proper, its scope should be limited to what is adequate for its purposes. I see no need here to resolve the question whether this frisk exceeded those bounds.

Turning now to No. 74, *Peters*, I agree that the conviction should be upheld, but here I would differ strongly and fundamentally with the Court's approach. The Court holds that the burglar's tools were recovered from Peters in a search incident to a lawful arrest. I do not think that Officer Lasky had anything close to probable cause to arrest Peters before he recovered the burglar's tools. Indeed, if probable cause existed here, I find it difficult to see why a different rationale was necessary to support the stop and frisk in *Terry* and why States such as New York have had to devote so much thought to the constitutional problems of field interrogation. This case will be the latest in an exceedingly small number of cases in this Court indicating what suffices for probable cause. While, as the Court noted in *Terry*, the influence of this Court on police tactics "in

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the field" is necessarily limited, the influence of a decision here on hundreds of courts and magistrates who have to decide whether there is probable cause for a real arrest or a full search will be large.

Officer Lasky testified that, at 1 o'clock in the afternoon, he heard a noise at the door to his apartment. He did not testify, nor did any state court conclude, that this "led him to believe that someone sought to force entry." *Ante* at 392 U. S. 66. He looked out into the public hallway and saw two men whom he did not recognize, surely not a strange occurrence in a large apartment building. One of them appeared to be tiptoeing. Lasky did not testify that the other man was tiptoeing or that either of them was behaving "furtively." *Ibid.* Lasky left his apartment and ran to them, gun in hand. He did not testify that there was any "flight," *ante* at 392 U. S. 66, [Footnote 2/2] though flight at the approach of a gun-carrying stranger (Lasky was apparently not in uniform) is hardly indicative of *mens rea.*

Probable cause to arrest means evidence that would warrant a prudent and reasonable man (such as a magistrate, actual or hypothetical) in believing that a particular person has committed or is committing a crime. [Footnote 2/3]

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Officer Lasky had no extrinsic reason to think that a crime had been or was being committed, so whether it would have been proper to issue a warrant depends entirely on his statements of his observations of the men. Apart from his conclusory statement that he thought the men were burglars, he offered very little specific evidence. I find it hard to believe that, if Peters had made good his escape and there were no report of a burglary in the neighborhood, this Court would hold it proper for a prudent neutral magistrate to issue a warrant for his arrest. [Footnote 2/4]

In the course of upholding Peters' conviction, the Court makes two other points that may lead to future confusion. The first concerns the "moment of arrest." If there is an escalating encounter between a policeman and a citizen, beginning perhaps with a friendly conversation but ending in imprisonment, and if evidence is developing during that encounter, it may be important to identify the moment of arrest, *i.e.*, the moment when the policeman was not permitted to proceed further unless he by then had probable cause. This "moment of arrest" problem is not, on the Court's premises, in any way involved in this case: the Court holds that Officer Lasky had probable cause to arrest at the moment he caught Peters, and hence probable cause clearly preceded anything that might be thought an arrest. The Court implies, however, that, although there is no problem about whether the arrest of Peters occurred

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late enough, *i.e.*, after probable cause developed, there might be a problem about whether it occurred early enough, *i.e.*, before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say,

"Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not, in fact, arrest me until afterwards."

This fact is important because, as demonstrated by *Terry*, not every curtailment of freedom of movement is an "arrest" requiring antecedent probable cause. At the same time, an officer who does have probable cause may, of course, seize and search

immediately. Hence, while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause, the prosecution must be able to date the arrest as *early* as it chooses following the development of probable cause.

The second possible source of confusion is the Court's statement that "Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects." *Ante* at 392 U. S. 67. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search, [Footnote 2/5] I assume that this is merely a factual observation. As a factual matter, I agree with it.

Although the articulable circumstances are somewhat less suspicious here than they were in *Terry,* I would affirm on the *Terry* ground that Officer Lasky had reasonable

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cause to make a forced stop. Unlike probable cause to arrest, reasonable grounds to stop do not depend on any degree of likelihood that a crime has been committed. An officer may forcibly intrude upon an incipient crime even where he could not make an arrest for the simple reason that there is nothing to arrest anyone for. Hence, although Officer Lasky had small reason to believe that a crime had been committed, his right to stop Peters can be justified if he had a reasonable suspicion that Peters was about to attempt burglary.

It was clear that the officer had to act quickly if he was going to act at all, and, as stated above, it seems to me that, where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action. Perhaps more important, the Court's opinion in *Terry* emphasized the special qualifications of an experienced police officer. While "probable cause" to arrest or search has always depended on the existence of hard evidence that would persuade a "reasonable man," in judging on-the-street encounters, it seems to me proper to take into account a police officer's trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct. Thus, the statement by an officer that "he looked like a burglar to me" adds little to an affidavit filed with a magistrate in an effort to obtain a warrant. When the question is whether it was reasonable to take limited but forcible steps in a situation requiring immediate action, however, such a statement looms larger. A court is, of course, entitled to disbelieve the officer (who is subject to cross-examination), but, when it believes him and when there are some articulable supporting facts, it is entitled to find action taken under fire to be reasonable.

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Given Officer Lasky's statement of the circumstances, and crediting his experienced judgment as he watched the two men, the state courts were entitled to conclude, as they did, that Lasky forcibly stopped Peters on "reasonable suspicion." The frisk made incident to that stop was a limited one, which turned up burglar's tools. Although the frisk is constitutionally permitted only in order to protect the officer, if it is lawful the State is of course entitled to the use of any other contraband that appears.

For the foregoing reasons I concur in the result in these cases.

[Footnote 2/1]

For a thoughtful study of many of these points, *see* ALI Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, §§ 2.01, 2.02, and the commentary on these sections appearing at 87-105.

[Footnote 2/2]

It is true, as the Court states, that the New York courts attributed such a statement to him. The attribution seems to me unwarranted by the record.

[Footnote 2/3]

E.g., Beck v. Ohio, 379 U. S. 89; *Rios v. United States,* 364 U. S. 253; *Henry v. United States,* 361 U. S. 98. In *Henry, supra,* at 361 U. S. 100, the Court said that 18 U.S.C. § 3052 "states the constitutional standard" for felony arrests by FBI agents without warrant. That section authorized agents to

"make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

Under *Ker v. California*, 374 U. S. 23, a parallel standard is applicable to warrantless arrests by state and local police.

[Footnote 2/4]

Compare Henry v. United States, 361 U. S. 98, in which the Court said there was "far from enough evidence . . . to justify a magistrate in issuing a warrant." *Id.* at 361 U. S. 103. Agents knew that a federal crime, theft of whisky from an interstate shipment, had been committed "in the neighborhood." Petitioner was observed driving into an alley, picking up packages, and driving away. I agree that these facts did not constitute probable cause, but find it hard to see that the evidence here was more impressive.

[Footnote 2/5]

The leading case is *United States v. Rabinowitz*, 339 U. S. 56.

MR. JUSTICE BLACK, concurring in No. 74 and dissenting in No. 63.

I concur in the affirmance of the judgment against Peters, but dissent from the reversal of No. 63, *Sibron v. New York*, and would affirm that conviction. Sibron was convicted of violating New York's anti-narcotics law on the basis of evidence seized from him by the police. The Court reverses on the ground that the narcotics were seized as the result of an unreasonable search in violation of the Fourth Amendment. The Court has decided today in *Terry v. Ohio* and in No. 74, *Peters v. New York*, that a policeman does not violate the Fourth Amendment when he makes a limited search for weapons on the person of a man who the policeman has probable cause to believe has a dangerous weapon on him with which he might injure the policeman or others or both, unless he is searched and the weapon is taken away from him. And, of course, under established principles, it is not a violation of the Fourth Amendment for a policeman to search a person who he has probable cause to believe is committing a felony at the time. For both these reasons, I think the seizure of the narcotics from Sibron was not unreasonable

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under the Fourth Amendment. Because of a different emphasis on the facts, I find it necessary to restate them.

About 4 p.m., Patrolman Martin saw appellant Sibron in the vicinity of 742 Broadway. From then until 12 o'clock midnight, Sibron remained there. During that time, the policeman saw Sibron talking with six or eight persons whom the policeman knew from past experience to be narcotics addicts. Later, at about 12 o'clock, Sibron went into a restaurant, and there the patrolman saw Sibron speak with three more known addicts. While Sibron was eating in the restaurant, the policeman went to him and asked him to come out. Sibron came out. There, the officer said to Sibron, "You know what I am after." Sibron mumbled something and reached into his left coat pocket. The officer also moved his hand to the pocket and seized what was in it, which turned out to be heroin. The patrolman testified at the hearing to suppress use of the heroin as evidence that he "thought he [Sibron] might have been" reaching for a gun.

Counsel for New York, for some reason that I have not been able to understand, has attempted to confess error — that is, that for some reason the search or seizure here violated the Fourth Amendment. I agree with the Court that we need not and should not accept this confession of error. But, unlike the Court, I think, for two reasons, that the seizure did not violate the Fourth Amendment, and that the heroin was properly admitted in evidence.

First. I think there was probable cause for the policeman to believe that, when Sibron reached his hand to his coat pocket, Sibron had a dangerous weapon which he might use if it were not taken away from him. This, according to the Court's own opinion, seems to have been the ground on which the Court of Appeals of New York justified the search, since it

"affirmed on the

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basis of § 180-a, which authorizes such a search when the officer 'reasonably suspects that he is in danger of life or limb.'"

Ante at 392 U. S. 63. And it seems to me to be a reasonable inference that, when Sibron, who had been approaching and talking to addicts for eight hours, reached his hand quickly to his left coat pocket, he might well be reaching for a gun. And as the Court has emphasized today in its opinions in the other "stop and frisk" cases, a policeman under such circumstances has to act in a split second; delay may mean death for him. No one can know when an addict may be moved to shoot or stab, and particularly when he moves his hand hurriedly to a pocket where weapons are known to be habitually carried, it behooves an officer who wants to live to act at once, as this officer did. It is true that the officer might also have thought Sibron was about to get heroin, instead of a

weapon. But the law enforcement officers all over the Nation have gained little protection from the courts through opinions here if they are now left helpless to act in self-defense when a man associating intimately and continuously with addicts, upon meeting an officer, shifts his hand immediately to a pocket where weapons are constantly carried.

In appraising the facts as I have, I realize that the Court has chosen to draw inferences different from mine and those drawn by the courts below. The Court, for illustration, draws inferences that the officer's testimony at the hearing continued upon the "plain premise that he had been looking for narcotics all the time." *Ante* at 392 U. S. 47, n. 4. But this Court is hardly, at this distance from the place and atmosphere of the trial, in a position to overturn the trial and appellate courts on its own independent finding of an unspoken "premise" of the officer's inner thoughts.

In acting upon its own findings and rejecting those of the lower state courts, this Court, sitting in the marble halls of the Supreme Court Building in Washington,

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D.C. should be most cautious. Due to our holding in *Mapp v. Ohio*, 367 U. S. 643, we are due to get for review literally thousands of cases raising questions like those before us here. If we are setting ourselves meticulously to review all such findings, our task will be endless, and many will rue the day when *Mapp* was decided. It is not only wise but imperative that, where findings of the facts of reasonableness and probable cause are involved in such state cases, we should not overturn state court findings unless in the most extravagant and egregious errors. It seems fantastic to me even to suggest that this is such a case. I would leave these state court holdings alone.

Second, I think also that there was sufficient evidence here on which to base findings that, after recovery of the heroin, in particular, an officer could reasonably believe there was probable cause to charge Sibron with violating New York's narcotics laws. As I have previously argued, there was, I think, ample evidence to give the officer probable cause to believe Sibron had a dangerous weapon and that he might use it. Under such circumstances, the officer had a right to search him in the very limited fashion he did here. Since, therefore, this was a reasonable and justified search, the use of the heroin discovered by it was admissible in evidence.

I would affirm.

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4.6: Illinois v. Gates 462 U.S. 213 (1983)

U.S. Supreme Court

Illinois v. Gates, 462 U.S. 213 (1983)

Illinois v. Gates

No. 81-430

Argued October 13, 1982

Reargued March 1, 1983

Decided June 8, 1983

462 U.S. 213

On May 3, 1978, the Police Department of Bloomingdale, Ill., received an anonymous letter which included statements that respondents, husband and wife, were engaged in selling drugs; that the wife would drive their car to Florida on May 3 to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and that respondents presently had over $100,000 worth of drugs in their basement. Acting on the tip, a police officer determined respondents' address and learned that the husband made a reservation on a May 5 flight to Florida. Arrangements for surveillance of the flight were made with an agent of the Drug Enforcement Administration (DEA), and the surveillance disclosed that the husband took the flight, stayed overnight in a motel room registered in the wife's name, and left the following morning with a woman in a car bearing an Illinois license plate issued to the husband, heading north on an interstate highway used by travelers to the Bloomingdale area. A search warrant for respondents' residence and automobile was then obtained from an Illinois state court judge, based on the Bloomingdale police officer's affidavit setting forth the foregoing facts and a copy of the anonymous letter. When respondents arrived at their home, the police were waiting, and discovered marihuana and other contraband in respondents' car trunk and home. Prior to respondents' trial on charges of violating state drug laws, the trial court ordered suppression of all the items seized, and the Illinois Appellate Court affirmed. The Illinois Supreme Court also affirmed, holding that the letter and affidavit were inadequate to sustain a determination of probable cause for issuance of the search warrant under *Aguilar v. Texas*, 378 U. S. 108, and *Spinelli v. United States*, 393 U. S. 410, since they failed to satisfy the "two-pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report.

Held:

1. The question — which this Court requested the parties to address — whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should be modified so as, for example, not to require exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment, will not be decided in this case, since it was not presented to or decided by the Illinois courts. Although prior decisions interpreting the "not pressed or passed on below" rule have not involved a State's failure to raise a defense to a federal right or remedy asserted below, the purposes underlying the rule are, for the most part, as applicable in such a case as in one where a party fails to assert a federal right. The fact that the Illinois courts affirmatively applied the federal exclusionary rule does not affect the application of the "not pressed or passed on below" rule. Nor does the State's repeated opposition to respondents' substantive Fourth Amendment claims suffice to have raised the separate question whether the exclusionary rule should be modified. The extent of the continued vitality of the rule is an issue of unusual significance, and adhering scrupulously to the customary limitations on this Court's discretion promotes respect for its adjudicatory process and the stability of its decisions, and lessens the threat of untoward practical ramifications not foreseen at the time of decision. Pp. 462 U. S. 217-224.

2. The rigid "two-pronged test" under *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for issuance of a warrant is abandoned, and the "totality of the circumstances" approach that traditionally has informed probable cause determinations is substituted in its place. The elements under the "two-pronged test" concerning the informant's "veracity," "reliability," and "basis of knowledge" should be understood simply as closely intertwined issues that may usefully illuminate the common sense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular

place. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. This flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*. Pp.462 U. S. 230-241.

3. The judge issuing the warrant had a substantial basis for concluding that probable cause to search respondents' home and car existed. Under the "totality of the circumstances" analysis, corroboration of details of an informant's tip by independent police work is of significant value. *Cf. Draper v. United States*, 358 U. S. 307. Here, even standing alone, the facts obtained through the independent investigation of the Bloomingdale police officer and the DEA at least suggested that respondents were involved in drug trafficking. In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by the police officer's efforts. Pp. 462 U. S. 241-246.

85 Ill.2d 376, 423 N.E.2d 887, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C.J., and BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 462 U. S. 246. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 462 U. S. 274. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 462 U. S. 291.

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4.7: Utah v. Strieff 579 US ___ (2016)

SUPREME COURT OF THE UNITED STATES

UTAH *v.* STRIEFF

certiorari to the supreme court of utah

No. 14–1373. Argued February 22, 2016—Decided June 20, 2016

Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

Held: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown* v. *Illinois*, 422 U. S. 590 . In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Pp. 4–10.

(a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." *Segura* v. *United States*, 468 U. S. 796 . But to ensure that those deterrence benefits are not outweighed by the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson* v. *Michigan*, 547 U. S. 586 . Pp. 4–5.

(b) As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, pre-existing, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest. Pp. 5–10.

(1) Three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590 , lead to this conclusion. The first, "temporal proximity" between the initially unlawful stop and the search, *id.*, at 603, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, "the presence of intervening circumstances, *id.*, at 603–604, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, "the purpose and flagrancy of the official misconduct," *id.*, at 604, also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. Pp. 6–9.

(2) Strieff's counterarguments are unpersuasive. First, neither Officer Fackrell's purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell's purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by *Brown*'s "purpose and flagrancy" factor. Pp. 9–10.

2015 UT 2, 357 P. 3d 532, reversed.

Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Alito, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined as to Parts I, II, and III. Kagan, J., filed a dissenting opinion, in which Ginsburg, J., joined.

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4.8: Carroll v. United States 267 U.S. 132 (1925)

U.S. Supreme Court

Carroll v. United States, 267 U.S. 132 (1925)

Carroll v. United States

No. 15

Argued December 4, 1923

Restored to docket for reargument January 28, 1924

Reargued March 14, 1924

Decided March 2, 1925

267 U.S. 132

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF MICHIGAN

1. The legislative history of 6 of the act supplemental to the National Prohibition Act, November 23, 1921, c. 134, 42 Stat. 223, which makes it a misdemeanor for any officer of the United States to search a private dwelling without a search warrant or to search any other building or property without a search warrant, maliciously and without reasonable cause, shows clearly the intent of Congress to make a distinction as to the necessity for a search warrant in the searching of private dwellings and in the searching of automobiles or other road vehicles, in the enforcement of the Prohibition Act. P. 267 U. S. 144.

2. The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. P.267 U. S. 147.

3. Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act, do not violate the Amendment, if made upon probable cause, *i.e.*, upon a belief, reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband liquor. P. 267 U. S. 149.

4. Various acts of Congress are cited to show that, practically since the beginning of the Government, the Fourth Amendment has been construed as recognizing a necessary difference between a search for contraband in a store, dwelling-house, or other structure

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for the search of which a warrant may readily be obtained, and a search of a ship, wagon, automobile, or other vehicle which may be quickly moved out of the locality or jurisdiction in which the warrant must be sought. P. 267 U. S. 150.

5. Section 26, Title II, of the National Prohibition Act, provides that, when an officer "shall discover any person in the act" of transporting intoxicating liquor in any automobile, or other vehicle, in violation of law, it shall be his duty to seize the liquor and thereupon to take possession of the vehicle and arrest the person in charge of it, and that, upon conviction of such person, the court shall order the liquor destroyed, and, except for good cause shown, shall order a public sale, etc. of the other property seized.

Held:

(a) That the primary purpose is the seizure and destruction of the contraband liquor, and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. P. 267 U. S. 153.

(b) Hence, the right to search an automobile for illicit liquor and to seize the liquor, if found, and thereupon to seize the vehicle also and to arrest the offender, does not depend upon the right to arrest the offender in the first instance, and therefore it is not determined by the degree of his offence — whether a misdemeanor under § 29, Title II of the Act, because of being his first or second offence, or a felony because it is his third, and the rule allowing arrest without warrant for misdemeanor only when the offence is committed in the officer's presence, but for a felony when the officer has reasonable cause to believe that the person arrested has committed a felony, is not the test of the validity of such search and seizure. Pp. 267 U. S. 155, 267 U. S. 156.

(c) The seizure is legal if the officer, in stopping and searching the vehicle, has reasonable or probable cause for believing that contraband liquor is being illegally transported in it. P. 267 U. S. 155.

(d) The language of § 26 — when an officer shall "discover " any person in the act of transporting, etc. — does not limit him to what he learns of the contents of a passing automobile by the use of his senses at the time. P. 267 U. S. 158.

(e) The section thus construed is consistent with the Fourth Amendment. P. 267 U. S. 159.

6. Probable cause held to exist where prohibition officers, while patrolling a highway much used in illegal transportation of liquor, stopped and searched an automobile upon the faith of information previously obtained by them that the car and its occupants, identified by the officers, were engaged in the illegal business of "bootlegging." P. 267 U. S. 159.

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7. When contraband liquor, seized from an automobile and used in the conviction of those in charge of the transportation, was shown at the trial to have been taken in a search justified by probable cause, *held* that the Court's refusal to return he liquor on defendants' motion before trial, even if erroneous because probable cause was not then proven, was not a substantial reason for . reversing the conviction. P. 267 U. S. 162.

8. The Court notices judicially that Grand Rapids is about 152 miles from Detroit, and that Detroit, and its neighborhood along the Detroit River, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. P. 267 U. S. 160.

Affirmed.

This is a writ of error to the District Court under Section 238 of the Judicial Code. The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to-wit: 68 quarts of so-called bonded whiskey and gin, in violation of the National Prohibition Act. The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whiskey and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial, a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: on September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kruska and the two defendants,

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Carroll and Kiro. Cronenwett was introduced to them as one Stafford, working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whiskey. The price was fixed at $13 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile Roadster, the number of which Cronenwett then identified, a did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro, going eastward from Grand Rapids in the same Oldsmobile Roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the Carroll boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty, with Peterson, the State officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned

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their car and followed the defendants to a point some sixteen miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskeys, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whiskey and gin. When the defendants were arrested, Carroll said to Cronenwett, "Take the liquor and give us one more chance and I will make it right with you," and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer and Scully remained on the road looking for other cars of whose coming they had information. The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there, they believed they were carrying liquor, and hence the search, seizure and arrest.

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MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:

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

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the Act, or which has been so used, and provides that no property rights shall exist in such liquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as

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a residence in an apartment house, hotel, or boarding house."

Section 26, Title II, under which the seizure herein was made, provides in part as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

The section then provides that the court, upon conviction of the person so arrested, shall order the liquor destroyed, and, except for good cause shown, shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By Section 6 of an Act supplemental to the National Prohibition Act, c. 134, 42 Stat. 222, 223, it is provided that, if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, "shall search any private dwelling," as defined in that Act, "without a warrant directing such search," or "shall without a search warrant maliciously and without reasonable cause search any other building or property," he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental Act through the Senate, Amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:

"Section 6. That any officer, agent or employee of the United States engaged in the enforcement of this Act or

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the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $1000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the Court."

This Amendment was objected to in the House, and the Judiciary Committee, to whom it was referred, reported to the House of Representatives the following as a substitute.

"Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this Act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor, shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court."

In its report, the Committee spoke in part as follows:

"It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the national prohibition act and would otherwise seriously interfere with the Government in the enforcement of many other laws, as its scope is not limited to the prohibition law,

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but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeably to the Constitution, search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is, as a rule, contained in the various State constitutions, but notwithstanding that fact, search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation."

"The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises."

"Not only does this amendment prohibit search of any lands, but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade, though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant, they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured, the automobile would be beyond the reach of the officer, with its load of illegal liquor disposed of."

The conference report resulted, so far as the difference between the two Houses was concerned, in providing for the punishment of any officer, agent or employee of the Government who searches a "private dwelling" without a warrant, and for the punishment of any such officer,

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etc., who searches any "other building or property" where, and only where, he makes the search without a warrant "maliciously and without probable cause." In other words, it left the way open for searching an automobile, or vehicle of transportation, without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is *Boyd v. United States*, 116 U. S. 616. An Act of Congress of June 22, 1874, authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that, under the Fourth Amendment, the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and that it was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In *Weeks v. United States*, 232 U. S. 383, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal

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holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In *Silverthorne Lumber Company v. United States*, 251 U. S. 385, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested, and, while under arrest, the marshal had gone to the office of the company without a warrant and made a clean sweep of all books, papers and documents found there, and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment, and the judgment for contempt was reversed.

In *Gouled v. United States*, 255 U. S. 298, the obtaining through stealth by a representative of the Government, from the office of one suspected of defrauding the Government, of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that, when the paper was offered in evidence and duly objected to, it must be ruled inadmissible because obtained through an unreasonable search and seizure, and also in violation of the Fifth Amendment because working compulsory incrimination.

In *Amos v. United States*, 255 U. S. 313, it was held that, where concealed liquor was found by government officers without a search warrant in the home of the defendant,

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in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority, the true rule is that, if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Boyd v. United States*, 116 U. S. 616, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the Court, speaking through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 116 U. S. 623):

“The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man’s private books and papers for the purpose of obtaining information

therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other, it is not. The seizure of stolen goods is authorized by the

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common law, and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past, and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth v. Dana*, 2 Met. (Mass.) 329. Many other things of this character might be enumerated."

It is noteworthy that the twenty-fourth section of the Act of 1789, to which the Court there refers, provides:

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed, and therein to search for, seize, and secure any such goods, wares or merchandise, and if they shall have cause to suspect a concealment thereof, in any

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particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial, and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 451, 1 Stat. 145, 170; in Section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315, and in Sections 68-71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus, contemporaneously with the adoption of the Fourth Amendment, we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. *Compare Hester v. United States*, 265 U. S. 57.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial

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and forfeiture. This Act was renewed April 27, 1816, 3 Stat. 315, for a year and expired. The Act of February 28, 1865, revived Section 2 of the Act of 1815, above described, c. 67, 13 Stat. 441. The substance of this section was reenacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as Section 3061. Neither Section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. Indeed, that section was referred to and treated a operative by this Court in *Cotzhausen v. Nazro*, 107 U. S. 215, 107 U. S. 219. *See also United States v. One Black Horse*, 129 Fed. 167.

Again, by Section 2140 of the Revised Statutes, any Indian agent, sub-agent or commander of a military post in the Indian Country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian Country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched, and if any liquor is found therein, then it, together with the vehicles, shall be seized and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian Country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian Country, to be seized and forfeited if found, and of the Act of June 30, 1834, Section 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian Country to cause the boats, stores or places of deposit of such person to be searched and the liquor found forfeited. This Court recognized the statute of 1822 as justifying such a search and seizure in *American Fur Co. v. United States,* 2 Pet. 358. By the Indian

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Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian Territory may be seized, libeled and forfeited as provided in the Revised Statutes, Section 2140.

And again, in Alaska, by Section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors, or any person authorized by them in writing, shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties or forfeiture under the Act and to keep and deliver the same, and the Attorney General, in construing the Act, advised the Government:

"If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the 3-mile limit according to the practice of customs officers when acting under Section 3059 of the Revised Statutes, and to seize such vessels."

26 Opinions Attorneys General 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable

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if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, Title II, of the National Prohibition Act, like the second section of the Act of 1789, for the searching of vessels, like the provisions of the Act of 1815, and Section 3061, Revised Statutes, for searching vehicles for smuggled goods, and like the Act of 1822, and that of 1834 and Section 2140, R.S., and the Act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian Country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited, and thirdly, the driver was to be arrested. Under Section 29, Title II, of the Act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine or 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus, he is to be arrested for a misdemeanor for his first and second offenses and for a felony if he offends the third time. The main purpose of the Act obviously was to deal

with the liquor and its transportation and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden

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product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation, and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under Section 28, Title II, of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution:*Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

It follows from this that, if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. *Stacey v. Emery*, 97 U. S. 642. The measure of legality of such a seizure is,

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therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* and *Amos* cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval, protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States v. Kaplan*, 286 Fed. 963, 972.

But we are pressed with the argument that, if the search of the automobile discloses the presence of liquor and leads under the statute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of misdemeanor if committed

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in his presence. *Kurtz v. Moffitt*, 115 U. S. 487; *Elk v. United States*, 177 U. S. 529. The rule is sometimes expressed as follows:

"In cases of misdemeanor, a peace officer, like a private person, has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

Halsbury's Laws of England, Vol. 9, part III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, 1 Stephen, History of Criminal Law, 193, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant. *Rohan v. Sawan*, 5 Cush. 281. The argument for defendants is that, as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it.*Elrod v. Moss*, 278 Fed. 123; *Hughes v. State*, 145 Tenn. 544.

So it is that, under the rule contended for by defendants, the liquor, if carried by one who has been already twice convicted of the same offense, may be seized on information other than the senses, while, if he has been only once convicted, it may not be seized unless the presence of the liquor is detected by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental, as shown by the lightness

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of the penalty. *See Commonwealth v. Street*, 3 Pa.Dist. & Co. Reports, 783. In England at the common law, the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important, and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of Section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. *Agnew v. Haymes*, 141 Fed. 631, 641. The language of the section provides for seizure when the officer of the law "discovers" anyone in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by, and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks v. United States*, 232 U. S. 383, 232 U. S. 392; *Dillon v. O'Brien and Davis*, 16 Cox. C.C. 245; *Getchell v. Page*, 103 Me. 387; *Kneeland v. Connally*, 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer

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has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest, as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested, and that, upon conviction, the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that, if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property, and it is a wise one, because it leaves the rule one which is easily applied and understood and is uniform. *Holbck v. State*, 106 Ohio St.195, accords with this conclusion. *Ash v. United States*, 299 Fed. 277 and *Milam v. United States*, 296 Fed. 629, decisions by the Circuit Court of Appeals for the fourth circuit, take the same view. The *Ash* case is very similar in its facts to the case at bar, and both were by the same court which decided *Snyder v. United States*, 285 Fed. 1, cited for the defendants. *See also Park v. United States* (1st C.C.A.) 294 Fed. 776, 783, and *Lambert v. United States*, (9th C.C.A.) 282 Fed. 413.

Finally, was there probable cause? In *The Apollon*, 9 Wheat. 362, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion, Mr. Justice Story, who delivered the judgment of the Court, said (page 22 U. S. 374):

"It has been very justly observed at the bar that the Court is bound to take notice of public facts and geographical

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positions, and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety, and may be gathered from the public documents of the government."

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids, *i.e.*, that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later, these officers suddenly met the same men on their way westward, presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear,

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the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey v. Emery*,97 U. S. 642, 97 U. S. 645, a suit for damages for seizure by a collector, this Court defined probable cause as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Locke v. United States, 7 Cranch 339; *The George*, 1 Mason, 24; *The Thompson,* 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth v. Carey*, 12 Cush. 246, 251 that

"if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful."

Commonwealth v. Phelps, 209 Mass. 396; *Rohan v. Sawin*, 5 Cush. 281, 285. In *McCarthy v. De Armit*, 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

"The substance of all the definitions is a reasonable ground for belief in guilt."

In the case of the *Director General v. Kastenbaum*, 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 263 U. S. 28):

"But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent,

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which in the judgment of the court would make his faith reasonable."

See also Munn v. e Nemours, 3 Wash.C.C. 37.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy

information were sufficient, in themselves, to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aide on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the Government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is

Affirmed.

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MR. JUSTICE MCKENNA, before his retirement, concurred in this opinion.

The separate opinion of MR. JUSTICE McREYNOLDS concurred in by MR. JUSTICE SUTHERLAND.

1. The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods.

"To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an imminent good by means that are unlawful, is as little consonant to private morality as to public justice."

Sir William Scott, *The Louis*, 2 Dolson 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by Federal officers without a warrant and upon mere suspicion — ill-founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act (c. 85, 41 Stat. 305). They maintain that both arrest and seizure were unlawful, and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: *Crowell v. M'Fadon,* 8 Cranch 94, 12 U. S. 98; *United States v. 1960 Bags of Coffee,* 8 Cranch 398, 403 [argument of counsel — omitted], 12 U. S. 405; *Otis v. Watkins,* 9 Cranch 339; *Gelston v. Hoyt,* 3 Wheat. 246, 16 U. S. 310, 16 U. S. 318; *Wood v. United States,* 16 Pet. 342; *Taylor v. United States,* 3 How. 197, 44 U. S. 205. They turned upon express provisions of applicable Acts of Congress; they did not involve the point now presented, and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

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Whether the officers are shielded from prosecution or action by Rev.Stat. Sec. 970 is not important. That section does not undertake to deprive the citizen of any constitutional right, or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether, by apt words, Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors — nothing more — and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. *United States v. Harris*, 177 U. S. 305, 177 U. S. 310. And the well settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. Moffitt, 115 U. S. 487, 115 U. S. 498 —

"By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence except in the case

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of felony, and then only for the purpose of bringing the offender before a civil magistrate."

Elk v. United States, 177 U. S. 529, 177 U. S. 531 —

"An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

Commonwealth v. Wright, 158 Mass. 149, 158 —

"It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that, therefore, an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant unless it is given by statute. . . . The Legislature has often empowered officers to arrest without warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law."

Pinkerton v. Verberg, 78 Mich. 573, 584 —

"Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. . . . If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer."

3. The Volstead Act contains no provision which annuls the accepted common law rule or discloses definite intent

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to authorize arrests without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view, Section 26 is relied upon —

"When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

Let it be observed that this section has no special application to automobiles; it includes any vehicle — buggy, wagon, boat or air craft. Certainly, in a criminal statute, always to be strictly construed, the words "shall discover. . . in the act of transporting in violation of the law" cannot mean shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning, apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged, and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following: "An Act to regulate the collection of duties on imports and tonnage," approved March 2, 1789, c. 22, 1 Stat. 627, 677, 678;

"An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported

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into the United States, and on the tonnage of ships or vessels,"

approved August 4, 1790, c. 35, 1 Stat. 145, 170; "An Act further to provide for the collection of duties on imports and tonnage," approved March 3, 1815, c. 94, 3 Stat. 231, 232. These and similar Acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

"An Act supplemental to the National Prohibition Act," approved November 23, 1921, c. 134, 42 Stat. 222, 223, provides —

"That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for warrants in order to search private dwellings and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches, and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is

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valid, and so are some seizures. But what of it? The Act made nothing legal which theretofore was unlawful, and to conclude that, by declaring the unauthorized search of a private dwelling criminal, Congress intended to remove ancient restrictions from other searches and from arrests as well would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures, unreasonableness often depends upon the means adopted. Here, the seizure followed an unlawful arrest, and therefore became itself unlawful — as plainly unlawful as the seizure within the home so vigorously denounced in *Weeks v. United States*, 232 U. S. 383, 232 U. S. 391, 232 U. S. 392, 232 U. S. 393.

In *Snyder v. United States*, 285 Fed. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine:

"That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty, or if it had contained anyone of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think,

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neither justifies the assault nor condemns the principle which makes such an act unlawful."

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him, and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In *Weeks v. United States*, *supra*, through Mr. Justice Day, this court said:

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have

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resulted in their embodiment in the fundamental law of the land."

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 251 U. S. 391:

"The proposition could not be presented more nakedly. It is that, although, of course, its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Gouled v. United States, 255 U. S. 298, and *Amos v. United States*, 255 U. S. 313, distinctly point out that property procured by unlawful action of Federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal and violated the guarantee of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest, and was therefore obtained in violation of their constitutional

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rights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a Federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwelt, chief prohibition officer. His entire testimony as given at the trial follows —

"I am in charge of the Federal Prohibition Department in this District. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes Street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Kiro and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of Grand Rapids, to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's

apartment, they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the sixth day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light

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lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th day of October, it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing."

"On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car, we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said 'there goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them; drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to get out of the car, which they did. Carroll referred to me and called me by the name of 'Fred' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the

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name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor and give us one more chance and I will make it right with you.' At the same time, he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a ten dollar bill, and there was some other bills; I don't know how much there was; it wasn't a large amount."

"As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the Marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits 'A' and 'B.'"

"Q. Now, those two bottles, Exhibits 'A' and 'B,' were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it go up here?"

"A. We didn't label them out on the road; simply found it was liquor and sent it in, and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles and Mr. Johnson's name is on the label that goes over the box with mine, and this liquor was taken out of the case today. It was taken out for the purpose of analyzation. The others were not broken until today. "

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"Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it, yes sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car."

"[Cross-examination.] I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car, and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately."

"Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir."

"Q. And took possession of it, arrested them, and brought them in? A. Yes, sir."

“Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time.”

“[Redirect examination.] The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whiskey in one lazyback.”

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came two and a half months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion, it has been careful to say

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so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me, it seems clear enough that the judgment should be reversed.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this opinion.

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CHAPTER OVERVIEW

5: Exceptions to the Fourth Amendment

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5.1: US v. Jones 565 US___(2012)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES v. JONES

certiorari to the united states court of appeals for the district of columbia circuit

No. 10–1259. Argued November 8, 2011—Decided January 23, 2012

The Government obtained a search warrant permitting it to install a Global-Positioning-System (GPS) tracking device on a vehicle registered to respondent Jones's wife. The warrant authorized installation in the District of Columbia and within 10 days, but agents installed the device on the 11th day and in Maryland. The Government then tracked the vehicle's movements for 28 days. It subsequently secured an indictment of Jones and others on drug trafficking conspiracy charges. The District Court suppressed the GPS data obtained while the vehicle was parked at Jones's residence, but held the remaining data admissible because Jones had no reasonable expectation of privacy when the vehicle was on public streets. Jones was convicted. The D. C. Circuit reversed, concluding that admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment.

Held: The Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. Pp. 3–12.

(a) The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Here, the Government's physical intrusion on an "effect" for the purpose of obtaining information constitutes a "search." This type of encroachment on an area enumerated in the Amendment would have been considered a search within the meaning of the Amendment at the time it was adopted. Pp. 3–4.

(b) This conclusion is consistent with this Court's Fourth Amendment jurisprudence, which until the latter half of the 20th century was tied to common-law trespass. Later cases, which have deviated from that exclusively property-based approach, have applied the analysis of Justice Harlan's concurrence in Katz v. United States, 389 U. S. 347 , which said that the Fourth Amendment protects a person's "reasonable expectation of privacy," id., at 360. Here, the Court need not address the Government's contention that Jones had no "reasonable expectation of privacy," because Jones's Fourth Amendment rights do not rise or fall with the Katz formulation. At bottom, the Court must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Kyllo v. United States, 533 U. S. 27 . Katz did not repudiate the understanding that the Fourth Amendment embodies a particular concern for government trespass upon the areas it enumerates. The Katz reasonable-expectation-of-privacy test has been added to, but not substituted for, the common-law trespassory test. See Alderman v. United States, 394 U. S. 165 ; Soldal v. Cook County, 506 U. S. 56 . United States v. Knotts, 460 U. S. 276 , and United States v. Karo, 468 U. S. 705 —post-Katz cases rejecting Fourth Amendment challenges to "beepers," electronic tracking devices representing another form of electronic monitoring—do not foreclose the conclusion that a search occurred here. New York v. Class, 475 U. S. 106 , and Oliver v. United States, 466 U. S. 170 , also do not support the Government's position. Pp. 4–12.

(c) The Government's alternative argument—that if the attachment and use of the device was a search, it was a reasonable one—is forfeited because it was not raised below. P. 12.

615 F. 3d 544, affirmed.

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Sotomayor, JJ., joined. Sotomayor, J., filed a concurring opinion. Alito, J., filed an opinion concurring in the judgment, in which Ginsburg, Breyer, and Kagan, JJ., joined.

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5.2: Carroll v. United States 267 U.S. 132 (1925)

U.S. Supreme Court

Carroll v. United States, 267 U.S. 132 (1925)

Carroll v. United States

No. 15

Argued December 4, 1923

Restored to docket for reargument January 28, 1924

Reargued March 14, 1924

Decided March 2, 1925

267 U.S. 132

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF MICHIGAN

Syllabus

1. The legislative history of 6 of the act supplemental to the National Prohibition Act, November 23, 1921, c. 134, 42 Stat. 223, which makes it a misdemeanor for any officer of the United States to search a private dwelling without a search warrant or to search any other building or property without a search warrant, maliciously and without reasonable cause, shows clearly the intent of Congress to make a distinction as to the necessity for a search warrant in the searching of private dwellings and in the searching of automobiles or other road vehicles, in the enforcement of the Prohibition Act. P. 267 U. S. 144.

2. The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens. P.267 U. S. 147.

3. Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act, do not violate the Amendment, if made upon probable cause, *i.e.*, upon a belief, reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband liquor. P. 267 U. S. 149.

4. Various acts of Congress are cited to show that, practically since the beginning of the Government, the Fourth Amendment has been construed as recognizing a necessary difference between a search for contraband in a store, dwelling-house, or other structure

for the search of which a warrant may readily be obtained, and a search of a ship, wagon, automobile, or other vehicle which may be quickly moved out of the locality or jurisdiction in which the warrant must be sought. P. 267 U. S. 150.

5. Section 26, Title II, of the National Prohibition Act, provides that, when an officer "shall discover any person in the act" of transporting intoxicating liquor in any automobile, or other vehicle, in violation of law, it shall be his duty to seize the liquor and thereupon to take possession of the vehicle and arrest the person in charge of it, and that, upon conviction of such person, the court shall order the liquor destroyed, and, except for good cause shown, shall order a public sale, etc. of the other property seized.

Held:

(a) That the primary purpose is the seizure and destruction of the contraband liquor, and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. P. 267 U. S. 153.

(b) Hence, the right to search an automobile for illicit liquor and to seize the liquor, if found, and thereupon to seize the vehicle also and to arrest the offender, does not depend upon the right to arrest the offender in the first instance, and therefore it is not determined by the degree of his offence — whether a misdemeanor under § 29, Title II of the Act, because of being his first or second offence, or a felony because it is his third, and the rule allowing arrest without warrant for misdemeanor only when the

offence is committed in the officer's presence, but for a felony when the officer has reasonable cause to believe that the person arrested has committed a felony, is not the test of the validity of such search and seizure. Pp. 267 U. S. 155, 267 U. S. 156.

(c) The seizure is legal if the officer, in stopping and searching the vehicle, has reasonable or probable cause for believing that contraband liquor is being illegally transported in it. P. 267 U. S. 155.

(d) The language of § 26 — when an officer shall "discover " any person in the act of transporting, etc. — does not limit him to what he learns of the contents of a passing automobile by the use of his senses at the time. P. 267 U. S. 158.

(e) The section thus construed is consistent with the Fourth Amendment. P. 267 U. S. 159.

6. Probable cause held to exist where prohibition officers, while patrolling a highway much used in illegal transportation of liquor, stopped and searched an automobile upon the faith of information previously obtained by them that the car and its occupants, identified by the officers, were engaged in the illegal business of "bootlegging." P. 267 U. S. 159.

7. When contraband liquor, seized from an automobile and used in the conviction of those in charge of the transportation, was shown at the trial to have been taken in a search justified by probable cause, *held* that the Court's refusal to return he liquor on defendants' motion before trial, even if erroneous because probable cause was not then proven, was not a substantial reason for . reversing the conviction. P. 267 U. S. 162.

8. The Court notices judicially that Grand Rapids is about 152 miles from Detroit, and that Detroit, and its neighborhood along the Detroit River, which is the international boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. P. 267 U. S. 160.

Affirmed.

This is a writ of error to the District Court under Section 238 of the Judicial Code. The plaintiffs in error, hereafter to be called the defendants, George Carroll and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to-wit: 68 quarts of so-called bonded whiskey and gin, in violation of the National Prohibition Act. The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whiskey and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial, a motion was made by the defendants that all the liquor seized be returned to the defendant Carroll, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: on September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kruska and the two defendants, Carroll and Kiro. Cronenwett was introduced to them as one Stafford, working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whiskey. The price was fixed at $13 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile Roadster, the number of which Cronenwett then identified, a did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom Carroll subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, Carroll and Kiro, going eastward from Grand Rapids in the same Oldsmobile Roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the Carroll boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty, with Peterson, the State officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and Carroll met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned

their car and followed the defendants to a point some sixteen miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskeys, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whiskey and gin. When the defendants were arrested, Carroll said to Cronenwett, "Take the liquor and give us one more chance and I will make it right with you," and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer and Scully remained on the road looking for other cars of whose coming they had information. The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there, they believed they were carrying liquor, and hence the search, seizure and arrest.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

The constitutional and statutory provisions involved in this case include the Fourth Amendment and the National Prohibition Act.

The Fourth Amendment is in part as follows:

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

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315, passed to enforce the Eighteenth Amendment, makes it unlawful to have or possess any liquor intended for use in violating the Act, or which has been so used, and provides that no property rights shall exist in such liquor. A search warrant may issue and such liquor, with the containers thereof, may be seized under the warrant and be ultimately destroyed. The section further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house."

Section 26, Title II, under which the seizure herein was made, provides in part as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

The section then provides that the court, upon conviction of the person so arrested, shall order the liquor destroyed, and, except for good cause shown, shall order a sale by public auction of the other property seized, and that the proceeds shall be paid into the Treasury of the United States.

By Section 6 of an Act supplemental to the National Prohibition Act, c. 134, 42 Stat. 222, 223, it is provided that, if any officer or agent or employee of the United States engaged in the enforcement of the Prohibition Act or this Amendment, "shall search any private dwelling," as defined in that Act, "without a warrant directing such search," or "shall without a search warrant maliciously and without reasonable cause search any other building or property," he shall be guilty of a misdemeanor and subject to fine or imprisonment or both.

In the passage of the supplemental Act through the Senate, Amendment No. 32, known as the Stanley Amendment, was adopted, the relevant part of which was as follows:

"Section 6. That any officer, agent or employee of the United States engaged in the enforcement of this Act or the National Prohibition Act, or any other law of the United States, who shall search or attempt to search the property or premises of any person without previously securing a search warrant, as provided by law, shall be guilty of a misdemeanor and upon conviction thereof

shall be fined not to exceed $1000, or imprisoned not to exceed one year, or both so fined and imprisoned in the discretion of the Court."

This Amendment was objected to in the House, and the Judiciary Committee, to whom it was referred, reported to the House of Representatives the following as a substitute.

"Sec. 6. That no officer, agent or employee of the United States, while engaged in the enforcement of this Act, the National Prohibition Act, or any law in reference to the manufacture or taxation of, or traffic in, intoxicating liquor, shall search any private dwelling without a warrant directing such search, and no such warrant shall issue unless there is reason to believe such dwelling is used as a place in which liquor is manufactured for sale or sold. The term 'private dwelling' shall be construed to include the room or rooms occupied not transiently, but solely as a residence in an apartment house, hotel, or boarding house. Any violation of any provision of this paragraph shall be punished by a fine of not to exceed $1000 or imprisonment not to exceed one year, or both such fine and imprisonment, in the discretion of the court."

In its report, the Committee spoke in part as follows:

"It appeared to the committee that the effect of the Senate amendment No. 32, if agreed to by the House, would greatly cripple the enforcement of the national prohibition act and would otherwise seriously interfere with the Government in the enforcement of many other laws, as its scope is not limited to the prohibition law, but applies equally to all laws where prompt action is necessary. There are on the statute books of the United States a number of laws authorizing search without a search warrant. Under the common law and agreeably to the Constitution, search may in many cases be legally made without a warrant. The Constitution does not forbid search, as some parties contend, but it does forbid unreasonable search. This provision in regard to search is, as a rule, contained in the various State constitutions, but notwithstanding that fact, search without a warrant is permitted in many cases, and especially is that true in the enforcement of liquor legislation."

"The Senate amendment prohibits all search or attempt to search any property or premises without a search warrant. The effect of that would necessarily be to prohibit all search, as no search can take place if it is not on some property or premises."

"Not only does this amendment prohibit search of any lands, but it prohibits the search of all property. It will prevent the search of the common bootlegger and his stock in trade, though caught and arrested in the act of violating the law. But what is perhaps more serious, it will make it impossible to stop the rum running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they cannot search for liquor without a warrant, they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured, the automobile would be beyond the reach of the officer, with its load of illegal liquor disposed of."

The conference report resulted, so far as the difference between the two Houses was concerned, in providing for the punishment of any officer, agent or employee of the Government who searches a "private dwelling" without a warrant, and for the punishment of any such officer, etc., who searches any "other building or property" where, and only where, he makes the search without a warrant "maliciously and without probable cause." In other words, it left the way open for searching an automobile, or vehicle of transportation, without a warrant, if the search was not malicious or without probable cause.

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles is the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

The leading case on the subject of search and seizure is *Boyd v. United States*, 116 U. S. 616. An Act of Congress of June 22, 1874, authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books, invoices and papers on pain in case of refusal of having the allegations of the attorney in his motion taken as confessed. This was held to be unconstitutional and void as applied to suits for penalties or to establish a forfeiture of goods, on the ground that, under the Fourth Amendment, the compulsory production of invoices to furnish evidence for forfeiture of goods constituted an unreasonable search even where made upon a search warrant, and that it was also a violation of the Fifth Amendment, in that it compelled the defendant in a criminal case to produce evidence against himself or be in the attitude of confessing his guilt.

In *Weeks v. United States*, 232 U. S. 383, it was held that a court in a criminal prosecution could not retain letters of the accused seized in his house, in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises, to be used as evidence against him, the accused having made timely application to the court for an order for the return of the letters.

In *Silverthorne Lumber Company v. United States*, 251 U. S. 385, a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its president, until he should purge himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the company and Silverthorne. Silverthorne had been arrested, and, while under arrest, the marshal had gone to the office of the company without a warrant and made a clean sweep of all books, papers and documents found there, and had taken copies and photographs of the papers. The District Court ordered the return of the originals, but impounded the photographs and copies. This was held to be an unreasonable search of the property and possessions of the corporation and a violation of the Fourth Amendment, and the judgment for contempt was reversed.

In *Gouled v. United States*, 255 U. S. 298, the obtaining through stealth by a representative of the Government, from the office of one suspected of defrauding the Government, of a paper which had no pecuniary value in itself, but was only to be used as evidence against its owner, was held to be a violation of the Fourth Amendment. It was further held that, when the paper was offered in evidence and duly objected to, it must be ruled inadmissible because obtained through an unreasonable search and seizure, and also in violation of the Fifth Amendment because working compulsory incrimination.

In *Amos v. United States*, 255 U. S. 313, it was held that, where concealed liquor was found by government officers without a search warrant in the home of the defendant, in his absence, and after a demand made upon his wife, it was inadmissible as evidence against the defendant because acquired by an unreasonable seizure.

In none of the cases cited is there any ruling as to the validity under the Fourth Amendment of a seizure without a warrant of contraband goods in the course of transportation and subject to forfeiture or destruction.

On reason and authority, the true rule is that, if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

In *Boyd v. United States*, 116 U. S. 616, as already said, the decision did not turn on whether a reasonable search might be made without a warrant; but for the purpose of showing the principle on which the Fourth Amendment proceeds, and to avoid any misapprehension of what was decided, the Court, speaking through Mr. Justice Bradley, used language which is of particular significance and applicability here. It was there said (page 116 U. S. 623):

“The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man’s private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to the possession of the property; in the other, it is not. The seizure of stolen goods is authorized by the Homecommon law, and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past, and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as ‘unreasonable,’ and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth v. Dana*, 2 Met. (Mass.) 329. Many other things of this character might be enumerated.”

It is noteworthy that the twenty-fourth section of the Act of 1789, to which the Court there refers, provides:

"That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed, and therein to search for, seize, and secure any such goods, wares or merchandise, and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial, and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."

Like provisions were contained in the Act of August 4, 1790, c. 35, Sections 451, 1 Stat. 145, 170; in Section 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315, and in Sections 68-71 of the Act of March 2, 1799, c. 22, 1 Stat. 627, 677, 678.

Thus, contemporaneously with the adoption of the Fourth Amendment, we find in the first Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant. *Compare Hester v. United States,* 265 U. S. 57.

Again, by the second section of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officers not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been so unlawfully brought into the country, to seize and secure the same, and the vehicle or beast as well, for trial and forfeiture. This Act was renewed April 27, 1816, 3 Stat. 315, for a year and expired. The Act of February 28, 1865, revived Section 2 of the Act of 1815, above described, c. 67, 13 Stat. 441. The substance of this section was reenacted in the third section of the Act of July 18, 1866, c. 201, 14 Stat. 178, and was thereafter embodied in the Revised Statutes as Section 3061. Neither Section 3061 nor any of its earlier counterparts has ever been attacked as unconstitutional. Indeed, that section was referred to and treated a operative by this Court in *Cotzhausen v. Nazro,* 107 U. S. 215, 107 U. S. 219. *See also United States v. One Black Horse,* 129 Fed. 167.

Again, by Section 2140 of the Revised Statutes, any Indian agent, sub-agent or commander of a military post in the Indian Country, having reason to suspect or being informed that any white person or Indian is about to introduce, or has introduced, any spirituous liquor or wine into the Indian Country, in violation of law, may cause the boats, stores, packages, wagons, sleds and places of deposit of such person to be searched, and if any liquor is found therein, then it, together with the vehicles, shall be seized and proceeded against by libel in the proper court and forfeited. Section 2140 was the outgrowth of the Act of May 6, 1822, c. 58, 3 Stat. 682, authorizing Indian agents to cause the goods of traders in the Indian Country to be searched upon suspicion or information that ardent spirits were being introduced into the Indian Country, to be seized and forfeited if found, and of the Act of June 30, 1834, Section 20, c. 161, 4 Stat. 729, 732, enabling an Indian agent having reason to suspect any person of having introduced or being about to introduce liquors into the Indian Country to cause the boats, stores or places of deposit of such person to be searched and the liquor found forfeited. This Court recognized the statute of 1822 as justifying such a search and seizure in *American Fur Co. v. United States,* 2 Pet. 358. By the Indian Appropriation Act of March 2, 1917, c. 146, 39 Stat. 969, 970, automobiles used in introducing or attempting to introduce intoxicants into the Indian Territory may be seized, libeled and forfeited as provided in the Revised Statutes, Section 2140.

And again, in Alaska, by Section 174 of the Act of March 3, 1899, c. 429, 30 Stat. 1253, 1280, it is provided that collectors and deputy collectors, or any person authorized by them in writing, shall be given power to arrest persons and seize vessels and merchandise in Alaska liable to fine, penalties or forfeiture under the Act and to keep and deliver the same, and the Attorney General, in construing the Act, advised the Government:

"If your agents reasonably suspect that a violation of law has occurred, in my opinion they have power to search any vessel within the 3-mile limit according to the practice of customs officers when acting under Section 3059 of the Revised Statutes, and to seize such vessels."

26 Opinions Attorneys General 243.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a

necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable Homeif a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Section 26, Title II, of the National Prohibition Act, like the second section of the Act of 1789, for the searching of vessels, like the provisions of the Act of 1815, and Section 3061, Revised Statutes, for searching vehicles for smuggled goods, and like the Act of 1822, and that of 1834 and Section 2140, R.S., and the Act of 1917 for the search of vehicles and automobiles for liquor smuggled into the Indian Country, was enacted primarily to accomplish the seizure and destruction of contraband goods; secondly, the automobile was to be forfeited, and thirdly, the driver was to be arrested. Under Section 29, Title II, of the Act the latter might be punished by not more than $500 fine for the first offense, not more than $1,000 fine or 90 days' imprisonment for the second offense, and by a fine of $500 or more and by not more than 2 years' imprisonment for the third offense. Thus, he is to be arrested for a misdemeanor for his first and second offenses and for a felony if he offends the third time. The main purpose of the Act obviously was to deal with the liquor and its transportation and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation, and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental. The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected. Under Section 28, Title II, of the Prohibition Act, the Commissioner of Internal Revenue, his assistants, agents and inspectors are to have the power and protection in the enforcement of the Act conferred by the existing laws relating to the manufacture or sale of intoxicating liquors. Officers who seize under Section 26 of the Prohibition Act are therefore protected by Section 970 of the Revised Statutes, providing that:

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"When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any Act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution:*Provided*, That the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent."

It follows from this that, if an officer seizes an automobile or the liquor in it without a warrant and the facts as subsequently developed do not justify a judgment of condemnation and forfeiture, the officer may escape costs or a suit for damages by a showing that he had reasonable or probable cause for the seizure. *Stacey v. Emery*, 97 U. S. 642. The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.

We here find the line of distinction between legal and illegal seizures of liquor in transport in vehicles. It is certainly a reasonable distinction. It gives the owner of an automobile or other vehicle seized under Section 26, in absence of probable cause, a right to have restored to him the automobile, it protects him under the *Weeks* and *Amos* cases from use of the liquor as evidence against him, and it subjects the officer making the seizures to damages. On the other hand, in a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them.

Such a rule fulfills the guaranty of the Fourth Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit and issued after judicial approval, protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. *United States v. Kaplan*, 286 Fed. 963, 972.

But we are pressed with the argument that, if the search of the automobile discloses the presence of liquor and leads under the statute to the arrest of the person in charge of the automobile, the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without warrant for a misdemeanor. The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of misdemeanor if committed in his presence. *Kurtz v. Moffitt*, 115 U. S. 487; *Elk v. United States*, 177 U. S. 529. The rule is sometimes expressed as follows:

"In cases of misdemeanor, a peace officer, like a private person, has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

Halsbury's Laws of England, Vol. 9, part III, 612.

The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, 1 Stephen, History of Criminal Law, 193, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant. *Rohan v. Sawan*, 5 Cush. 281. The argument for defendants is that, as the misdemeanor to justify arrest without warrant must be committed in the presence of the police officer, the offense is not committed in his presence unless he can by his senses detect that the liquor is being transported, no matter how reliable his previous information by which he can identify the automobile as loaded with it.*Elrod v. Moss*, 278 Fed. 123; *Hughes v. State*, 145 Tenn. 544.

So it is that, under the rule contended for by defendants, the liquor, if carried by one who has been already twice convicted of the same offense, may be seized on information other than the senses, while, if he has been only once convicted, it may not be seized unless the presence of the liquor is detected by the senses as the automobile concealing it rushes by. This is certainly a very unsatisfactory line of difference when the main object of the section is to forfeit and suppress the liquor, the arrest of the individual being only incidental, as shown by the lightness of the penalty. *See Commonwealth v. Street*, 3 Pa.Dist. & Co. Reports, 783. In England at the common law, the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important, and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors. As the main purpose of Section 26 was seizure and forfeiture, it is not so much the owner as the property that offends. *Agnew v. Haymes*, 141 Fed. 631, 641. The language of the section provides for seizure when the officer of the law "discovers" anyone in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by, and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it.

We do not think such a nice distinction is applicable in the present case. When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution. *Weeks v. United States*, 232 U. S. 383, 232 U. S. 392; *Dillon v. O'Brien and Davis*, 16 Cox. C.C. 245; *Getchell v. Page*, 103 Me. 387; *Kneeland v. Connally*, 70 Ga. 424; 1 Bishop, Criminal Procedure, Sec. 211; 1 Wharton, Criminal Procedure (10th edition), Sec. 97. The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest, as Section 26 indicates. It is true that Section 26, Title II, provides for immediate proceedings against the person arrested, and that, upon conviction, the liquor is to be destroyed and the automobile or other vehicle is to be sold, with the saving of the interest of a lienor who does not know of its unlawful use; but it is evident that, if the person arrested is ignorant of the contents of the vehicle, or if he escapes, proceedings can be had against the liquor for destruction or other disposition under Section 25 of the same title. The character of the offense for which, after the contraband liquor is found and seized, the driver can be prosecuted does not affect the validity of the seizure.

This conclusion is in keeping with the requirements of the Fourth Amendment and the principles of search and seizure of contraband forfeitable property, and it is a wise one, because it leaves the rule one which is easily applied and understood and is uniform. *Holbck v. State*, 106 Ohio St.195, accords with this conclusion. *Ash v. United States*, 299 Fed. 277 and *Milam v. United States*, 296 Fed. 629, decisions by the Circuit Court of Appeals for the fourth circuit, take the same view. The *Ash* case is very similar in its facts to the case at bar, and both were by the same court which decided *Snyder v. United States*, 285 Fed. 1, cited for the defendants. *See also Park v. United States* (1st C.C.A.) 294 Fed. 776, 783, and *Lambert v. United States*, (9th C.C.A.) 282 Fed. 413.

Finally, was there probable cause? In *The Apollon*, 9 Wheat. 362, the question was whether the seizure of a French vessel at a particular place was upon probable cause that she was there for the purpose of smuggling. In this discussion, Mr. Justice Story, who delivered the judgment of the Court, said (page 22 U. S. 374):

"It has been very justly observed at the bar that the Court is bound to take notice of public facts and geographical positions, and that this remote part of the country has been infested, at different periods, by smugglers, is a matter of general notoriety, and may be gathered from the public documents of the government."

We know in this way that Grand Rapids is about 152 miles from Detroit, and that Detroit and its neighborhood along the Detroit River, which is the International Boundary, is one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior. It is obvious from the evidence that the prohibition agents were engaged in a regular patrol along the important highways from Detroit to Grand Rapids to stop and seize liquor carried in automobiles. They knew or had convincing evidence to make them believe that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids, *i.e.*, that they were engaged in plying the unlawful trade of selling such liquor in that city. The officers had soon after noted their going from Grand Rapids half way to Detroit, and attempted to follow them to that city to see where they went, but they escaped observation. Two months later, these officers suddenly met the same men on their way westward, presumably from Detroit. The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids, where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so. Emphasis is put by defendants' counsel on the statement made by one of the officers that they were not looking for defendants at the particular time when they appeared. We do not perceive that it has any weight. As soon as they did appear, the officers were entitled to use their reasoning faculties upon all the facts of which they had previous knowledge in respect to the defendants.Home

The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey v. Emery*,97 U. S. 642, 97 U. S. 645, a suit for damages for seizure by a collector, this Court defined probable cause as follows:

"If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

Locke v. United States, 7 Cranch 339; *The George*, 1 Mason, 24; *The Thompson*, 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth v. Carey*, 12 Cush. 246, 251 that

"if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful."

Commonwealth v. Phelps, 209 Mass. 396; *Rohan v. Sawin*, 5 Cush. 281, 285. In *McCarthy v. De Armit*, 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

"The substance of all the definitions is a reasonable ground for belief in guilt."

In the case of the *Director General v. Kastenbaum*, 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 263 U. S. 28):

"But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable."

See also Munn v. e Nemours, 3 Wash.C.C. 37.

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient, in themselves, to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

Counsel finally argue that the defendants should be permitted to escape the effect of the conviction because the court refused on motion to deliver them the liquor when, as they say, the evidence adduced on the motion was much less than that shown on the trial, and did not show probable cause. The record does not make it clear what evidence was produced in support of or against the motion. But, apart from this, we think the point is without substance here. If the evidence given on the trial was sufficient, as we think it was, to sustain the introduction of the liquor as evidence, it is immaterial that there was an inadequacy of evidence when application was made for its return. A conviction on adequate and admissible evidence should not be set aide on such a ground. The whole matter was gone into at the trial, so no right of the defendants was infringed.

Counsel for the Government contend that Kiro, the defendant who did not own the automobile, could not complain of the violation of the Fourth Amendment in the use of the liquor as evidence against him, whatever the view taken as to Carroll's rights. Our conclusion as to the whole case makes it unnecessary for us to discuss this aspect of it.

The judgment is

Affirmed.

MR. JUSTICE MCKENNA, before his retirement, concurred in this opinion.

The separate opinion of MR. JUSTICE McREYNOLDS concurred in by MR. JUSTICE SUTHERLAND.

1. The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods.

"To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an imminent good by means that are unlawful, is as little consonant to private morality as to public justice."

Sir William Scott, *The Louis*, 2 Dolson 210, 257.

While quietly driving an ordinary automobile along a much frequented public road, plaintiffs in error were arrested by Federal officers without a warrant and upon mere suspicion — ill-founded, as I think. The officers then searched the machine and discovered carefully secreted whisky, which was seized and thereafter used as evidence against plaintiffs in error when on trial for transporting intoxicating liquor contrary to the Volstead Act (c. 85, 41 Stat. 305). They maintain that both arrest and seizure were unlawful, and that use of the liquor as evidence violated their constitutional rights.

This is not a proceeding to forfeit seized goods; nor is it an action against the seizing officer for a tort. Cases like the following are not controlling: *Crowell v. M'Fadon,* 8 Cranch 94, 12 U. S. 98; *United States v. 1960 Bags of Coffee,* 8 Cranch 398, 403 [argument of counsel — omitted], 12 U. S. 405; *Otis v. Watkins,* 9 Cranch 339; *Gelston v. Hoyt,* 3 Wheat. 246, 16 U. S. 310, 16 U. S. 318; *Wood v. United States,* 16 Pet. 342; *Taylor v. United States,* 3 How. 197, 44 U. S. 205. They turned upon express provisions of applicable Acts of Congress; they did not involve the point now presented, and afford little, if any, assistance toward its proper solution. The Volstead Act does not, in terms, authorize arrest or seizure upon mere suspicion.

Whether the officers are shielded from prosecution or action by Rev.Stat. Sec. 970 is not important. That section does not undertake to deprive the citizen of any constitutional right, or to permit the use of evidence unlawfully obtained. It does, however, indicate the clear understanding of Congress that probable cause is not always enough to justify a seizure.

Nor are we now concerned with the question whether, by apt words, Congress might have authorized the arrest without a warrant. It has not attempted to do this. On the contrary, the whole history of the legislation indicates a fixed purpose not so to do. First and second violations are declared to be misdemeanors — nothing more — and Congress, of course, understood the rule concerning arrests for such offenses. Whether different penalties should have been prescribed or other provisions added is not for us to inquire; nor do difficulties attending enforcement give us power to supplement the legislation.

2. As the Volstead Act contains no definite grant of authority to arrest upon suspicion and without warrant for a first offense, we come to inquire whether such authority can be inferred from its provisions.

Unless the statute which creates a misdemeanor contains some clear provision to the contrary, suspicion that it is being violated will not justify an arrest. Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. *United States v. Harris*, 177 U. S. 305, 177 U. S. 310. And the well settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence.

Kurtz v. Moffitt, 115 U. S. 487, 115 U. S. 498 —

"By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence except in the case Homeof felony, and then only for the purpose of bringing the offender before a civil magistrate."

Elk v. United States, 177 U. S. 529, 177 U. S. 531 —

"An officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."

Commonwealth v. Wright, 158 Mass. 149, 158 —

"It is suggested that the statutory misdemeanor of having in one's possession short lobsters with intent to sell them is a continuing offence, which is being committed while such possession continues, and that, therefore, an officer who sees any person in possession of such lobsters with intent to sell them can arrest such person without a warrant, as for a misdemeanor committed in his presence. We are of opinion, however, that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant unless it is given by statute. . . . The Legislature has often empowered officers to arrest without warrant for similar offenses, which perhaps tends to show that, in its opinion, no such right exists at common law."

Pinkerton v. Verberg, 78 Mich. 573, 584 —

"Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. . . . If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer."

3. The Volstead Act contains no provision which annuls the accepted common law rule or discloses definite intent to authorize arrests without warrant for misdemeanors not committed in the officer's presence.

To support the contrary view, Section 26 is relied upon —

"When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

Let it be observed that this section has no special application to automobiles; it includes any vehicle — buggy, wagon, boat or air craft. Certainly, in a criminal statute, always to be strictly construed, the words "shall discover. . . in the act of transporting in violation of the law" cannot mean shall have reasonable cause to suspect or believe that such transportation is being carried on. To discover and to suspect are wholly different things. Since the beginning, apt words have been used when Congress intended that arrests for misdemeanors or seizures might be made upon suspicion. It has studiously refrained from making a felony of the offense here charged, and it did not undertake by any apt words to enlarge the power to arrest. It was not ignorant of the established rule on the subject, and well understood how this could be abrogated, as plainly appears from statutes like the following: "An Act to regulate the collection of duties on imports and tonnage," approved March 2, 1789, c. 22, 1 Stat. 627, 677, 678;

"An Act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels,"

approved August 4, 1790, c. 35, 1 Stat. 145, 170; "An Act further to provide for the collection of duties on imports and tonnage," approved March 3, 1815, c. 94, 3 Stat. 231, 232. These and similar Acts definitely empowered officers to seize upon suspicion and therein radically differ from the Volstead Act, which authorized no such thing.

"An Act supplemental to the National Prohibition Act," approved November 23, 1921, c. 134, 42 Stat. 222, 223, provides —

"That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment."

And it is argued that the words and history of this section indicate the intent of Congress to distinguish between the necessity for warrants in order to search private dwellings and the right to search automobiles without one. Evidently Congress regarded the searching of private dwellings as matter of much graver consequence than some other searches, and distinguished between them by declaring the former criminal. But the connection between this distinction and the legality of plaintiffs in error's arrest is not apparent. Nor can I find reason for inquiring concerning the validity of the distinction under the Fourth Amendment. Of course, the distinction is valid, and so are some seizures. But what of it? The Act made nothing legal which theretofore was unlawful, and to conclude that, by declaring the unauthorized search of a private dwelling criminal, Congress intended to remove ancient restrictions from other searches and from arrests as well would seem impossible.

While the Fourth Amendment denounces only unreasonable seizures, unreasonableness often depends upon the means adopted. Here, the seizure followed an unlawful arrest, and therefore became itself unlawful — as plainly unlawful as the seizure within the home so vigorously denounced in *Weeks v. United States*, 232 U. S. 383, 232 U. S. 391, 232 U. S. 392, 232 U. S. 393.

In *Snyder v. United States*, 285 Fed. 1, 2, the Court of Appeals, Fourth Circuit, rejected evidence obtained by an unwarranted arrest, and clearly announced some very wholesome doctrine:

"That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty, or if it had contained anyone of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him, and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?

In *Weeks v. United States, supra,* through Mr. Justice Day, this court said:

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to

appeal for the maintenance of such fundamental rights. . . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 251 U. S. 391:

"The proposition could not be presented more nakedly. It is that, although, of course, its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Gouled v. United States, 255 U. S. 298, and *Amos v. United States*, 255 U. S. 313, distinctly point out that property procured by unlawful action of Federal officers cannot be introduced as evidence.

The arrest of plaintiffs in error was unauthorized, illegal and violated the guarantee of due process given by the Fifth Amendment. The liquor offered in evidence was obtained by the search which followed this arrest, and was therefore obtained in violation of their constitutional Homerights. Articles found upon or in the control of one lawfully arrested may be used as evidence for certain purposes, but not at all when secured by the unlawful action of a Federal officer.

4. The facts known by the officers who arrested plaintiffs in error were wholly insufficient to create a reasonable belief that they were transporting liquor contrary to law. These facts were detailed by Fred Cronenwelt, chief prohibition officer. His entire testimony as given at the trial follows —

"I am in charge of the Federal Prohibition Department in this District. I am acquainted with these two respondents, and first saw them on September 29, 1921, in Mr. Scully's apartment on Oakes Street, Grand Rapids. There were three of them that came to Mr. Scully's apartment, one by the name of Kruska, George Kiro and John Carroll. I was introduced to them under the name of Stafford, and told them I was working for the Michigan Chair Company, and wanted to buy three cases of whisky, and the price was agreed upon. After they thought I was all right, they said they would be back in half or three-quarters of an hour; that they had to go out to the east end of Grand Rapids, to get this liquor. They went away and came back in a short time, and Mr. Kruska came upstairs and said they couldn't get it that night; that a fellow by the name of Irving, where they were going to get it, wasn't in, but they were going to deliver it the next day, about ten. They didn't deliver it the next day. I am not positive about the price. It seems to me it was around $130 a case. It might be $135. Both respondents took part in this conversation. When they came to Mr. Scully's apartment, they had this same car. While it was dark and I wasn't able to get a good look at this car, later, on the sixth day of October, when I was out on the road with Mr. Scully, I was waiting on the highway while he went to Reed's Lake to get a light lunch, and they drove by, and I had their license number and the appearance of their car, and knowing the two boys, seeing them on the 29th day of September, I was satisfied when I seen the car on December 15th it was the same car I had seen on the 6th day of October. On the 6th day of October, it was probably twenty minutes before Scully got back to where I was. I told him the Carroll boys had just gone toward Detroit and we were trying to catch up with them and see where they were going. We did catch up with them somewhere along by Ada, just before we got to Ada, and followed them to East Lansing. We gave up the chase at East Lansing."

"On the 15th of December, when Peterson and Scully and I overhauled this car on the road, it was in the country, on Pike 16, the road leading between Grand Rapids and Detroit. When we passed the car, we were going toward Ionia, or Detroit, and the Kiro and Carroll boys were coming towards Grand Rapids when Mr. Scully and I recognized them and said 'there goes the Carroll brothers,' and we went on still further in the same direction we were going and turned around and went back to them; drove up to the side of them. Mr. Scully was driving the car; I was sitting in the front seat, and I stepped out on the running board and held out my hand and said, 'Carroll, stop that car,' and they did stop it. John Kiro was driving the car. After we got them stopped, we asked them to

get out of the car, which they did. Carroll referred to me and called me by the name of 'Fred' just as soon as I got up to him. Raised up the back part of the roadster; didn't find any liquor there; then raised up the cushion; then I struck at the lazyback of the seat and it was hard. I then started to open it up, and I did tear the cushion some, and Carroll said, 'Don't tear the cushion; we have only got six cases in there;' and I took out two bottles and found out it was liquor; satisfied it was liquor. Mr. Peterson and a fellow by the

name of Gerald Donker came in with the two Carroll boys and the liquor and the car to Grand Rapids. They brought the two defendants and the car and the liquor to Grand Rapids. I and the other men besides Peterson stayed out on the road, looking for other cars that we had information were coming in. There was conversation between me and Carroll before Peterson started for town with the defendants. Mr. Carroll said, 'Take the liquor and give us one more chance and I will make it right with you.' At the same time, he reached in one of his trousers pockets and pulled out money; the amount of it I don't know. I wouldn't say it was a whole lot. I saw a ten dollar bill, and there was some other bills; I don't know how much there was; it wasn't a large amount."

"As I understand, Mr. Hanley helped carry the liquor from the car. On the next day afterwards, we put this liquor in boxes, steel boxes, and left it in the Marshal's vault, and it is still there now. Mr. Hanley and Chief Deputy Johnson, some of the agents and myself were there. Mr. Peterson was there the next day that the labels were signed by the different officers; those two bottles, Exhibits 'A' and 'B.'"

"Q. Now, those two bottles, Exhibits 'A' and 'B,' were those the two bottles you took out of the car out there, or were those two bottles taken out of the liquor after it go up here?"

"A. We didn't label them out on the road; simply found it was liquor and sent it in, and this liquor was in Mr. Hanley's custody that evening and during the middle of the next day when we checked it over to see the amount of liquor that was there. Mr. Johnson and I sealed the bottles and Mr. Johnson's name is on the label that goes over the box with mine, and this liquor was taken out of the case today. It was taken out for the purpose of analyzation. The others were not broken until today. "

"Q. And are you able to tell us, from the label and from the bottles, whether it is part of the same liquor taken out of that car? A. It has the appearance of it, yes sir. Those are the bottles that were in there that Mr. Hanley said was gotten out of the Carroll car."

"[Cross-examination.] I think I was the first one to get back to the Carroll car after it was stopped. I had a gun in my pocket; I didn't present it. I was the first one to the car, and raised up the back of the car, but the others were there shortly afterward. We assembled right around the car immediately."

"Q. And whatever examination and what investigation you made you went right ahead and did it in your own way? A. Yes, sir."

"Q. And took possession of it, arrested them, and brought them in? A. Yes, sir."

"Q. And at that time, of course, you had no search warrant? A. No, sir. We had no knowledge that this car was coming through at that particular time."

"[Redirect examination.] The lazyback was awfully hard when I struck it with my fist. It was harder than upholstery ordinarily is in those backs; a great deal harder. It was practically solid. Sixty-nine quarts of whiskey in one lazyback."

The negotiation concerning three cases of whisky on September 29th was the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion. No whisky was delivered, and it is not certain that they ever intended to deliver any. The arrest came two and a half months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!

5. When Congress has intended that seizures or arrests might be made upon suspicion, it has been careful to say so. The history and terms of the Volstead Act are not consistent with the suggestion that it was the purpose of Congress to grant the power here claimed for enforcement officers. The facts known when the arrest occurred were wholly insufficient to engender reasonable belief that plaintiffs in error were committing a misdemeanor, and the legality of the arrest cannot be supported by facts ascertained through the search which followed.

To me, it seems clear enough that the judgment should be reversed.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this opinion.

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5.3: Kyllo v. United States 533 U.S. 27 (2001)

OCTOBER TERM, 2000

Syllabus

KYLLO *v.* UNITED STATES

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

No. 99-8508. Argued February 20, 200l-Decided June 11,2001

Suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal-imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing. After Kyllo was indicted on a federal drug charge, he unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea. The Ninth Circuit ultimately affirmed, upholding the thermal imaging on the ground that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had, ruled the court, there was no objectively reasonable expectation of privacy because the thermal imager did not expose any intimate details of Kyllo's life, only amorphous hot spots on his home's exterior.

Held: Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant. Pp. 31-41.

(a) The question whether a warrantless search of a home is reasonable and hence constitutional must be answered no in most instances, but the antecedent question whether a Fourth Amendment "search" has occurred is not so simple. This Court has approved warrantless visual surveillance of a home, see *California* v. *Ciraolo*, 476 U. S. 207, 213, ruling that visual observation is no "search" at all, see *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 234-235, 239. In assessing when a search is not a search, the Court has adapted a principle first enunciated in *Katz* v. *United States*, 389 U. S. 347, 361: A "search" does not occur-even when its object is a house explicitly protected by the Fourth Amendment-unless the individual manifested a subjective

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Syllabus

expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable, see, *e. g.*, *California* v. *Ciraolo*, *supra*, at 211. Pp. 31-33.

(b) While it may be difficult to refine the *Katz* test in some instances, in the case of the search of a home's interior-the prototypical and hence most commonly litigated area of protected privacy-there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. Thus, obtaining by sense-enhancing technology any information regarding the home's interior that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman* v. *United States*, 365 U. S. 505, 512, constitutes a search-at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. Pp. 33-35.

(c) Based on this criterion, the information obtained by the thermal imager in this case was the product of a search. The Court rejects the Government's argument that the thermal imaging must be upheld because it detected only heat radiating from the home's external surface. Such a mechanical interpretation of the Fourth Amendment was rejected in *Katz*, where the eavesdropping device in question picked up only sound waves that reached the exterior of the phone booth to which it was attached. Reversing that approach would leave the homeowner at the mercy of advancing technology-including imaging technology that could discern all human activity in the home. Also rejected is the Government's contention that the thermal imaging was constitutional because it did not detect "intimate details." Such an approach would be wrong in principle because, in the sanctity of the home, *all* details are

intimate details. See, *e. g.*, *United States* v. *Karo*, 468 U. S. *705; Dow Chemical*, *supra*, at 238, distinguished. It would also be impractical in application, failing to provide a workable accommodation between law enforcement needs and Fourth Amendment interests. See *Oliver* v. *United States*, 466 U. S. 170, 181. Pp. 35-40.

(d) Since the imaging in this case was an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant was supported by probable cause-and if not, whether there is any other basis for supporting admission of that evidence. P. 40.

190 F.3d 1041, reversed and remanded.

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SCALIA, J., delivered the opinion of the Court, in which SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 41.

Kenneth Lerner, by appointment of the Court, 531 U. S. 955, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were former Solicitor General Waxman, Assistant Attorney General Robinson, Irving L. Gornstein, and Deborah Watson. *

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires highintensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth-black

*Briefs of *amici curiae* urging reversal were filed for the Liberty Project by *Julie M. Carpenter;* and for the National Association of Criminal Defense Lawyers et al. by *James* J. *Tomkovicz, Lisa B. Kemler,* and *Steven R. Shapiro.*

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is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U. s. C. § 841(a)(1). He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Supp. App. to Pet. for Cert. 39-40. Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, 140 F.3d 1249 (1998), but that

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opinion was withdrawn and the panel (after a change in composition) affirmed, 190 F.3d 1041 (1999), with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, id., at 1046, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall," id., at 1047. We granted certiorari. 530 U. S. 1305 (2000).

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois* v. *Rodriguez*, 497 U. S. 177, 181 (1990); *Payton* v. *New York*, 445 U. S. 573, 586 (1980).

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, *e. g.*, *Goldman* v. *United States*, 316 U. S. 129, 134-136 (1942); *Olmstead* v. *United States*, 277 U. S. 438, 464-466 (1928). Cf. *Silverman* v. *United States*, *supra*, at 510-512 (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because" 'the

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eye cannot by the laws of England be guilty of a trespass.'" *Boyd* v. *United States*, 116 U. S. 616, 628 (1886) (quoting *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, see *Rakas* v. *III inois*, 439 U. S. 128, 143 (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search" 1 despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See *Minnesota* v. *Carter*, 525 U. S. 83, 104 (1998) (BREYER, J., concurring in judgment). But in fact we have held that visual observation is no "search" at allperhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. See *Dow Chemical Co.* v. *United States*, *476* U. S. 227, 234-235, 239 (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz* v. *United States*, 389 U. S. 347 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth-a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the

1 When the Fourth Amendment was adopted, as now, to "search" meant "[tJo look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

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Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id.*, at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See id., at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur-even when the explicitly protected location of a *house* is concerned-unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Ciraolo*, *supra*, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, *Smith* v. *Maryland*, 442 U. S. 735, 743744 (1979), and we have applied the test on two different occasions

in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo, supra; Florida* v. *Riley,* 488 U. S. 445 (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow* Chemical, we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U. S., at 237, n. 4 (emphasis in original).

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been

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entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. See *Ciraolo, supra,* at 215. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test-whether the individual has an expectation of privacy that society is prepared to recognize as reasonable-has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter, supra,* at 97 (SCALIA, J., concurring). But see *Rakas, supra,* at 143-144, n.12. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes-the prototypical and hence most commonly litigated area of protected privacythere is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by senseenhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman,* 365 U. S., at 512, constitutes a searchat least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the

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information obtained by the thermal imager in this case was the product of a search.2

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house," Brief for United States 26. The dissent makes this its leading point, see *post,* at 41, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house-and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz,* where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technologyincluding imaging technology that could discern all human

2 The dissent's repeated assertion that the thermal imaging did not obtain information regarding the interior of the home, *post,* at 43, 44 (opinion of STEVENS, J.), is simply inaccurate. A thermal imager reveals the relative heat of various rooms in the home. The dissent may not find that information particularly private or important, see *post,* at 43-44, 45, 4950, but there is no basis for saying it is not information regarding the interior of the home. The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home-for example, by observing snowmelt on the roof, *post,* at 43-is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find

out the same information lawful. In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.

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activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.3 The dissent's reliance on the distinction between "off-the-wall" and "through-the-wall" observation is entirely incompatible with the dissent's belief, which we discuss below, that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal-imaging devices continue to measure heat "off-the-wall" rather than "through-the-wall"; the dissent's disapproval of those more sophisticated thermalimaging devices, see *post*, at 49, is an acknowledgment that there is no substance to this distinction. As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, see *post*, at 44, that would validate even the "through-the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (i. *e.*, the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States* v. *Karo*, 468 U. S. 705 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police ac-

3 The ability to "see" through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a "RadarBased Through-the-Wall Surveillance System," "Handheld Ultrasound Through the Wall Surveillance," and a "Radar Flashlight" that "will enable law enforcement officers to detect individuals through interior building walls." www.nlectc.org/techproj/ (visited May 3, 2001). Some devices may emit low levels of radiation that travel "through-the-wall," but others, such as more sophisticated thermal-imaging devices, are entirely passive, or "off-the-wall" as the dissent puts it.

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tivity was held to be a search, and the search was held unlawfu1.4

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas," Brief for United States 22. It points out that in *Dow Chemical* we observed that the enhanced aerial photography did not reveal any "intimate details." 476 U. S., at 238. *Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U. S., at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo*, supra, the only thing detected was a can of ether in the

4 The dissent asserts, *post*, at 44-45, n. 3, that we have misunderstood its point, which is not that inference *insulates* a search, but that inference alone is *not* a search. If we misunderstood the point, it was only in a good-faith effort to render the point germane to the case at hand. The issue in this case is not the police's allegedly unlawful inferencing, but their allegedly unlawful thermal-imaging measurement of the emanations from a house. We say such measurement is a search; the dissent says it is not, because an inference is not a search. We took that to mean that, since the technologically enhanced emanations had to be the basis of inferences before anything inside the house could be known, the use of the emanations could not be a search. But the dissent certainly knows better than we what it intends. And if it means only that an inference is not a search, we certainly agree. That has no bearing, however, upon whether hi-tech measurement of emanations from a house is a search.

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home; and in *Arizona* v. *Hicks*, 480 U. S. 321 (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm-or even how relatively warm-Kyllo was heating his residence.5

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment," *Oliver* v. *United States*, 466 U. S. 170, 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes-which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath-a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which

5The Government cites our statement in *California* v. *Ciraolo*, *476* U. S. 207 (1986), noting apparent agreement with the State of California that aerial surveillance of a house's curtilage could become "'invasive'" if "'modern technology'" revealed "'those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" *Id.*, at 215, n. 3 (quoting Brief for State of California 14-15). We think the Court's focus in this secondhand dictum was not upon intimacy but upon otherwise-imperceptibility, which is precisely the principle we vindicate today.

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home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up "intimate" detailsand thus would be unable to know in advance whether it is constitutional.

The dissent's proposed standard-whether the technology offers the "functional equivalent of actual presence in the area being searched," *post*, at 47-would seem quite similar to our own at first blush. The dissent concludes that *Katz* was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible, *post*, at 49-50. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, JUSTICE STEVENS should conclude a search has occurred. Cf. *Karo*, 468 U. S., at 735 (STEVENS, J., concurring in part and dissenting in part) ("I find little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device …. A bathtub is a less private area when the plumber is present even if his back is turned"). The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information-whether the "homeowner would even care if anybody noticed," *post*, at 50. The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.6

6 The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor. See *post*, at 47. That quarrel,

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We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U. S., at 590. That line, we think, must be not only firm but also brightwhich requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll* v. *United States*, *267* U. S. 132, 149 (1925).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause-and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

however, is not with us but with this Court's precedent. See *Ciraolo*, supra, at 215 ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet"). Given that we can quite confidently say that thermal imaging is not "routine," we decline in this case to reexamine that factor.

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

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JusTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy.l Moreover, I believe that the supposedly "bright-line" rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

I

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from

1 After an evidentiary hearing, the District Court found:

"[T]he use of the thermal imaging device here was not an intrusion into Kyllo's home. No intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within the home. The device used cannot penetrate walls or windows to reveal conversations or human activities. The device recorded only the heat being emitted from the home." Supp. App. to Pet. for Cert. 40.

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our Fourth Amendment jurisprudence. One of those core principles, of course, is that "searches and seizures *inside a home* without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U. S. 573, 586 (1980) (emphasis added). But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. See id., at 586-587.2 Whether that property is residential or commercial, the basic principle is the same: "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986) (quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967)); see *Florida* v. *Riley*, 488 U. S. 445, 449-450 *(1989); California* v. *Greenwood*, 486 U. S. 35, 40-41 (1988); *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 235-236 *(1986); Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). That is the principle implicated here.

While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," *ante*, at 38-40; see *ante*, at 36, n. 3, this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted

2 Thus, for example, we have found consistent with the Fourth Amendment, even absent a warrant, the search and seizure of garbage left for collection outside the curtilage of a home, *California* v. *Greenwood*, *486* U. S. 35 (1988); the aerial surveillance of a fenced-in backyard from an altitude of 1,000 feet, *California* v. *Ciraolo*, 476 U. S. 207 (1986); the aerial observation of a partially

exposed interior of a residential greenhouse from 400 feet above, *Florida* v. *Riley*, 488 U. S. 445(1989); the aerial photography of an industrial complex from several thousand feet above, *Dow Chemical Co.* v. *United States*, 476 U. S. 227 (1986); and the observation of smoke emanating from chimney stacks, *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974).

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from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, see Appendix, *infra*, no details regarding the interior of petitioner's home were revealed. Unlike an x-ray scan, or other possible "throughthe-wall" techniques, the detection of infrared radiation emanating from the home did not accomplish "an unauthorized physical penetration into the premises," *Silverman* v. *United States*, 365 U. S. 505, 509 (1961), nor did it "obtain information that it could not have obtained by observation from outside the curtilage of the house," *United States* v. *Karo*, 468 U. S. 705, 715 (1984).

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

Thus, the notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their … houses" against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or

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in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U. S., at 361 (Harlan, J., concurring).

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner's home, and while it did pick up "details of the home" that were exposed to the public, *ante*, at 38, it did not obtain "any information regarding the *interior* of the home," *ante*, at 34 (emphasis added). In the Court's own words, based on what the thermal imager "showed" regarding the outside of petitioner's home, the officers "concluded" that petitioner was engaging in illegal activity inside the home. *Ante*, at 30. It would be quite absurd to characterize their thought processes as "searches," regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that "the lady of the house [was taking] her daily sauna and bath." *Ante*, at 38. In either case, the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, see *California* v. *Greenwood*, 486 U. S. 35 (1988), or pen register data, see *Smith* v. *Maryland*, 442 U. S. 735 (1979), or, as in this case, subpoenaed utility records, see 190 F.3d 1041, 1043 (CA9 1999). For the first time in its history, the Court assumes that an inference can amount to a Fourth Amendment violation. See *ante*, at 36-37.3

3 Although the Court credits us with the "novel proposition that inference insulates a search," *ante*, at 36, our point simply is that an inference cannot *be* a search, contrary to the Court's reasoning. See *supra* this page. Thus, the Court's use of *United States* v. *Karo*, 468 U. S. 705

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Notwithstanding the implications of today's decision, there is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as "the police cannot reasonably be

expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," *Greenwood*, 486 U. S., at 41, so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," *ante*, at 34, and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 122 (1984) ("The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well

(1984), to refute a point we do not make underscores the fact that the Court has no real answer (either in logic or in law) to the point we do make. Of course, *Karo* itself does not provide any support for the Court's view that inferences can amount to unconstitutional searches. The illegality in that case was "the monitoring of a beeper in a private residence" to obtain information that "could not have [been] obtained by observation from outside," id., at 714-715, rather than any thought processes that flowed from such monitoring.

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justified, that certain facts will not come to the attention of the authorities"). The interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home," *United States* v. *United States Dist. Court for Eastern Dist. of Mich., 407* U. S. 297, 313 (1972), and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.4

II

Instead of trying to answer the question whether the use of the thermal imager in this case was even arguably unreasonable, the Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to 'see' through walls and other opaque barriers." *Ante*, at 36, and n. 3. The newly minted rule encompasses "obtaining [1] by senseenhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area … [4] at least where (as here) the technology in question is not in general public use." *Ante*, at 34 (internal quotation marks omitted). In my judgment, the

4 This view comports with that of all the Courts of Appeals that have resolved the issue. See 190 F.3d 1041 *(CA9* 1999); *United States* v. *Robinson*, 62 F.3d 1325 (CAll 1995) (upholding warrantless use of thermal imager); *United States* v. *Myers*, 46 F.3d 668 *(CA7* 1995) (same); *United States* v. *Ishmael*, 48 F.3d 850 *(CA5* 1995) (same); *United States* v. *Pinson*, 24 F.3d 1056 *(CA8* 1994) (same). But see *United States* v. *Cusumano*, 67 F.3d 1497 (CAW 1995) (warrantless use of thermal imager violated Fourth Amendment), vacated and decided on other grounds, 83 F.3d 1247 (CAW 1996) (en bane).

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Court's new rule is at once too broad and too narrow, and is not justified by the Court's explanation for its adoption. As I have suggested, I would not erect a constitutional impediment to the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched.

Despite the Court's attempt to draw a line that is "not only firm but also bright," *ante*, at 40, the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use," *ante*, at 34. Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion.5 In any event, putting aside its lack of clarity, this criterion

is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule, *ibid.*, is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States* v. *Place*, 462 U. S. 696, 707 (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the Fourth Amendment," and it must follow that sense-enhancing equipment that identifies nothing but illegal

5 The record describes a device that numbers close to a thousand manufactured units; that has a predecessor numbering in the neighborhood of 4,000 to 5,000 units; that competes with a similar product numbering from 5,000 to 6,000 units; and that is "readily available to the public" for commercial, personal, or law enforcement purposes, and is just an 800number away from being rented from "half a dozen national companies" by anyone who wants one. App. 18. Since, by virtue of the Court's new rule, the issue is one of first impression, perhaps it should order an evidentiary hearing to determine whether these facts suffice to establish "general public use."

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activity is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule, as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive, even if the devices (like the dog sniffs) are "so limited both in the manner in which" they obtain information and "in the content of the information" they reveal. *Ibid.* If nothing more than that sort of information could be obtained by using the devices in a public place to monitor emissions from a house, then their use would be no more objectionable than the use of the thermal imager in this case.

The application of the Court's new rule to "any information regarding the interior of the home," *ante*, at 34, is also unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the interior of a home should not provide it with constitutional protection. See *supra*, at 47 and this page. The criterion, moreover, is too sweeping in that information "regarding" the interior of a home apparently is not just information obtained through its walls, but also information concerning the outside of the building that could lead to (however many) inferences "regarding" what might be inside. Under that expansive view, I suppose, an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional "search" of the home.

Because the new rule applies to information regarding the "interior" of the home, it is too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home. If such equipment

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did provide its user with the functional equivalent of access to a private place-such as, for example, the telephone booth involved in *Katz*, or an office building-then the rule should apply to such an area as well as to a home. See *Katz*, *389* U. S., at 351 ("[T]he Fourth Amendment protects people, not places").

The final requirement of the Court's new rule, that the information "could not otherwise have been obtained without physical intrusion into a constitutionally protected area," *ante*, at 34 (internal quotation marks omitted), also extends too far as the Court applies it. As noted, the Court effectively treats the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home. See *supra*, at 44. As I have explained, however, the process of drawing inferences from data in the public domain should not be characterized as a search.

The two reasons advanced by the Court as justifications for the adoption of its new rule are both unpersuasive. First, the Court suggests that its rule is compelled by our holding in *Katz*, because in that case, as in this, the surveillance consisted of nothing more than the monitoring of waves emanating from a private area into the public domain. See *ante*, at 35. Yet there are critical differences between the cases. In *Katz*, the electronic listening device attached to the outside of the phone booth allowed the officers to pick up the content of the conversation inside the booth, making them the functional equivalent of intruders because they

gathered information that was otherwise available only to someone inside the private area; it would be as if, in this case, the thermal imager presented a view of the heat-generating activity inside petitioner's home. By contrast, the thermal imager here disclosed only the relative amounts of heat radiating from the house; it would be as if, in *Katz*, the listening device disclosed only the rela-

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tive volume of sound leaving the booth, which presumably was discernible in the public domain.6 Surely, there is a significant difference between the general and well-settled expectation that strangers will not have direct access to the contents of private communications, on the one hand, and the rather theoretical expectation that an occasional homeowner would even care if anybody noticed the relative amounts of heat emanating from the walls of his house, on the other. It is pure hyperbole for the Court to suggest that refusing to extend the holding of *Katz* to this case would leave the homeowner at the mercy of "technology that could discern all human activity in the home." *Ante*, at 35-36.

Second, the Court argues that the permissibility of "through-the-wall surveillance" cannot depend on a distinction between observing "intimate details" such as "the lady of the house [taking] her daily sauna and bath," and noticing only "the nonintimate rug on the vestibule floor" or "objects no smaller than 36 by 36 inches." *Ante*, at 37, 3839. This entire argument assumes, of course, that the thermal imager in this case could or did perform "through-thewall surveillance" that could identify any detail "that would previously have been unknowable without physical intrusion." *Ante*, at 39-40. In fact, the device could not, see n. 1, *supra*, and did not, see Appendix, *infra*, enable its user to identify either the lady of the house, the rug on the vestibule floor, or anything else inside the house, whether smaller or larger than 36 by 36 inches. Indeed, the vague thermal images of petitioner's home that are reproduced in the Appendix were submitted by him to the District Court as part of an expert report raising the question whether the device could even take "accurate, consistent infrared images" of the

6 The use of the latter device would be constitutional given Smith v.

Maryland, 442 U. S. 735, 741 (1979), which upheld the use of pen registers to record numbers dialed on a phone because, unlike "the listening device employed in *Katz* … pen registers do not acquire the *contents* of communications."

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outside of his house. Defendant's Exh. 107, p. 4. But even if the device could reliably show extraordinary differences in the amounts of heat leaving his home, drawing the inference that there was something suspicious occurring inside the residence-a conclusion that officers far less gifted than Sherlock Holmes would readily draw-does not qualify as "through-the-wall surveillance," much less a Fourth Amendment violation.

III

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

I respectfully dissent.

[Appendix to opinion of STEVENS, J., follows this page.]

Appendix to opinion of STEVENS, J.

APPENDIX TO OPINION OF STEVENS, J. (Images and text reproduced from defendant's exhibit 107) Top left: Infrared image of a video frame from the videotape submitted as evidence in this case. The thermogram indicates the suspect house as it appeared with the Gain and contrast in its default setting. Only the outline of the house is visible. The camera used was the Thermovision 210. Top Right: Infrared image of a subsequent videoframe taken from the videotape. The gain and contrast settings have been increased in order to make the walls and roof of the structure appear hotter than what it actually is.



Bottom Left: Infrared image of the opposite side of the suspects house. The thermogram is also taken from the same videotape. The camera settings are in the default mode and the outline of the house is barely visible. Only the hot electrical transformer and the street light are identifiable.

Bottom Right: The same image, but with the gain and contrast increased. This change in camera settings cause any object to appear hotter than what it actually is. The arrow indicates the overloading of an area immediately around a hot object in this case the electrical transformer and the streetlight. This overloading of the image is an inherent design flaw in the camera itself.

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5.4: Brendlin v. California 551 U.S. 249 (2007)

OPINION OF THE COURT
BRENDLIN V. CALIFORNIA
551 U. S. ____ (2007)

SUPREME COURT OF THE UNITED STATES
NO. 06-8120

BRUCE EDWARD BRENDLIN, PETITIONER *v.* CALIFORNIA

on writ of certiorari to the supreme court of california

[June 18, 2007]

Justice Souter delivered the opinion of the Court.

When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. The question in this case is whether the same is true of a passenger. We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.

I

Early in the morning of November 27, 2001, Deputy Sheriff Robert Brokenbrough and his partner saw a parked Buick with expired registration tags. In his ensuing conversation with the police dispatcher, Brokenbrough learned that an application for renewal of registration was being processed. The officers saw the car again on the road, and this time Brokenbrough noticed its display of a temporary operating permit with the number "11," indicating it was legal to drive the car through November. App. 115. The officers decided to pull the Buick over to verify that the permit matched the vehicle, even though, as Brokenbrough admitted later, there was nothing unusual about the permit or the way it was affixed. Brokenbrough asked the driver, Karen Simeroth, for her license and saw a passenger in the front seat, petitioner Bruce Brendlin, whom he recognized as "one of the Brendlin brothers." *Id.*, at 65. He recalled that either Scott or Bruce Brendlin had dropped out of parole supervision and asked Brendlin to identify himself. [Footnote 1] Brokenbrough returned to his cruiser, called for backup, and verified that Brendlin was a parole violator with an outstanding no-bail warrant for his arrest. While he was in the patrol car, Brokenbrough saw Brendlin briefly open and then close the passenger door of the Buick. Once reinforcements arrived, Brokenbrough went to the passenger side of the Buick, ordered him out of the car at gunpoint, and declared him under arrest. When the police searched Brendlin incident to arrest, they found an orange syringe cap on his person. A patdown search of Simeroth revealed syringes and a plastic bag of a green leafy substance, and she was also formally arrested. Officers then searched the car and found tubing, a scale, and other things used to produce methamphetamine.

Brendlin was charged with possession and manufacture of methamphetamine, and he moved to suppress the evidence obtained in the searches of his person and the car as fruits of an unconstitutional seizure, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop. He did not assert that his Fourth Amendment rights were violated by the search of Simeroth's vehicle, cf. *Rakas* v. *Illinois*, 439 U. S. 128 (1978), but claimed only that the traffic stop was an unlawful seizure of his person. The trial court denied the suppression motion after finding that the stop was lawful and Brendlin was not seized until Brokenbrough ordered him out of the car and formally arrested him. Brendlin pleaded guilty, subject to appeal on the suppression issue, and was sentenced to four years in prison.

The California Court of Appeal reversed the denial of the suppression motion, holding that Brendlin was seized by the traffic stop, which they held unlawful. 8 Cal. Rptr. 3d 882 (2004) (officially depublished). By a narrow majority, the Supreme Court of California reversed. The State Supreme Court noted California's concession that the officers had no reasonable basis to suspect unlawful operation of the car, 38 Cal. 4th 1107, 1114, 136 P. 3d 845, 848 (2006),[Footnote 2] but still held suppression unwarranted because a passenger "is not seized as a constitutional matter in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority," *id*., at 1111, 136 P. 3d, at 846. The court reasoned that Brendlin was not seized by the traffic stop because Simeroth was its exclusive target, *id*., at 1118, 136 P. 3d, at 851, that a passenger cannot submit to an officer's show of authority while the driver controls the car, *id*., at 1118–1119, 135 P. 3d, at 851–852, and that once a car has been pulled off the road, a passenger "would feel free to depart or otherwise to

conduct his or her affairs as though the police were not present," *id*., at 1119, 136 P. 3d, at 852. In dissent, Justice Corrigan said that a traffic stop entails the seizure of a passenger even when the driver is the sole target of police investigation because a passenger is detained for the purpose of ensuring an officer's safety and would not feel free to leave the car without the officer's permission. *Id*., at 1125, 136 P. 3d, at 856.

We granted certiorari to decide whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure, 549 U. S. __ (2007). We now vacate.

II

A

A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, " 'by means of physical force or show of authority,' " terminates or restrains his freedom of movement, *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968)), "*through means intentionally applied*," *Brower* v. *County of Inyo*, 489 U. S. 593, 597 (1989) (emphasis in original). Thus, an "unintended person … [may be] the object of the detention," so long as the detention is "willful" and not merely the consequence of "an unknowing act." *Id*., at 596; cf. *County of Sacramento* v. *Lewis*, 523 U. S. 833, 844 (1998) (no seizure where a police officer accidentally struck and killed a motorcycle passenger during a high-speed pursuit). A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. See *California* v. *Hodari D.*, 499 U. S. 621, 626, n. 2 (1991); *Lewis*, *supra*, at 844, 845, n. 7.

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *id*., at 554 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, *e.g*., *Hodari D*., *supra*, at 627; *Michigan* v. *Chesternut*, 486 U. S. 567, 573 (1988); *INS* v. *Delgado*, 466 U. S. 210, 215 (1984), but added that when a person "has no desire to leave" for reasons unrelated to the police presence, the "coercive effect of the encounter" can be measured better by asking whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," *Bostick*, *supra*, at 435–436; see also *United States* v. *Drayton*, 536 U. S. 194, 202 (2002).

The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979); see also *Whren*v. *United States*, 517 U. S. 806, 809–810 (1996). And although we have not, until today, squarely answered the question whether a passenger is also seized, we have said over and over in dicta that during a traffic stop an officer seizes everyone in the vehicle, not just the driver. See, *e.g.*, *Prouse*, *supra*, at 653 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"); *Colorado* v. *Bannister*, 449 U. S. 1, 4, n. 3 (1980) *(per curiam)* ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"); *Berkemer* v. *McCarty*, 468 U. S. 420, 436–437 (1984) ("[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure" (internal quotation marks omitted)); *United States* v. *Hensley*, 469 U. S. 221, 226 (1985) ("[S]topping a car and detaining its occupants constitute a seizure"); *Whren*, *supra*, at 809–810 ("Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]").

We have come closest to the question here in two cases dealing with unlawful seizure of a passenger, and neither time did we indicate any distinction between driver and passenger that would affect the Fourth Amendment analysis. *Delaware*v. *Prouse* considered grounds for stopping a car on the road and held that Prouse's suppression motion was properly granted. We spoke of the arresting officer's testimony that Prouse was in the back seat when the car was pulled over, see 440 U. S., at 650, n. 1, described Prouse as an occupant, not as the driver, and referred to the car's "occupants" as being seized, *id*., at 653. Justification for stopping a car was the issue again in *Whren* v. *United States*, where we passed upon a Fourth Amendment challenge by two petitioners who moved to suppress drug evidence found during the course of a traffic stop. See 517 U. S., at 809. Both driver and passenger claimed to have been seized illegally when the police stopped the car; we agreed and held suppression unwarranted only because the stop rested on probable cause. *Id*., at 809–810, 819.

B

The State concedes that the police had no adequate justification to pull the car over, see n. 2, *supra*, but argues that the passenger was not seized and thus cannot claim that the evidence was tainted by an unconstitutional stop. We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to "terminate the encounter" between the police and himself. *Bostick*, *supra*, at 436. We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on "privacy and personal security" does not normally (and did not here) distinguish between passenger and driver. *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976). An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. Cf. *Drayton*, *supra*, at 197–199, 203–204 (finding no seizure when police officers boarded a stationary bus and asked passengers for permission to search for drugs).[Footnote 3]

It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland* v. *Wilson*, 519 U. S. 408 (1997), we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. *Id.*, at 414–415; cf. *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)* (driver may be ordered out of the car as a matter of course). In fashioning this rule, we invoked our earlier statement that " '[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.' " *Wilson*, *supra*, at 414 (quoting *Michigan*v. *Summers*, 452 U. S. 692, 702–703 (1981)). What we have said in these opinions probably reflects a societal expectation of " 'unquestioned [police] command' " at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission. *Wilson*, *supra*, at 414.[Footnote 4]

Our conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. See *United States* v. *Kimball*, 25 F. 3d 1, 5 (CA1 1994); *United States* v. *Mosley*, 454 F. 3d 249, 253 (CA3 2006); *United States* v. *Rusher*, 966 F. 2d 868, 874, n. 4 (CA4 1992); *United States* v. *Grant*, 349 F. 3d 192, 196 (CA5 2003); *United States* v. *Perez*, 440 F. 3d 363, 369 (CA6 2006); *United States* v. *Powell*, 929 F. 2d 1190, 1195 (CA7 1991); *United States* v. *Ameling*, 328 F. 3d 443, 446–447, n. 3 (CA8 2003); *United States* v. *Twilley*, 222 F. 3d 1092, 1095 (CA9 2000); *United States* v. *Eylicio-Montoya*, 70 F. 3d 1158, 1163–1164 (CA10 1995); *State* v. *Bowers*, 334 Ark. 447, 451–452, 976 S. W. 2d 379, 381–382 (1998); *State* v. *Haworth*, 106 Idaho 405, 405–406, 679 P. 2d 1123, 1123–1124 (1984); *People* v. *Bunch*, 207 Ill. 2d 7, 13, 796 N. E. 2d 1024, 1029 (2003); *State* v. *Eis*, 348 N. W. 2d 224, 226 (Iowa 1984); *State* v. *Hodges*, 252 Kan. 989, 1002–1005, 851 P. 2d 352, 361–362 (1993); *State* v. *Carter*, 69 Ohio St. 3d 57, 63, 630 N. E. 2d 355, 360 (1994) *(per curiam); State* v. *Harris*, 206 Wis. 2d 243, 253–258, 557 N. W. 2d 245, 249–251 (1996). And the treatise writers share this prevailing judicial view that a passenger may bring a Fourth Amendment challenge to the legality of a traffic stop. See, *e.g.*, 6 W. LaFave, Search and Seizure §11.3(e), pp. 194, 195, and n. 277 (4th ed. 2004 and Supp. 2007) ("If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" (footnote omitted)); 1 W. Ringel, Searches & Seizures, Arrests and Confessions §11:20, p. 11–98 (2d ed. 2007) ("[A] law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger").[Footnote 5]

C

The contrary conclusion drawn by the Supreme Court of California, that seizure came only with formal arrest, reflects three premises as to which we respectfully disagree. First, the State Supreme Court reasoned that Brendlin was not seized by the stop because Deputy Sheriff Brokenbrough only intended to investigate Simeroth and did not direct a show of authority toward Brendlin. The court saw Brokenbrough's "flashing lights [as] directed at the driver," and pointed to the lack of record evidence that Brokenbrough "was even aware [Brendlin] was in the car prior to the vehicle stop." 38 Cal. 4th, at 1118, 136 P. 3d, at 851. But that

view of the facts ignores the objective *Mendenhall* test of what a reasonable passenger would understand. To the extent that there is anything ambiguous in the show of force (was it fairly seen as directed only at the driver or at the car and its occupants?), the test resolves the ambiguity, and here it leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority. The State Supreme Court's approach, on the contrary, shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car, and we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis. See, *e.g.*, *Whren*, 517 U. S., at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); *Chesternut*, 486 U. S., at 575, n. 7 ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted"); *Mendenhall*, 446 U. S., at 554, n. 6 (principal opinion) (disregarding a Government agent's subjective intent to detain Mendenhall); cf. *Rakas*, 439 U. S., at 132–135 (rejecting the "target theory" of Fourth Amendment standing, which would have allowed "any criminal defendant at whom a search was directed" to challenge the legality of the search (internal quotation marks omitted)).

California defends the State Supreme Court's ruling on this point by citing our cases holding that seizure requires a purposeful, deliberate act of detention. See Brief for Respondent 9–14. But *Chesternut*, *supra*, answers that argument. The intent that counts under the Fourth Amendment is the "intent [that] has been conveyed to the person confronted," *id.*, at 575, n. 7, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized. Our most recent cases are in accord on this point. In *Lewis*, 523 U. S. 833, we considered whether a seizure occurred when an officer accidentally ran over a passenger who had fallen off a motorcycle during a high-speed chase, and in holding that no seizure took place, we stressed that the officer stopped Lewis's movement by accidentally crashing into him, not "through means intentionally applied." *Id.*, at 844 (emphasis deleted). We did not even consider, let alone emphasize, the possibility that the officer had meant to detain the driver only and not the passenger. Nor is *Brower*, 489 U. S. 593, to the contrary, where it was dispositive that "Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped." *Id.*, at 599. California reads this language to suggest that for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority, see Brief for Respondent 12, as if the thrust of our observation were that Brower, and not someone else, was "meant to be stopped." But our point was not that Brower alone was the target but that officers detained him "through means intentionally applied"; if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock. Neither case, then, is at odds with our holding that the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business.

Second, the Supreme Court of California assumed that Brendlin, "as the passenger, had no ability to submit to the deputy's show of authority" because only the driver was in control of the moving vehicle. 38 Cal. 4th, at 1118, 1119, 136 P. 3d, at 852. But what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away. Here, Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop he could, and apparently did, submit by staying inside.

Third, the State Supreme Court shied away from the rule we apply today for fear that it "would encompass even those motorists following the vehicle subject to the traffic stop who, by virtue of the original detention, are forced to slow down and perhaps even come to a halt in order to accommodate that vehicle's submission to police authority." *Id.*, at 1120, 136 P. 3d, at 853. But an occupant of a car who knows that he is stuck in traffic because another car has been pulled over (like the motorist who can't even make out why the road is suddenly clogged) would not perceive a show of authority as directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect an individual's "sense of security and privacy in traveling in an automobile." *Prouse*, 440 U. S., at 662. Nor would the consequential blockage call for a precautionary rule to avoid the kind of "arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was intended to limit. *Martinez-Fuerte*, 428 U. S., at 554.[Footnote 6]

Indeed, the consequence to worry about would not flow from our conclusion, but from the rule that almost all courts have rejected. Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.[Footnote 7] The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to

run the kind of "roving patrols" that would still violate the driver's Fourth Amendment right. See, *e.g.*, *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973) (stop and search by Border Patrol agents without a warrant or probable cause violated the Fourth Amendment); *Prouse*, *supra*, at 663 (police spot check of driver's license and registration without reasonable suspicion violated the Fourth Amendment).

* * *

Brendlin was seized from the moment Simeroth's car came to a halt on the side of the road, and it was error to deny his suppression motion on the ground that seizure occurred only at the formal arrest. It will be for the state courts to consider in the first instance whether suppression turns on any other issue. The judgment of the Supreme Court of California is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Footnote 1

The parties dispute the accuracy of the transcript of the suppression hearing and disagree as to whether Brendlin gave his name or the false name "Bruce Brown." App. 115.

Footnote 2

California conceded that the police officers lacked reasonable suspicion to justify the traffic stop because a " 'vehicle with an application for renewal of expired registration would be expected to have a temporary operating permit.' " 38 Cal. 4th, at 1114, 136 P. 3d, at 848 (quoting Brief for Respondent California in No. S123133 (Sup. Ct. Cal.), p. 24).

Footnote 3

Of course, police may also stop a car solely to investigate a passenger's conduct. See, *e.g.*, *United States* v. *Rodriguez-Diaz*, 161 F. Supp. 2d 627, 629, n. 1 (Md. 2001) (passenger's violation of local seatbelt law); *People* v. *Roth*, 85 P. 3d 571, 573 (Colo. App. 2003) (passenger's violation of littering ordinance). Accordingly, a passenger cannot assume, merely from the fact of a traffic stop, that the driver's conduct is the cause of the stop.

Footnote 4

Although the State Supreme Court inferred from Brendlin's decision to open and close the passenger door during the traffic stop that he was "awar[e] of the available options," 38 Cal. 4th 1107, 1120, 136 P. 3d 845, 852 (2006), this conduct could equally be taken to indicate that Brendlin felt compelled to remain inside the car. In any event, the test is not what Brendlin felt but what a reasonable passenger would have understood.

Footnote 5

Only two State Supreme Courts, other than California's, have stood against this tide of authority. See *People* v. *Jackson*, 39 P. 3d 1174, 1184–1186 (Colo. 2002) (en banc); *State* v. *Mendez*, 137 Wash. 2d 208, 222–223, 970 P. 2d 722, 729 (1999) (en banc).

Footnote 6

California claims that, under today's rule, "all taxi cab and bus passengers would be 'seized' under the Fourth Amendment when the cab or bus driver is pulled over by the police for running a red light." Brief for Respondent 23. But the relationship between driver and passenger is not the same in a common carrier as it is in a private vehicle, and the expectations of police officers and passengers differ accordingly. In those cases, as here, the crucial question would be whether a reasonable person in the passenger's position would feel free to take steps to terminate the encounter.

Footnote 7

Compare *Delaware* v. *Prouse*, 440 U. S. 648, 663 (1979) (requiring "at least articulable and reasonable suspicion" to support random, investigative traffic stops), and *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880–884 (1975) (same), with *Whren* v. *United States*, 517 U. S. 806, 810 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred"), and *Atwater* v. *Lago Vista*, 532 U. S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender").

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5.5: Rodriguez v. US 575 US___(2015)

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SUPREME COURT OF THE UNITED STATES

Syllabus

RODRIGUEZ *v*. UNITED STATES

certiorari to the united states court of appeals for the eighth circuit

No. 13–9972. Argued January 21, 2015—Decided April 21, 2015

Officer Struble, a K–9 officer, stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including, *inter alia*, checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time Struble issued the written warning until the dog alerted.

Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge recommended denial of the motion. He found no reasonable suspicion supporting detention once Struble issued the written warning. Under Eighth Circuit precedent, however, he concluded that prolonging the stop by "seven to eight minutes" for the dog sniff was only a *de minimis*intrusion on Rodriguez's Fourth Amendment rights and was for that reason permissible. The District Court then denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed. Noting that the seven or eight minute delay was an acceptable "*de minimis* intrusion on Rodriguez's personal liberty," the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

Held:

1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under *Terry* v. *Ohio*, 392 U. S. 1 , than an arrest, see, *e.g.*, *Arizona* v. *Johnson*, 555 U. S. 323 . Its tolerable duration is determined by the seizure's "mission," which is to address the traffic violation that warranted the stop, *Illinois* v. *Caballes*, 543 U. S. 405 and attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do not lengthen the roadside detention, *Johnson*, 555 U. S., at 327–328 (questioning); *Caballes*, 543 U. S., at 406, 408 (dog sniff), but a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket, *id.*, at 407.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Delaware* v. *Prouse*, 440 U. S. 648 –659. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In concluding that the *de minimis* intrusion here could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on *Pennsylvania* v. *Mimms*, 434 U. S. 106 . The Court reasoned in *Mimms* that the government's "legitimate and weighty" interest in officer safety outweighed the "*de minimis*" additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, *id.*, at 110–111. The officer-safety interest recognized in *Mimms*, however, stemmed from the danger to

the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore gains no support from *Mimms*.

The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop "prolonged beyond" the time in fact needed for the officer to complete his traffic-based inquiries is "unlawful," *Caballes*, 543 U. S., at 407. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 5–8.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. P. 9.

741 F. 3d 905, vacated and remanded.

Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Breyer, Sotomayor, and Kagan, JJ., joined. Kennedy, J., filed a dissenting opinion. Thomas, J., filed a dissenting opinion, in which Alito, J., joined, and in which Kennedy, J., joined as to all but Part III. Alito, J., filed a dissenting opinion.

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5.6: US v. Leon 468 US 897 (1984)

U.S. Supreme Court

United States v. Leon, 468 U.S. 897 (1984)

United States v. Leon

No. 82-1771

Argued January 17, 1984

Decided July 5, 1984

468 U.S. 897

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

Syllabus

Acting on the basis of information from a confidential informant, officers of the Burbank, Cal., Police Department initiated a drug-trafficking investigation involving surveillance of respondents' activities. Based on an affidavit summarizing the police officers' observations, Officer Rombach prepared an application for a warrant to search three residences and respondents' automobiles for an extensive list of items. The application w as reviewed by several Deputy District Attorneys, and a facially valid search warrant was issued by a state court judge. Ensuing searches produced large quantities of drugs and other evidence. Respondents were indicted for federal drug offenses, and filed motions to suppress the evidence seized pursuant to the warrant. After an evidentiary hearing, the District Court granted the motions in part, concluding that the affidavit was insufficient to establish probable cause. Although recognizing that Officer Rombach had acted in good faith, the court rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good faith reliance on a search warrant. The Court of Appeals affirmed, also refusing the Government's invitation to recognize a good faith exception to the rule. The Government's petition for certiorari presented only the question whether a good faith exception to the exclusionary rule should be recognized.

Held:

1. The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. Pp. 468 U. S. 905-925.

(a) An examination of the Fourth Amendment's origin and purposes makes clear that the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong. The question whether the exclusionary sanction is appropriately imposed in a particular case as a judicially created remedy to safeguard Fourth Amendment rights through its deterrent effect, must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence. Indiscriminate application of the

exclusionary rule — impeding the criminal justice system's truthfinding function and allowing some guilty defendants to go free — may well generate disrespect for the law and the administration of justice. Pp. 468 U. S. 906-908.

(b) Application of the exclusionary rule should continue where a Fourth Amendment violation has been substantial and deliberate, but the balancing approach that has evolved in determining whether the rule should be applied in a variety of contexts — including criminal trials — suggests that the rule should be modified to permit the introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate. Pp. 468 U. S. 908-913.

(c) The deference accorded to a magistrate's finding of probable cause for the issuance of a warrant does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based, and the courts must also insist that the magistrate purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police. Moreover,

reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause. However, the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates. Admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will not reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests. Pp. 468 U. S. 913-917.

(d) Even assuming that the exclusionary rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law, and penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. Pp. 468 U. S. 918-921.

(e) A police officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable. Suppression remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, or if the

issuing magistrate wholly abandoned his detached and neutral judicial role. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient — *i.e.*, in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid. Pp. 468 U. S. 922-925.

2. In view of the modification of the exclusionary rule, the Court of Appeals' judgment cannot stand in this case. Only respondent Leon contended that no reasonably well trained police officer could have believed that there existed probable cause to search his house. However, the record establishes that the police officers' reliance on the state court judge's determination of probable cause was objectively reasonable. Pp. 925-926.

701 F.2d 187, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 468 U. S. 927. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 468 U. S. 928. STEVENS, J., filed a dissenting opinion, *post*, p. 468 U. S. 960.

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. To resolve this question, we must consider once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are "acquitted

or convicted on the basis of all the evidence which exposes the truth." *Alderman v. United States*, 394 U. S. 165, 394 U. S. 175 (1969).

I

In August, 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence at

620 Price Drive in Burbank, Cal. The informant also indicated that he had witnessed a sale of methaqualone by "Patsy" at the residence approximately five months earlier, and had observed at that time a shoebox containing a large amount of cash that belonged to "Patsy." He further declared that "Armando" and "Patsy" generally kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank.

On the basis of this information, the Burbank police initiated an extensive investigation focusing first on the Price Drive residence and later on two other residences as well. Cars parked at the Price Drive residence were determined to belong to respondents Armando Sanchez, who had previously been arrested for possession of marihuana, and Patsy Stewart, who had no criminal record. During the course of the investigation, officers observed an automobile belonging to respondent Ricardo Del Castillo, who had previously been arrested for possession of 50 pounds of marihuana, arrive at the Price Drive residence. The driver of that car entered the house, exited shortly thereafter carrying a small paper sack, and drove away. A check of Del Castillo's probation records led the officers to respondent Alberto Leon, whose telephone number Del Castillo had listed as his employer's. Leon had been arrested in 1980 on drug charges, and a companion had informed the police at that time that Leon was heavily involved in the importation of drugs into this country. Before the current investigation began, the Burbank officers had

learned that an informant had told a Glendale police officer that Leon stored a large quantity of methaqualone at his residence in Glendale. During the course of this investigation, the Burbank officers learned that Leon was living at 716 South Sunset Canyon in Burbank.

Subsequently, the officers observed several persons, at least one of whom had prior drug involvement, arriving at the Price Drive residence and leaving with small packages; observed a variety of other material activity at the two residences as well as at a condominium at 7902 Via Magdalena; and witnessed a variety of relevant activity involving respondents' automobiles. The officers also observed respondents Sanchez and Stewart board separate flights for Miami. The pair later returned to Los Angeles together, consented to a search of their luggage that revealed only a small amount of marihuana, and left the airport. Based on these and other observations summarized in the affidavit, App. 34, Officer Cyril Rombach of the Burbank Police Department, an experienced and well-trained narcotics investigator, prepared an application for a warrant to search 620 Price Drive, 716 South Sunset Canyon, 7902 Via Magdalena, and automobiles registered to each of the respondents for an extensive list of items believed to be related to respondents' drug trafficking activities. Officer Rombach's extensive application was reviewed by several Deputy District Attorneys.

A facially valid search warrant was issued in September, 1981, by a State Superior Court Judge. The ensuing searches produced large quantities of drugs at the Via Magdalena and Sunset Canyon addresses and a small quantity at the Price Drive residence. Other evidence was discovered at each of the residences and in Stewart's and Del Castillo's automobiles. Respondents were indicted by a grand jury in the District Court for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.

The respondents then filed motions to suppress the evidence seized pursuant to the warrant. [Footnote 1] The District Court held an evidentiary hearing and, while recognizing that the case was a close one, *see id.* at 131, granted the motions to suppress in part. It concluded that the affidavit was insufficient to establish probable cause, [Footnote 2] but did not suppress all of the evidence as to all of the respondents because none of the respondents had standing to challenge all of the searches. [Footnote 3] In

response to a request from the Government, the court made clear that Officer Rombach had acted in good faith, but it rejected the Government's suggestion that the Fourth Amendment exclusionary rule should not apply where evidence is seized in reasonable, good faith reliance on a search warrant. [Footnote 4] The District Court denied the Government's motion for reconsideration, *id.* at 147, and a divided panel of the Court of Appeals for the Ninth Circuit affirmed, judgt. order reported at 701 F.2d 187 (1983). The Court of Appeals first concluded that Officer Rombach's affidavit could not establish probable cause to search the Price Drive residence. To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility. Accordingly, the Court of Appeals concluded that the information provided by the informant was inadequate under both prongs of the two-part test

established in *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410(1969). [Footnote 5] The officers' independent investigation neither cured the staleness nor corroborated the details of the informant's declarations. The Court of Appeals then considered whether the affidavit formed a proper basis for the

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search of the Sunset Canyon residence. In its view, the affidavit included no facts indicating the basis for the informants' statements concerning respondent Leon's criminal activities, and was devoid of information establishing the informants' reliability. Because these deficiencies had not been cured by the police investigation, the District Court properly suppressed the fruits of the search. The Court of Appeals refused the Government's invitation to recognize a good faith exception to the Fourth Amendment exclusionary rule. App. to Pet. for Cert. 4a.

The Government's petition for certiorari expressly declined to seek review of the lower courts' determinations that the search warrant was unsupported by probable cause, and presented only the question

"[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective."

We granted certiorari to consider the propriety of such a modification. 463 U.S. 1206 (1983). Although it undoubtedly is within our power to consider the question whether probable cause existed under the "totality of the circumstances" test announced last Term in *Illinois v. Gates*, 462 U. S. 213 (1983), that question has not been briefed or argued; and it is also within our authority, which we choose to exercise, to take the case as it comes to us, accepting the Court of Appeals' conclusion that probable cause was lacking under the prevailing legal standards.*See* this Court's Rule 21. 1(a).

We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions. Accordingly, we reverse the judgment of the Court of Appeals.

II

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, *Mapp v.*

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Ohio, 367 U. S. 643, 367 U. S. 651, 655-657 (1961); *Olmstead v. United States*, 277 U. S. 438, 277 U. S. 462-463 (1928), or that the rule is required by the conjunction of the Fourth and Fifth Amendments. *Mapp v. Ohio*, *supra*, at 367 U. S. 661-662 (Black, J., concurring); *Agnello v. United States*, 269 U. S. 20, 269 U. S. 33-34 (1925). These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, *see Andresen v. Maryland*, 427 U. S. 463 (1976), and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, 428 U. S. 465, 428 U. S. 486 (1976).

A

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States v. Calandra*, 414 U. S. 338, 414 U. S. 354 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, *ibid.*, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." *Stone v. Powell*, *supra*, at 428 U. S. 540 (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, *supra*, at 414 U. S. 348.

Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is

"an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

Illinois v. Gates, *supra*, at 462 U. S. 223. Only the former question is currently before us, and it must

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be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.

"Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truthfinding functions of judge and jury."

United States v. Payner, 447 U. S. 727, 447 U. S. 734 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truthfinding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. [Footnote 6] Particularly

when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. *Stone v. Powell*, 428 U.S. at 428 U. S. 490. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." *Id.* at 428 U. S. 491. Accordingly,

"[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

United States v. Calandra, *supra*, at 414 U. S. 348; *see Stone v. Powell*, *supra*, at 428 U. S. 486-487; *United States v. Janis*, 428 U. S. 433, 428 U. S. 447 (1976).

B

Close attention to those remedial objectives has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule. The Court has, to be sure, not seriously questioned,

"in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence

from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate. . . ."

Franks v. Delaware, 438 U. S. 154, 438 U. S. 171 (1978); *Stone v. Powell*, *supra*, at 428 U. S. 492. Nevertheless, the balancing approach that has evolved in various contexts — including criminal trials —

"forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good faith belief that a search or seizure was in accord with the Fourth Amendment."

Illinois v. Gates, 462 U.S. at 462 U. S. 255 (WHITE, J., concurring in judgment).

In *Stone v. Powell*, *supra*, the Court emphasized the costs of the exclusionary rule, expressed its view that limiting the circumstances under which Fourth Amendment claims could be raised in federal habeas corpus proceedings would not reduce the rule's deterrent effect, *id.* at 428 U. S. 489-495, and held that a state prisoner who has been afforded a full and fair opportunity to litigate a Fourth Amendment claim may not obtain federal habeas relief on the ground that unlawfully obtained evidence had been introduced at his trial. *Cf. Rose v. Mitchell*, 443 U. S. 545, 443 U. S. 560-563 (1979). Proposed extensions of the exclusionary rule to proceedings other than the criminal trial itself have been evaluated and rejected under the same analytic approach. In *United States v. Calandra*, for example, we declined to allow grand jury witnesses to refuse to answer questions based on evidence obtained from an unlawful search or seizure, since "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain, at best." 414 U.S. at 414 U. S. 348. Similarly, in *United States v. Janis*, *supra*, we permitted the use in federal civil proceedings of evidence illegally seized by state officials, since the likelihood of deterring police misconduct through such an extension of the exclusionary rule was insufficient to outweigh its substantial social costs. In so doing, we declared that,

"[i]f . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."

Id. at 428 U. S. 454.

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As cases considering the use of unlawfully obtained evidence in criminal trials themselves make clear, it does not follow from the emphasis on the exclusionary rule's deterrent value that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States*, 394 U.S. at 394 U. S. 174. In determining whether persons aggrieved solely by the introduction of damaging evidence unlawfully obtained from their coconspirators or codefendants could seek suppression, for example, we found that the additional benefits of such an extension of the exclusionary rule would not outweigh its costs. *Id.* at 394 U. S. 174-175. Standing to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct. *Rakas v. Illinois*, 439 U. S. 128 (1978); *Brown v. United States*,411 U. S. 223 (1973); *Wong Sun v. United States*, 371 U. S. 471, 371 U. S. 491-492 (1963). *Cf. United States v. Payner*, 447 U. S. 727 (1980).

Even defendants with standing to challenge the introduction in their criminal trials of unlawfully obtained evidence cannot prevent every conceivable use of such evidence. Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case in chief may be used to impeach a defendant's direct testimony. *Walder v. United States*, 347 U. S. 62 (1954). *See also Oregon v. Hass*, 420 U. S. 714 (1975); *Harris v. New York*, 401 U. S. 222 (1971). A similar assessment of the "incremental furthering" of the ends of the exclusionary rule led us to conclude in *United States v. Havens*, 446 U. S. 620, 446 U. S. 627 (1980), that evidence inadmissible in the prosecution's case in chief or otherwise as substantive evidence of guilt may be used to impeach statements made by a defendant in response to "proper cross-examination reasonably suggested by the defendant's direct examination." *Id.* at 446 U. S. 627-628.

When considering the use of evidence obtained in violation of the Fourth Amendment in the prosecution's case in chief, moreover, we have declined to adopt a *per se* or "but for" rule

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that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest. *Brown v. Illinois*, 422 U. S. 590 (1975); *Wong Sun v. United States*, *supra*, at 371 U. S. 487-488. We also have held that a witness' testimony may be admitted even when his identity was discovered in an unconstitutional search. *United States v. Ceccolini*, 435 U. S. 268 (1978). The perception underlying these decisions — that the connection between police misconduct and evidence of crime may be sufficiently attenuated to permit the use of that evidence at trial — is a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect. *Dunaway v. New York*,442 U. S. 200, 442 U. S. 217-218 (1979); *United States v. Ceccolini*, *supra*, at 435 U. S. 279. [Footnote 7] In short, the "dissipation of the taint" concept that the Court has applied in deciding whether exclusion is appropriate in a particular case

"attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."

Brown v. Illinois, *supra*, at 411 U. S. 609 (POWELL, J., concurring in part). Not surprisingly in view of this purpose, an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus. *Dunaway v. New York*, *supra*, at 442 U. S. 218; *Brown v. Illinois*, *supra*, at 411 U. S. 603-604.

The same attention to the purposes underlying the exclusionary rule also has characterized decisions not involving the scope of the rule itself. We have not required suppression of the fruits of a search incident to an arrest made in good faith reliance on a substantive criminal statute that subsequently

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is declared unconstitutional. *Michigan v. DeFillippo*, 443 U. S. 31 (1979). [Footnote 8] Similarly, although the Court has been unwilling to conclude that new Fourth Amendment principles are always to have only prospective effect, *United States v. Johnson*, 457 U. S. 537, 457 U. S. 560 (1982), [Footnote 9] no Fourth Amendment decision marking a "clear break with the past" has been applied retroactively. *See United States v. Peltier*, 422 U. S. 531 (1975); *Desist v. United States*, 394 U. S. 244(1969); *Linkletter v. Walker*, 381 U. S. 618 (1965). [Footnote 10] The propriety

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of retroactive application of a newly announced Fourth Amendment principle, moreover, has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct. *United States v. Johnson*, *supra*,at 457 U. S. 560-561; *United States v. Peltier*, *supra*, at 422 U. S. 536-539, 422 U. S. 542.

As yet, we have not recognized any form of good faith exception to the Fourth Amendment exclusionary rule. [Footnote 11] But the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us. As we discuss below, our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.

III

A

Because a search warrant

"provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard

against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'"

United States v. Chadwick, 433 U. S. 1, 433 U. S. 9 (1977) (quoting *Johnson v. United States*, 333 U. S. 10, 333 U. S. 14 (1948)), we have expressed a strong preference for warrants, and declared that, "in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U. S. 102, 380 U. S. 106 (1965). *See Aguilar v. Texas*, 378 U.S. at 378 U. S. 111. Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination. *Spinelli v. United States*, 393 U.S. at 393 U. S. 419. *See Illinois v. Gates*, 462 U.S. at 462 U. S. 236; *United States v. Ventresca*, *supra*, at 380 U. S. 108-109.

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware*, 438 U. S. 154 (1978). [Footnote 12] Second, the courts must also insist that the magistrate purport to "perform his *neutral and detached' function and not serve merely as a rubber stamp for the police."Aguilar v. Texas*, *supra*, *at 378 U. S. 111*. *See Illinois v. Gates*, *supra*, *at 462 U. S. 239*. *A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. Lo-Ji Sales, Inc. v. New York, 442 U. S. 319, 442 U. S. 326-327 (1979).*

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S. at 462 U. S. 239.

"Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."

Ibid. See Aguilar v. Texas, *supra*, at 378 U. S. 114-115; *Giordenello v. United States*, 357 U. S. 480 (1958); *Nathanson v. United States*, 290 U. S. 41 (1933). [Footnote 13] Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates*, *supra*, at 462 U. S. 238-239, or because the form of the warrant was improper in some respect.

Only in the first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether

Fourth Amendment interests will be advanced. To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment, or that lawlessness among these actors requires application of the extreme sanction of exclusion. [Footnote 14]

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. [Footnote 15] Many of the factors

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that indicate that the exclusionary rule cannot provide an effective "special" or "general" deterrent for individual offending law enforcement officers [Footnote 16] apply as well to judges or magistrates. And, to the extent that the rule is thought to operate as a "systemic" deterrent on a wider audience, [Footnote 17] it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests. [Footnote 18]

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B

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping," and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant, and to point out suspected judicial errors. We find such arguments speculative, and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis, and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. [Footnote 19]

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.

"No empirical researcher, proponent or opponent of the rule has yet been able to establish with any assurance whether the rule has a deterrent effect. . . ."

United States v. Janis, 428 U.S. at 428 U. S. 452, n. 22. But even assuming that the rule effectively

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deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

As we observed in *Michigan v. Tucker*, 417 U. S. 433, 417 U. S. 447 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 422 U. S. 539:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The *Peltier* Court continued, *id.* at 422 U. S. 542:

"If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

See also Illinois v. Gates, 462 U.S. at 462 U. S. 260-261 (WHITE, J., concurring in judgment); *United States v. Janis*, *supra*, at 428 U. S. 459; *Brown v. Illinois*, 422 U.S. at422 U. S. 610-611 (POWELL, J., concurring in part). [Footnote 20] In short, where the officer's conduct is objectively reasonable,

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"excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

Stone v. Powell, 428 U.S. at 428 U. S. 539-540 (WHITE, J., dissenting).

This is particularly true, we believe, when an officer, acting with objective good faith, has obtained a search warrant from a judge or magistrate and acted within its scope. [Footnote 21] In most

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such cases, there is no police illegality, and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* at 428 U. S. 498 (BURGER, C.J., concurring). Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. [Footnote 22]

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C

We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness," *Illinois v. Gates*, 462 U.S. at462 U. S. 267 (WHITE, J., concurring in judgment), for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." *United States v. Ross*, 456 U. S. 798,456 U. S. 823, n. 32 (1982). Nevertheless, the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, *cf. Harlow v. Fitzgerald*, 457 U. S. 800, 457 U. S. 815-819 (1982), [Footnote 23] and it is clear that, in some circumstances

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the officer [Footnote 24] will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Franks v. Delaware*, 438 U. S. 154 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U. S. 319(1979); in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. at 422 U. S. 610-611 (POWELL, J., concurring in part); *see Illinois v. Gates*, *supra*, at 462 U. S. 263-264 (WHITE, J., concurring in judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient — *i.e.*, in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid. *Cf. Massachusetts v. Sheppard*, *post* at 468 U. S. 988-991.

In so limiting the suppression remedy, we leave untouched the probable cause standard and the various requirements for a valid warrant. Other objections to the modification of

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the Fourth Amendment exclusionary rule we consider to be insubstantial. The good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.

Nor are we persuaded that application of a good faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. [Footnote 25] There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. As cases addressing questions of good faith immunity under 42 U.S.C. § 1983, compare *O'Connor v. Donaldson*, 422 U. S. 563 (1975), *with Procunier v. Navarette*, 434 U. S. 555, 434 U. S. 566, n. 14 (1978), and cases involving the harmless error doctrine, *compare Milton v. Wainwright*, 407 U. S. 371, 407 U. S. 372 (1972), *with Coleman v. Alabama*, 399 U. S. 1 (1970), make clear, courts have considerable

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discretion in conforming their decisionmaking processes to the exigencies of particular cases.

If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good faith issue. [Footnote 26] Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors, and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith. We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice.

IV

When the principles we have enunciated today are applied to the facts of this case, it is apparent that the judgment of the Court of Appeals cannot stand. The Court of Appeals applied the prevailing legal standards to Officer Rombach's warrant application, and concluded that the application could not support the magistrate's probable cause determination. In so doing, the court clearly informed the magistrate that he

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had erred in issuing the challenged warrant. This aspect of the court's judgment is not under attack in this proceeding.

Having determined that the warrant should not have issued, the Court of Appeals understandably declined to adopt a modification of the Fourth Amendment exclusionary rule that this Court had not previously sanctioned. Although the modification finds strong support in our previous cases, the Court of Appeals' commendable self-restraint is not to be criticized. We have now reexamined the purposes of the exclusionary rule and the propriety of its application in cases where officers have relied on a subsequently invalidated search warrant. Our conclusion is that the rule's purposes will only rarely be served by applying it in such circumstances.

In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. Only respondent Leon has contended that no reasonably well trained police officer could have believed that there existed probable cause to search his house; significantly, the other respondents advance no comparable argument. Officer Rombach's application for a warrant clearly was supported by much more than a "bare bones" affidavit. The

affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

Accordingly, the judgment of the Court of Appeals is

Reversed.

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[Footnote 1]

Respondent Leon moved to suppress the evidence found on his person at the time of his arrest and the evidence seized from his residence at 716 South Sunset Canyon. Respondent Stewart's motion covered the fruits of searches of her residence at 620 Price Drive and the condominium at 7902 Via Magdalena and statements she made during the search of her residence. Respondent Sanchez sought to suppress the evidence discovered during the search of his residence at 620 Price Drive and statements he made shortly thereafter. He also joined Stewart's motion to suppress evidence seized from the condominium. Respondent Del Castillo apparently sought to suppress all of the evidence seized in the searches. App. 78-80. The respondents also moved to suppress evidence seized in the searches of their automobiles.

[Footnote 2]

"I just cannot find this warrant sufficient for a showing of probable cause."

"* * * *"

"There is no question of the reliability and credibility of the informant as not being established."

"Some details given tended to corroborate, maybe, the reliability of [the informant's] information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt."

"* * * *"

"So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant. . . ."

Id. at 127.

[Footnote 3]

The District Court concluded that Sanchez and Stewart had standing to challenge the search of 620 Price Drive; that Leon had standing to contest the legality of the search of 716 South Sunset Canyon; that none of the respondents had established a legitimate expectation of privacy in the condominium at 7902 Via Magdalena; and that Stewart and Del Castillo each had standing to challenge the searches of their automobiles. The Government indicated that it did not intend to introduce evidence seized from the other respondents' vehicles. *Id.* at 127-129. Finally, the court suppressed statements given by Sanchez and Stewart. *Id.* at 129-130.

[Footnote 4]

"On the issue of good faith, obviously that is not the law of the Circuit, and I am not going to apply that law."

"I will say certainly in my view, there is not any question about good faith. [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony — and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true."

Id. at 140.

[Footnote 5]

In *Illinois v. Gates*, 462 U. S. 213 (1983), decided last Term, the Court abandoned the two-pronged *Aguilar-Spinelli* test for determining whether an informant's tip suffices to establish probable cause for the issuance of a warrant and substituted in its place

a "totality of the circumstances" approach.

[Footnote 6]

Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NU Study and Other Studies of "Lost" Arrests, 1983 A.B.F.Res.J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. Thus, the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. *Id.* at 680. Davies' analysis of California data suggests that screening by police and prosecutors results in the release because of illegal searches or seizures of as many as 1.4% of all felony arrestees, *id.* at 650, that 0.9% of felony arrestees are released, because of illegal searches or seizures, at the preliminary hearing or after trial, *id.* at 653, and that roughly 0.05% of all felony arrestees benefit from reversals on appeal because of illegal searches. *Id.* at 654. *See also* K. Brosi, A Cross-City Comparison of Felony Case Processing 16, 18-19 (1979); U.S. General Accounting Office, Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 10-11, 14 (1979); F. Feeney, F. Dill, & A. Weir, Arrests Without Convictions: How Often They Occur and Why 203-206 (National Institute of Justice 1983); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 1-2 (1982); Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A.B.F.Res.J. 585, 600. The exclusionary rule also has been found to affect the plea-bargaining process. S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence 63 (1977). *But see* Davies, *supra*, at 668-669; Nardulli, *supra*, at 604-606.

Many of these researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures.

"[A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official unlawlessness."

Illinois v. Gates, 462 U.S. at 462 U. S. 257-258 (WHITE, J., concurring in judgment). Because we find that the rule can have no substantial deterrent effect in the sorts of situations under consideration in this case, *see infra* at 468 U. S. 916-921, we conclude that it cannot pay its way in those situations.

[Footnote 7]

"Brown's focus on 'the causal connection between the illegality and the confession' reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."

Dunaway v. New York, 442 U.S. at 442 U. S. 217-218 (citation omitted).

[Footnote 8]

We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. *See, e.g., Ybarra v. Illinois*, 444 U. S. 85 (1979); *Torres v. Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U. S. 266(1973); *Sibron v. New York*, 392 U. S. 40 (1968); *Berger v. New York*, 388 U. S. 41(1967).

"Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable cause requirements of the Fourth Amendment."

Michigan v. DeFillippo, 443 U.S. at 443 U. S. 39. The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here.

[Footnote 9]

The Court held in *United States v. Johnson* that a construction of the Fourth Amendment that did not constitute a "clear break with the past" is to be applied to all convictions not yet final when the decision was handed down. The limited holding, *see* 457 U.S. at 457 U. S. 562, turned in part on the Court's judgment that

"[f]ailure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.'"

Id. at 457 U. S. 561 (emphasis in original) (quoting *Desist v. United States*, 394 U. S. 244, 394 U. S. 277 (1969) (Fortas, J., dissenting)). Contrary to respondents' assertions, nothing in *Johnson* precludes adoption of a good faith exception tailored to situations in which the police have reasonably relied on a warrant issued by a detached and neutral magistrate, but later found to be defective.

[Footnote 10]

Our retroactivity decisions have, for the most part, turned on our assessments of

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Stovall v. Denno, 388 U. S. 293, 388 U. S. 297 (1967). As we observed earlier this Term:

"In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is at issue. Unjustified 'reliance' is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a 'clear break with the past.'"

Solem v. Stumes, 465 U. S. 638, 465 U. S. 645-646 (1984).

[Footnote 11]

Members of the Court have, however, urged reconsideration of the scope of the exclusionary rule. *See, e.g., Stone v. Powell*, 428 U. S. 465, 428 U. S. 496 (1976) (BURGER, C.J., concurring); *id.* at 428 U. S. 536 (WHITE, J., dissenting); *Illinois v. Gates*,462 U.S. at 462 U. S. 254-267 (WHITE, J., concurring in judgment); *Brown v. Illinois*,422 U. S. 590, 422 U. S. 609-612 (1975) (POWELL, J., concurring in part); *Schneckloth v. Bustamonte*, 412 U. S. 218, 412 U. S. 261-271 (1973) (POWELL, J., concurring); *California v. Minjares*, 443 U. S. 916 (1979) (REHNQUIST, J., dissenting from denial of stay). One Court of Appeals, no doubt influenced by these individual urgings, has adopted a form of good faith exception to the exclusionary rule. *United States v. Williams*, 622 F.2d 830 (CA5 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

[Footnote 12]

Indeed,

"it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."

438 U.S. at 438 U. S. 165.

[Footnote 13]

See also Beck v. Ohio, 379 U. S. 89 (1964), in which the Court concluded that

"the record . . . does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him."

Id. at 379 U. S. 95. Although the Court was willing to assume that the arresting officers acted in good faith, it concluded:

"'[G]ood faith on the part of the arresting officers is not enough.' *Henry v. United States*, 361 U. S. 98, 361 U. S. 102. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id. at 379 U. S. 97. We adhere to this view and emphasize that nothing in this opinion is intended to suggest a lowering of the probable cause standard. On the contrary, we deal here only with the remedy to be applied to a concededly unconstitutional search.

[Footnote 14]

Although there are assertions that some magistrates become rubber stamps for the police, and others may be unable effectively to screen police conduct, *see, e.g.*,2 W. LaFave, Search and Seizure § 4.1 (1978); Kamisar, Does (Did) (Should) The Exclusionary

Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L.Rev. 565, 569-571 (1983); Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo.L.J. 1361, 1412 (1981), we are not convinced that this is a problem of major proportions. *See* L. Tiffany, D. McIntyre, & D. Rotenberg, Detection of Crime 119 (1967); Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich.L.Rev. 1319, 1414, n. 396 (1977); P. Johnson, New Approaches to Enforcing the Fourth Amendment 8-10 (Working Paper, Sept.1978), quoted in Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 229-230 (5th ed.1980); R. Van Duizend, L. Sutton, & C. Carter, The Search Warrant Process, ch. 7 (Review Draft, National Center for State Courts, 1983).

[Footnote 15]

As the Supreme Judicial Court of Massachusetts recognized in *Commonwealth v. Sheppard*, 387 Mass. 488, 506, 441 N.E.2d 725 735 (1982):

"The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. . . . [I]deally, a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates."

But see United States v. Karathanos, 531 F.2d 26, 33-34 (CA2), *cert. denied*, 428 U.S. 910 (1976).

[Footnote 16]

See, e.g., Stone v. Powell, 428 U.S. at 428 U. S. 498 (BURGER, C.J., concurring); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 709-710 (1970).

[Footnote 17]

See, e.g., Dunaway v. New York, 442 U. S. 200, 442 U. S. 221 (1979) (STEVENS, J., concurring); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 399-401 (1981).

[Footnote 18]

Limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications. We doubt that magistrates are more desirous of avoiding the exclusion of evidence obtained pursuant to warrants they have issued than of avoiding invasions of privacy.

Federal magistrates, moreover, are subject to the direct supervision of district courts. They may be removed for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 631(i). If a magistrate serves merely as a "rubber stamp" for the police or is unable to exercise mature judgment, closer supervision or removal provides a more effective remedy than the exclusionary rule.

[Footnote 19]

Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. *Cf. Massachusetts v. Sheppard*, *post* at 468 U. S. 989, n. 6 ("[I]t was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested").

[Footnote 20]

We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good faith exception assume that the exception will turn on the subjective good faith of individual officers.

"Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."

Illinois v. Gates, 462 U.S. at 462 U. S. 261, n. 15 (WHITE, J., concurring in judgment); *see Dunaway v. New York*, 442 U.S. at 442 U. S. 221 (STEVENS, J., concurring). The objective standard we adopt, moreover, requires officers to have a reasonable

knowledge of what the law prohibits. *United States v. Peltier,* 422 U. S. 531, 422 U. S. 542 (1975). As Professor Jerold Israel has observed:

"The key to the [exclusionary] rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits. [An objective good faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to fourth amendment limitations. Finally, [it] should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality."

Israel, *supra,* n. 14, at 1412-1413 (footnotes omitted).

[Footnote 21]

According to the Attorney General's Task Force on Violent Crime, Final Report (1981), the situation in which an officer relies on a duly authorized warrant

"is a particularly compelling example of good faith. A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. Accordingly, we believe that there should be a rule which states that evidence obtained pursuant to and within the scope of a warrant is *prima facie* the result of good faith on the part of the officer seizing the evidence."

Id. at 55.

[Footnote 22]

To the extent that JUSTICE STEVENS' conclusions concerning the integrity of the courts, *post* at 468 U. S. 976-978, rest on a foundation other than his judgment, which we reject, concerning the effects of our decision on the deterrence of police illegality, we find his argument unpersuasive.

"Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment."

United States v. Janis, 428 U. S. 433, 428 U. S. 458, n. 35 (1976).

"While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."

Stone v. Powell, 428 U.S. at 428 U. S. 485. Our cases establish that the question whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts

"is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. . . . The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment."

United States v. Janis, supra, at 428 U. S. 459, n. 35. Absent unusual circumstances, when a Fourth Amendment violation has occurred because the police have reasonably relied on a warrant issued by a detached and neutral magistrate but ultimately found to be defective, "the integrity of the courts is not implicated."*Illinois v. Gates, supra,* at 462 U. S. 259, n. 14 (WHITE, J., concurring in judgment). *See Stone v. Powell,* 428 U.S. at 428 U. S. 485, n. 23; *id.* at 428 U. S. 540 (WHITE, J., dissenting); *United States v. Peltier,* 422 U. S. 531, 422 U. S. 536-539 (1975).

[Footnote 23]

In *Harlow,* we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights. The situations are not perfectly analogous, but we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. Although we have suggested that,

"[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule,"

Scott v. United States, 436 U. S. 128, 436 U. S. 139, n. 13 (1978), we believe that

"sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."

Massachusetts v. Painten, 389 U. S. 560, 389 U. S. 565 (1968) (WHITE, J., dissenting). Accordingly, our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances — including whether the warrant application had previously been rejected by a different magistrate — may be considered.

[Footnote 24]

References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.*See Whiteley v. Walden*, 401 U. S. 560, 401 U. S. 568 (191).

[Footnote 25]

The argument that defendants will lose their incentive to litigate meritorious Fourth Amendment claims as a result of the good faith exception we adopt today is unpersuasive. Although the exception might discourage presentation of insubstantial suppression motions, the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished.

[Footnote 26]

It has been suggested, in fact, that

"the recognition of a 'penumbral zone,' within which an inadvertent mistake would not call for exclusion, . . . will make it less tempting for judges to bend fourth amendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police."

Schroeder, *supra*, n. 14, at 1420-1421 (footnote omitted); *see* Ashdown, Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process, 24 Wm. & Mary L.Rev. 335, 383-384 (1983).

JUSTICE BLACKMUN, concurring.

The Court today holds that evidence obtained in violation of the Fourth Amendment by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded, as a matter of federal law, from the case in chief of federal and state criminal prosecutions. In so doing, the Court writes another chapter in the volume of Fourth Amendment law opened by *Weeks v. United States*, 232 U. S. 383 (1914). I join the Court's opinion in this case and the one in *Massachusetts v. Sheppard*, *post*,p. 468 U. S. 981, because I believe that the rule announced today advances the legitimate interests of the criminal justice system without sacrificing the individual rights protected by the Fourth Amendment. I write separately, however, to underscore what I regard as the unavoidably provisional nature of today's decisions.

As the Court's opinion in this case makes clear, the Court has narrowed the scope of the exclusionary rule because of an empirical judgment that the rule has little appreciable effect in cases where officers act in objectively reasonable reliance on search warrants. *See ante* at 468 U. S. 918-921. Because I share the view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself, *see ante* at 468 U. S. 905-906, I see no way to avoid making an empirical judgment of this sort, and I am satisfied that the Court has made the correct one on the information before it. Like all courts, we face institutional limitations on our ability to gather information about "legislative facts," and the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule. *See United States v. Janis*,428 U. S. 433, 428 U. S. 448-453 (1976). Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.

What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

If a single principle may be drawn from this Court's exclusionary rule decisions, from *Weeks* through *Mapp v. Ohio*, 367 U. S. 643 (1961), to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle.

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

Ten years ago, in *United States v. Calandra*, 414 U. S. 338 (1974), I expressed the fear that the Court's decision

"may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search and seizure cases."

Id. at 414 U. S. 365 (dissenting opinion). Since then, in case after case, I have witnessed the Court's gradual but determined strangulation

of the rule. [Footnote 2/1] It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *piece de resistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated — a result that had previously been thought to be foreclosed.

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights, and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.

The majority ignores the fundamental constitutional importance of what is at stake here. While the machinery of law enforcement, and indeed the nature of crime itself, have changed dramatically since the Fourth Amendment became part of the Nation's fundamental law in 1791, what the Framers understood then remains true today — that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our

commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve personal freedoms. In the constitutional scheme they ordained, the sometimes unpopular task of ensuring that the government's enforcement efforts remain within the strict boundaries fixed by the Fourth Amendment was entrusted to the courts. As James Madison predicted in his address to the First Congress on June 8, 1789:

"If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."

1 Annals of Cong. 439. If those independent tribunals lose their resolve, however, as the Court has done today, and give way to the seductive call of expediency, the vital guarantees of the Fourth Amendment are reduced to nothing more than a "form of words." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 251 U. S. 392(1920).

A proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale. But even if I were to accept the Court's chosen method of analyzing the question posed by these cases, I would still conclude that the Court's decision cannot be justified.

I

The Court holds that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached

and neutral magistrate is admissible in the prosecution's case in chief, even though a reviewing court has subsequently determined either that the warrant was defective, No. 82-963, or that those officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search, No. 82-1771. I have no doubt that these decisions will prove in time to have been a grave mistake. But, as troubling and important as today's new doctrine may be for the administration of criminal justice in this country, the mode of analysis used to generate that doctrine also requires critical examination, for it may prove in the long run to pose the greater threat to our civil liberties.

A

At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a

"'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right.'"

Ante at 468 U. S. 906, quoting *United States v. Calandra*, 414 U.S. at 414 U. S. 348. The germ of that idea is found in *Wolf v. Colorado*, 338 U. S. 25 (1949), and although I had thought that such a narrow conception of the rule had been forever put to rest by our decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), it has been revived by the present Court and reaches full flower with today's decision. The essence of this view, as expressed initially in the *Calandra* opinion and as reiterated today, is that the sole

"purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong . . . is *fully accomplished* by the original search without probable cause."

414 U.S. at 414 U. S. 354 (emphasis added); *see also ante* at 468 U. S. 906. This reading of the Amendment implies that its proscriptions are directed solely at those government agents who may actually invade an individual's constitutionally

protected privacy. The courts are not subject to any direct constitutional duty to exclude illegally obtained evidence, because the question of the admissibility of such evidence is not addressed by the Amendment. This view of the scope of the Amendment relegates the judiciary to the periphery. Because the only constitutionally cognizable injury has already been "fully accomplished" by the police by the time a case comes before the courts, the Constitution is not itself violated if the judge decides to admit the tainted evidence. Indeed, the most the judge can do is wring his hands and hope that perhaps, by excluding such evidence, he can deter future transgressions by the police.

Such a reading appears plausible, because, as critics of the exclusionary rule never tire of repeating, [Footnote 2/2] the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution's most vital imperatives are stated in general terms, and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases. The nature of our Constitution, as Chief Justice Marshall long ago explained,

"requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

McCulloch v. Maryland, 4 Wheat. 316, 17 U. S. 407 (1819).

A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

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When that fact is kept in mind, the role of the courts and their possible involvement in the concerns of the Fourth Amendment comes into sharper focus. Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is, in fact, a single governmental action prohibited by the terms of the Amendment. [Footnote 2/3] Once that connection between the evidence-gathering role of the police and the evidence-admitting function of the courts is acknowledged, the plausibility of the Court's interpretation becomes more suspect. Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. [Footnote 2/4] It is difficult to give any meaning

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at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police, but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. [Footnote 2/5] The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy — which is done, after all, for the purpose of securing evidence — but also the subsequent use of any evidence so obtained.

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The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy, and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures.

Such a conception of the rights secured by the Fourth Amendment was unquestionably the original basis of what has come to be called the exclusionary rule when it was first formulated in *Weeks v. United States*, 232 U. S. 383 (1914). There the Court considered whether evidence seized in violation of the Fourth Amendment by a United States Marshal could be admitted at trial after the defendant had moved that the evidence be returned. Significantly, although the Court considered the Marshal's initial invasion of the defendant's home to be unlawful, it went on to consider a question that

"involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence without his authority, by a United States Marshal holding no

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warrant for . . . the search of his premises."

Id. at 232 U. S. 393. In answering that question, Justice Day, speaking for a unanimous Court, expressly recognized that the commands of the Fourth Amendment were addressed to both the courts and the Executive Branch:

"The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all entrusted under our*

Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Id. at 232 U. S. 391-392.

The heart of the *Weeks* opinion, and for me the beginning of wisdom about the Fourth Amendment's proper meaning, is found in the following passage:

"If letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great

principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution. . . . Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and, under color of his office, undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action."

Id. at 232 U. S. 393-394.

What this passage succinctly captures is the essential recognition, ignored by the present Court, that seizures are generally executed for the purpose of bringing "proof to the aid of the Government," *id.* at 232 U. S. 393, that the utility of such evidence in a criminal prosecution arises ultimately in the context of the courts, and that the courts therefore cannot be absolved of responsibility for the means by which evidence is obtained. As the Court in *Weeks* clearly recognized, the obligations cast upon government by the Fourth Amendment are not confined merely to the police. In the words of Justice Holmes:

"If the search and seizure are unlawful as invading personal rights secured by the Constitution, those rights would be infringed yet further if the evidence were allowed to be used."

Dodge v. United States, 272 U. S. 530, 272 U. S. 32 (1926). As the Court further explained in *Olmstead v. United States*, 277 U. S. 438 (1928):

"The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a

violation of the Amendment. Theretofore, many had supposed, under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. . . . But in the *Weeks* case and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to an action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received."

Id. at 277 U. S. 462-463.

That conception of the rule, in my view, is more faithful to the meaning and purpose of the Fourth Amendment and to the judiciary's role as the guardian of the people's constitutional liberties. In contrast to the present Court's restrictive reading, the Court in *Weeks* recognized that, if the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

B

From the foregoing, it is clear why the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead*. [Footnote 2/6] In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned

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remedial purposes, but rather by a direct constitutional command. A new phase in the history of the rule, however, opened with the Court's decision in *Wolf v. Colorado*, 338 U. S. 25 (1949). Although that decision held that the security of one's person and privacy protected by the Fourth Amendment was "implicit in *the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the Fourteenth Amendment, id. at 338 U. S. 27-28, quoting Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325 (1937), the Court went on, in what can only be regarded as a tour de force of constitutional obfuscation, to say that the "ways of enforcing such a basic right raise questions of a different order," 338 U.S. at 338 U. S. 28. Notwithstanding the force of the Weeks doctrine that the Fourth Amendment required exclusion, a state court was free to admit illegally seized evidence, according to the Court in Wolf, so long as the State had devised some other "effective" means of vindicating a defendant's Fourth Amendment rights. 338 U.S. at 338 U. S. 31*.

Twelve years later, in *Mapp v. Ohio*, 367 U. S. 643 (1961), however, the Court restored the original understanding of the *Weeks* case by overruling the holding of *Wolf* and repudiating its rationale. Although, in the course of reaching this conclusion, the Court in *Mapp* responded at certain points to the question, first raised in *Wolf*, of whether the exclusionary rule was an "effective" remedy compared to alternative means of enforcing the right, *see* 367 U.S. at 367 U. S. 651-653, it nevertheless expressly held that

"all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority*, inadmissible in a state court."

Id. at 367 U. S. 655 (emphasis added). In the Court's view, the exclusionary rule was not one among a range of options to be selected at the discretion of judges; it was "an essential part of both the Fourth and Fourteenth Amendments." *Id.* at 367 U. S. 657. Rejection of the *Wolf* approach was constitutionally required, the Court explained, because

"the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of

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its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."

367 U.S. at 367 U. S. 656. Indeed, no other explanation suffices to account for the Court's holding in Mapp, since the only possible predicate for the Court's conclusion that the States were bound by the Fourteenth Amendment to honor the *Weeks* doctrine is that the exclusionary rule was "part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy." 367 U.S. at 367 U. S. 651. [Footnote 2/7]

Despite this clear pronouncement, however, the Court since *Calandra* has gradually pressed the deterrence rationale for the rule back to center stage. *See, e.g., United States v. Peltier*, 422 U. S. 531 (1975); *United States v. Janis*, 428 U. S. 433(1976); *Stone v. Powell*, 428 U. S. 465 (1976). The various arguments advanced by the Court in this campaign have only strengthened my conviction that the deterrence theory is both misguided and unworkable. First,

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the Court has frequently bewailed the "cost" of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free not, in Justice (then Judge) Cardozo's misleading epigram, "because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly

contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself, that has imposed this cost. [Footnote 2/8]

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In addition, the Court's decisions over the past decade have made plain that the entire enterprise of attempting to assess the benefits and costs of the exclusionary rule in various contexts is a virtually impossible task for the judiciary to perform honestly or accurately. Although the Court's language in those cases suggests that some specific empirical basis may support its analyses, the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. In *Calandra*, for example, the Court, in considering whether the exclusionary rule should apply in grand jury proceedings, had before it no concrete evidence whatever concerning the impact that application of the rule in such proceedings would have either in terms of the long-term costs or the expected benefits. To the extent empirical data are available regarding the general costs and benefits of the exclusionary rule, such data have shown, on the one hand, as the Court acknowledges today, that the costs are not as substantial as critics have asserted in the past, *see ante* at 468 U. S. 907-908, n. 6, and, on the other hand, that, while the exclusionary rule may well have certain deterrent effects, it is extremely difficult to determine with any degree of precision whether the incidence of unlawful conduct by police is now lower than it was prior to *Mapp*. *See United States v. Janis*, 428 U.S. at 428 U. S. 449-453, and n. 22; *Stone v. Powell*, 428 U.S. at 428 U. S. 492, n. 32. [Footnote 2/9] The

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Court has sought to turn this uncertainty to its advantage by casting the burden of proof upon proponents of the rule, *see, e.g., United States v. Janis, supra*, at 428 U. S. 453-454. "Obviously," however,

"the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome-determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion. [Footnote 2/10]"

By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition, but for which there is only limited empirical support, is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties. I share the view, expressed by Justice Stewart for the Court in *Faretta v. California*, 422 U. S. 806 (1975), that "[p]ersonal liberties are not rooted in the law of averages." *Id.* at 422 U. S. 834. Rather than seeking to give effect to the liberties secured by the Fourth Amendment through guesswork about deterrence, the Court should restore to its proper place the principle framed 70 years ago in *Weeks* that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.

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II

Application of that principle clearly requires affirmance in the two cases decided today. In the first, *United States v. Leon*, No. 82-1771, it is conceded by the Government and accepted by the Court that the affidavit filed by the police officers in support of their application for a search warrant failed to provide a sufficient basis on which a neutral and detached magistrate could conclude that there was probable cause to issue the warrant. Specifically, it is conceded that the officers' application for a warrant was based in part on information supplied by a confidential informant of unproven reliability that was over five months old by the time it was relayed to the police. Although the police conducted an independent investigation on the basis of this tip, both the District Court and the Court of Appeals concluded that the additional information gathered by the officers failed to corroborate the details of the informant's tip, and was "as consistent with innocence as . . . with guilt." App. to Pet. for Cert. 10a. The warrant, therefore, should never have issued. Stripped of the authority of the warrant, the conduct of these officers was plainly unconstitutional — it amounted to nothing less than a naked invasion of the privacy of respondents' homes without the requisite justification demanded by the Fourth Amendment. In order to restore the Government to the position it would have occupied had this unconstitutional search not occurred, therefore, it was necessary that the evidence be suppressed. As we said in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), the Warrant Clause is not

"an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement."

Id. at 403 U. S. 481 (footnote omitted).

A close examination of the facts of this case reveals that this is neither an extraordinary nor indeed a very costly step.

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The warrant had authorized a search for cocaine, methaqualone tablets, and miscellaneous narcotics paraphernalia at several locations: a condominium at 7902 Via Magdalena in Los Angeles; a residence at 620 Price Drive in Burbank; a residence at 716 South Sunset Canyon in Burbank; and four automobiles owned respectively by respondents Leon, Sanchez, Stewart, and Del Castillo. App. 31-33. Pursuant to this warrant, the officers seized approximately four pounds of cocaine and over 1,000 methaqualone tablets from the Via Magdalena condominium, nearly one pound of cocaine from the Sunset Canyon residence, about an ounce of cocaine from the Price Drive residence, and certain paraphernalia from Del Castillo's and Stewart's automobiles. On the basis of this and other evidence, the four respondents were charged with violating 21 U.S.C. § 846 for conspiring to possess and distribute cocaine, and § 841(a)(1) for possessing methaqualone and cocaine with intent to distribute. The indictment specifically alleged that respondents had maintained the Via Magdalena condominium as a storage area for controlled substances which they distributed to prospective purchasers. App. 27-28.

At the suppression hearing, the District Court determined that none of the respondents had a sufficient expectation of privacy to contest the search of the Via Magdalena condominium, that respondents Stewart and Sanchez could challenge the search of their home at Price Drive, that respondent Leon was entitled to challenge the search of his home at Sunset Canyon, and that respondents Del Castillo and Stewart could contest the search of their cars. Given its finding that probable cause to issue the warrant was lacking, the District Court ruled that the evidence from the Price Drive residence could not be used against respondents Stewart and Sanchez, that evidence from the Sunset Canyon residence could not be used against Leon, and that evidence obtained from both Del Castillo's and Stewart's automobiles could not be used against them. App. to Pet. for Cert. 10a-13a.

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The tenor of the Court's opinion suggests that this order somehow imposed a grave and presumably unjustifiable cost on society. Such a suggestion, however, is a gross exaggeration. Since the indictment focused upon a conspiracy among all respondents to use the Via Magdalena condominium as a storage area for controlled substances, and since the bulk of the evidence seized was from that condominium and was plainly admissible under the District Court's order, the Government would clearly still be able to present a strong case to the jury following the court's suppression order. I emphasize these details not to suggest how the Government's case would fare before the jury, but rather to clarify a point that is lost in the Court's rhetorical excesses over the costs of the exclusionary rule — namely, that the suppression of evidence will certainly tend to weaken the Government's position, but it will rarely force the Government to abandon a prosecution. *Cf. infra*, at 468 U. S. 950-951, and n. 11. In my view, a doctrine that preserves intact the constitutional rights of the accused, and, at the same time, is sufficiently limited to permit society's legitimate and pressing interest in criminal law enforcement to be served should not be so recklessly discarded. It is a doctrine that gives life to the

"very heart of the Fourth Amendment directive: that . . . a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises."

United States v. United States District Court, 407 U. S. 297, 407 U. S. 316 (1972). In the second case before the Court, *Massachusetts v. Sheppard*, No. 82-963, the State concedes and the Court accepts that the warrant issued to search respondent's home completely failed to state with particularity the things to be seized. Indeed, the warrant expressly and particularly described things such as "controlled substance[s]" and "other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance" that the police had no reason whatsoever to believe were to be found in

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respondent's home. App. 17a. Given the Fourth Amendment's requirement that "no Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized," this warrant should never have been issued. The police who entered

respondent's home, therefore, were without constitutional authority to do so.

Although the Court's opinion tends to overlook this fact, the requirement of particularity is not a mere "technicality," it is an express constitutional command.*Ybarra v. Illinois*, 444 U. S. 85, 444 U. S. 92 (1979); *Lo-Ji Sales, Inc. v. New York*, 442 U. S. 319 (1979); *Stanford v. Texas*, 379 U. S. 476 (1965); *Marron v. United States*, 275 U. S. 192, 275 U. S. 196 (1927). The purpose of that requirement is to prevent precisely the kind of governmental conduct that the faulty warrant at issue here created a grave risk of permitting — namely, a search that was not narrowly and particularly limited to the things that a neutral and detached magistrate had reason to believe might be found at respondent's home. Although it is true, as JUSTICE STEVENS observes, *see post* at 468 U. S. 964, that the affidavit submitted by the police set forth with particularity those items that they sought authority to search for, it is nevertheless clear that the warrant itself — the document which actually gave the officers legal authority to invade respondent's privacy — made no mention of these items. And, although it is true that the particular officers who applied for the warrant also happened to execute it and did so in accordance with the limits proposed in their affidavit, this happenstance should have no bearing on the central question whether these officers secured that prior judicial authority to conduct their search required by the Fourth Amendment. As we made clear in *United States v. United States District Court*, *supra*, at 407 U. S. 317 (footnote omitted), "[t]he Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." *See also Katz v. United States*, 389 U. S. 347, 389 U. S. 356-357 (1967) ("this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime

and voluntarily confined their activities to the least intrusive means consistent with that end"). Had the warrant actually been enforced by officers other than those who prepared the affidavit, the same result might not have occurred; indeed, the wholly erroneous nature of the warrant might have led such officers to feel at liberty to roam throughout respondent's home in search of drugs. *Cf. Whiteley v. Warden*, 401 U. S. 560 (1971). I therefore fail to see how a search pursuant to such a fundamentally defective warrant can be characterized as "reasonable . "

What the Framers of the Bill of Rights sought to accomplish through the express requirements of the Fourth Amendment was to define precisely the conditions under which government agents could search private property so that citizens would not have to depend solely upon the discretion and restraint of those agents for the protection of their privacy. Although the self-restraint and care exhibited by the officers in this case is commendable, that alone can never be a sufficient protection for constitutional liberties. I am convinced that it is not too much to ask that an attentive magistrate take those minimum steps necessary to ensure that every warrant he issues describes with particularity the things that his independent review of the warrant application convinces him are likely to be found in the premises. And I am equally convinced that it is not too much to ask that well-trained and experienced police officers take a moment to check that the warrant they have been issued at least describes those things for which they have sought leave to search. These convictions spring not from my own view of sound criminal law enforcement policy, but are instead compelled by the language of the Fourth Amendment and the history that led to its adoption.

III

Even if I were to accept the Court's general approach to the exclusionary rule, I could not agree with today's result.

There is no question that, in the hands of the present Court, the deterrence rationale has proved to be a powerful tool for confining the scope of the rule. In *Calandra*, for example, the Court concluded that the "speculative and undoubtedly minimal advance in the deterrence of police misconduct," was insufficient to outweigh the "expense of substantially impeding the role of the grand jury." 414 U.S. at 414 U. S. 351-352. In *Stone v. Powell*, the Court found that

"the additional contribution, if any, of the consideration of search and seizure claims of state prisoners on collateral review is small in relation to the costs."

428 U.S. at 428 U. S. 493. In *United States v. Janis*, 428 U. S. 433 (1976), the Court concluded that

"exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."

Id. at 428 U. S. 454. And in an opinion handed down today, the Court finds that the

"balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings held by the [Immigration and Naturalization Service]."

INS v. Lopez-Mendoza, *post* at 468 U. S. 1050.

Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the "substantial social costs" exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted. Upon analysis, however, such a result cannot be justified even on the Court's own terms.

At the outset, the Court suggests that society has been asked to pay a high price — in terms either of setting guilty persons free or of impeding the proper functioning of trials — as a result of excluding relevant physical evidence in cases

where the police, in conducting searches and seizing evidence, have made only an "objectively reasonable" mistake concerning the constitutionality of their actions.*See ante* at 468 U. S. 907-908. But what evidence is there to support such a claim? Significantly, the Court points to none, and, indeed, as the Court acknowledges, *see ante* at 468 U. S. 907-908, n. 6, recent studies have demonstrated that the "costs" of the exclusionary rule — calculated in terms of dropped prosecutions and lost convictions — are quite low. Contrary to the claims of the rule's critics that exclusion leads to "the release of countless guilty criminals," *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 403 U. S. 416 (1971) (BURGER, C.J., dissenting), these studies have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems. For example, a 1979 study prepared at the request of Congress by the General Accounting Office reported that only 0.4% of all cases actually declined for prosecution by federal prosecutors were declined primarily because of illegal search problems. Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979). If the GAO data are restated as a percentage of all arrests, the study shows that only 0.2% of all felony arrests are declined for prosecution because of potential exclusionary rule problems. *See* Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NU Study and Other Studies of "Lost" Arrests, 1983 A.B.F.Res.J. 611, 635. [Footnote 2/11] Of course, these data describe

only the costs attributable to the exclusion of evidence in all cases; the costs due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller. The Court, however, ignores this distinction and mistakenly weighs the aggregated costs of exclusion in all cases, irrespective of the circumstances that led to exclusion, *see ante* at 468 U. S. 907, against the potential benefits associated with only those cases in which evidence is excluded because police reasonably but mistakenly believe that their conduct does not violate the Fourth Amendment, *see ante* at 468 U. S. 915-921. When such faulty scales are used, it is little wonder that the balance tips in favor of restricting the application of the rule.

What then supports the Court's insistence that this evidence be admitted? Apparently, the Court's only answer is that, even though the costs of exclusion are not very substantial, the potential deterrent effect in these circumstances is so marginal that exclusion cannot be justified. The key to the Court's conclusion in this respect is its belief that the prospective deterrent effect of the exclusionary rule operates only in those situations in which police officers, when deciding whether to go forward with some particular search, have reason to know that their planned conduct will violate the requirements of the Fourth Amendment. *See ante*at 468 U. S. 919-921. If these officers in fact understand (or reasonably should understand because the law is well settled) that their proposed conduct will offend the Fourth Amendment and that, consequently, any evidence they seize will be suppressed in court, they will refrain from conducting the planned search. In those circumstances, the incentive system created by the exclusionary rule will have the hoped-for deterrent effect. But in situations where police officers reasonably (but mistakenly) believe that their planned conduct satisfies Fourth Amendment requirements — presumably either (a) because they are acting on the basis of an apparently valid warrant, or (b) because their conduct is only later determined to be invalid as a result of a

subsequent change in the law or the resolution of an unsettled question of law — then such officers will have no reason to refrain from conducting the search, and the exclusionary rule will have no effect.

At first blush, there is some logic to this position. Undoubtedly, in the situation hypothesized by the Court, the existence of the exclusionary rule cannot be expected to have any deterrent effect on the particular officers at the moment they are deciding whether to go forward with the search. Indeed, the subsequent exclusion of any evidence seized under such circumstances appears somehow "unfair" to the particular officers involved. As the Court suggests, these officers have acted in what they thought was an appropriate

and constitutionally authorized manner, but then the fruit of their efforts is nullified by the application of the exclusionary rule. *Ante* at 468 U. S. 920-921.

The flaw in the Court's argument, however, is that its logic captures only one comparatively minor element of the generally acknowledged deterrent purposes of the exclusionary rule. To be sure, the rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. *See United States v. Peltier,* 422 U.S. at 422 U. S. 556-557 (BRENNAN, J., dissenting). Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally. [Footnote 2/12] Thus, as the Court has previously

recognized,

"over the long-term, [the] demonstration [provided by the exclusionary rule] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."

Stone v. Powell, 428 U.S. at 428 U. S. 492. It is only through such an institutionwide mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank-and-file officers. [Footnote 2/13]

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

After today's decisions, however, that institutional incentive will be lost. Indeed, the Court's "reasonable mistake" exception to the exclusionary rule will tend to put a premium on police ignorance of the law. Armed with the assurance provided by today's decisions that evidence will always be admissible whenever an officer has "reasonably" relied upon a warrant, police departments will be encouraged to train officers that, if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a "let's-wait-until-it's-decided" approach in situations in which there is a question about a warrant's validity or the basis for its issuance. *Cf. United States v. Johnson*, 457 U. S. 537, 457 U. S. 561 (1982). [Footnote 2/14]

Although the Court brushes these concerns aside, a host of grave consequences can be expected to result from its decision to carve this new exception out of the exclusionary rule. A chief consequence of today's decisions will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. Creation of this new exception for good faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will, from now on, have virtually no consequence: if their decision to issue a

warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted. Inevitably, the care and attention devoted to such an inconsequential chore will dwindle. Although the Court is correct to note that magistrates do not share the same stake in the outcome of a criminal case as the police, they nevertheless need to appreciate that their role is of some moment in order to continue performing the important task of carefully reviewing warrant applications. Today's decisions effectively remove that incentive. [Footnote 2/15]

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Moreover, the good faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that, if they can secure a warrant, so long as the circumstances of its issuance are not "entirely unreasonable," *ante* at 468 U. S. 923, all police conduct pursuant to that warrant will be protected from further judicial review. [Footnote 2/16] The clear incentive that operated in the past to establish probable cause adequately because reviewing courts would examine the magistrate's judgment carefully, *see, e.g., Franks v. Delaware*, 438 U. S. 154, 438 U. S. 169-170 (1978); *Jones v. United States*, 362 U. S. 257, 362 U. S. 271-272 (1960); *Giordenello v. United States*, 357 U. S. 480, 357 U. S. 483 (1958), has now been so completely vitiated that the police need only show that it was not "entirely unreasonable" under the circumstances

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of a particular case for them to believe that the warrant they were issued was valid. *See ante* at 468 U. S. 923. The long-run effect unquestionably will be to undermine the integrity of the warrant process.

Finally, even if one were to believe, as the Court apparently does, that police are hobbled by inflexible and hypertechnical warrant procedures, today's decisions cannot be justified. This is because, given the relaxed standard for assessing probable cause established just last Term in *Illinois v. Gates*, 462 U. S. 213 (1983), the Court's newly fashioned good faith exception, when applied in the warrant context, will rarely, if ever, offer any greater flexibility for police than the *Gates*standard already supplies. In *Gates*, the Court held that

"[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Id. at 462 U. S. 238. The task of a reviewing court is confined to determining whether "the magistrate had a *substantial basis for . . . conclud[ing]' that probable cause existed." Ibid. Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new Gates standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the test announced today. [Footnote 2/17] Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under Gates and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling*

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concept of objectively reasonable reliance upon an objectively unreasonable warrant.

This paradox, as JUSTICE STEVENS suggests, *see post* at 468 U. S. 961-962, perhaps explains the Court's unwillingness to remand No. 82-1771 for reconsideration in light of *Gates*, for it is quite likely that, on remand, the Court of Appeals would find no violation of the Fourth Amendment, thereby demonstrating that the supposed need for the good faith exception in this context is more apparent than real. Therefore, although the Court's decisions are clearly limited to the situation in which police officers reasonably rely upon an apparently valid warrant in conducting a search, I am not at all confident that the exception unleashed today will remain so confined. Indeed, the full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights.

IV

When the public, as it quite properly has done in the past as well as in the present, demands that those in government increase their efforts to combat crime, it is all too easy for those government officials to seek expedient solutions. In contrast to such costly and

difficult measures as building more prisons, improving law enforcement methods, or hiring more prosecutors and judges to relieve the overburdened court systems in the country's metropolitan areas, the relaxation of Fourth Amendment standards seems a tempting, costless means of meeting the public's demand for better law enforcement. In the long run, however, we as a society pay a heavy price for such expediency, because, as Justice Jackson observed, the rights guaranteed in the Fourth Amendment

"are not mere second-class rights, but belong in the catalog of indispensable freedoms." *Brinegar v. United States*, 338 U. S. 160, 338 U. S. 180 (1949) (dissenting opinion). Once lost, such rights are difficult to recover. There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom.

I dissent.

* [This opinion applies also to No. 82-963, *Massachusetts v. Sheppard*, *post*, p. 468 U. S. 981.]

[Footnote 2/1]

See, e.g., United States v. Peltier, 422 U. S. 531, 422 U. S. 544 (1975) (BRENNAN, J., dissenting); *United States v. Janis*, 428 U. S. 433, 428 U. S. 460 (1976) (BRENNAN, J., dissenting); *Stone v. Powell*, 428 U. S. 465, 428 U. S. 502 (1976) (BRENNAN, J., dissenting); *Michigan v. DeFillippo*, 443 U. S. 31, 443 U. S. 41 (1979) (BRENNAN, J., dissenting); *United States v. Havens*, 446 U. S. 620, 446 U. S. 629 (1980) (BRENNAN, J., dissenting).

[Footnote 2/2]

See, e.g., Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215 (1978); S. Schlesinger, Exclusionary Injustice (1977).

[Footnote 2/3]

In deciding to enforce the exclusionary rule as a matter of state law, the California Supreme Court clearly recognized this point:

"When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge."

People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

For a thoughtful examination of this point, *see* Schrock & Welsh, Up from *Calandra:*The Exclusionary Rule as a Constitutional Requirement, 59 Minn.L.Rev. 251, 289-307 (1974).

[Footnote 2/4]

Examination of the early state declarations of rights which formed the models for the Fourth Amendment reveals that they were aimed as much at explicitly limiting the manner in which government could gather evidence as at protecting individual privacy. For example, the Massachusetts Constitution of 1780 provided:

"Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil Officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws."

Art. XIV of the Declaration of Rights of 1780. *See generally* T. Taylor, Two Studies in Constitutional Interpretation 41-43 (1969); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51-105 (1970); J. Lanynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 30-48 (1966); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum.L.Rev. 1365, 1369 (1983).

[Footnote 2/5]

In *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), the Court expressly recognized this point in rejecting the Government's contention that it should be permitted to make use of knowledge obtained in violation of the Fourth Amendment:

"The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."

"The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them. . . . In our opinion, such is not the law. It reduces the Fourth Amendment to a form of words. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.*"

Id. at 251 U. S. 391-392 (citations omitted) (emphasis added).

[Footnote 2/6]

See generally Kamisar, Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L.Rev. 565, 598-599 (1983); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 379-380 (1981).

[Footnote 2/7]

Indeed, the Court in *Mapp* expressly noted that the "factual considerations" raised in *Wolf* concerning the effectiveness of alternative remedies "are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment." 367 U.S. at 367 U. S. 651. It is true that, in *Linkletter v. Walker*,381 U. S. 618 (1965), in holding that *Mapp* was not to be applied retroactively, the Court described the exclusionary rule as the "only effective deterrent to lawless police action," 381 U.S. at 381 U. S. 636, thereby suggesting that the rule rested on a deterrence rationale. But, as I have explained on another occasion,

"[t]he emphasis upon deterrence in *Linkletter* must be understood in the light of the crucial fact that the States had justifiably relied from 1949 to 1961 upon *Wolf* . . . . , and consequently, that application of *Mapp* would have required the wholesale release of innumerable convicted prisoners, few of whom could have been successfully retried. In that circumstance, *Linkletter* held not only that retrospective application of *Mapp* would not further the goal of deterrence, but also that it would not further 'the administration of justice and the integrity of the judicial process.' 381 U.S. at 381 U. S. 637."

United State v. Calandra, 414 U. S. 338, 414 U. S. 359-360 (1974) (dissenting opinion).

[Footnote 2/8]

Justice Stewart has explained this point in detail in a recent article:

"Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the Fourth Amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place. . . ."

". . . The exclusionary rule places no limitations on the actions of the police. The fourth amendment does. The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. . . . [T]hat is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power."

Stewart, 83 Colum.L.Rev. at 1392-1393. *See also* Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev. 1532, 1563 (1972) ("Under the exclusionary rule, a court attempts to maintain the *status quo* that would have prevailed if the constitutional requirement had been obeyed").

[Footnote 2/9]

See generally on this point, Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NU Study and Other Studies of"Lost" Arrests, 1983 A.B.F.Res.J. 611, 627-629; Canon, Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S.Tex.L.J. 559, 561-563 (1982); Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and *United States v. Calandra*, 69 NW.U.L.Rev. 740 (1974).

[Footnote 2/10]

Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329, 332-333 (1973). *See also* White, Forgotten Points in the "Exclusionary Rule" Debate, 81 Mich.L.Rev. 1273, 1281-1282 (1983) (balancing of deterrent benefits and costs is an "inquiry [that] can never be performed in an adequate way, and the reality is thus that the decision must rest not upon those grounds, but upon prior dispositions or unarticulated intuitions that are never justified"); Canon, *supra*, at 564; Kamisar, 16 Creighton L.Rev. at 646.

[Footnote 2/11]

In a series of recent studies, researchers have attempted to quantify the actual costs of the rule. A recent National Institute of Justice study based on data for the 4-year period 1976-1979 gathered by the California Bureau of Criminal Statistics showed that 4.8% of all cases that were declined for prosecution by California prosecutors were rejected because of illegally seized evidence. National Institute of Justice, Criminal Justice Research Report — The Effects of the Exclusionary Rule: A Study in California 1 (1982). However, if these data are calculated as a percentage of all arrests, they show that only 0.8% of all arrests were rejected for prosecution because of illegally seized evidence. *See* Davies, 1983 A.B.F.Res.J. at 619.

In another measure of the rule's impact — the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded — the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example, a study based on data from nine mid-sized counties in Illinois, Michigan, and Pennsylvania reveals that motions to suppress physical evidence were filed in approximately 5% of the 7,500 cases studied, but that such motions were successful in only 0.7% of all these cases. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 A.B.F.Res.J. 585, 596. The study also shows that only 0.6% of all cases resulted in acquittals because evidence had been excluded. *Id.* at 600. In the GAO study, suppression motions were filed in 10.5% of all federal criminal cases surveyed, but of the motions filed, approximately 80-90% were denied. GAO Report, at 8, 10. Evidence was actually excluded in only 1.3% of the cases studied, and only 0.7% of all cases resulted in acquittals or dismissals after evidence was excluded. *Id.* at 9-11. *See* Davies, *supra*, at 660. And in another study based on data from cases during 1978 and 1979 in San Diego and Jacksonville, it was shown that only 1% of all cases resulting in nonconviction were caused by illegal searches. F. Feeney, F. Dill, & A. Weir, Arrests Without Conviction: How Often They Occur and Why (National Institute of Justice 1983). *See generally* Davies, *supra*, at 663.

[Footnote 2/12]

As Justice Stewart has observed:

"[T]he exclusionary rule is not designed to serve a specific deterrence function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a 'systematic deterrence:' the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system — bringing criminals to justice — can be achieved only when evidence of guilt may be used against defendants."

Stewart, 83 Colum.L.Rev. at 1400. *See also* Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 709-710 (1970) ("The exclusionary rule is not aimed at special deterrence, since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them"); Mertens & Wasserstrom, 70 Geo.L.J. at 399-401; Kamisar, 16 Creighton L.Rev. at 597, n. 204.

[Footnote 2/13]

Although specific empirical data on the systemic deterrent effect of the rule are not conclusive, the testimony of those actually involved in law enforcement suggests that, at the very least, the *Mapp* decision had the effect of increasing police awareness of

Fourth Amendment requirements and of prompting prosecutors and police commanders to work towards educating rank-and-file officers. For example, as former New York Police Commissioner Murphy explained the impact of the *Mapp* decision:

"I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect. . . . I was immediately caught up in the entire program of reevaluating our procedures, which had followed the *Defore*rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp*. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen."

Murphy, Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments, 44 Texas L.Rev. 939, 941 (1966).

Further testimony about the impact of the *Mapp* decision can be found in the statement of Deputy Commissioner Reisman:

"The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant — illegally, if you will–was admissible in state courts. So the feeling was, why bother? Well, once that rule was changed, we knew we had better start teaching our men about it."

N.Y. Times, Apr. 28, 1965, p. 50, col. 1. A former United States Attorney and now Attorney General of Maryland, Stephen Sachs, has described the impact of the rule on police practices in similar terms:

"I have watched the rule deter, routinely, throughout my years as a prosecutor. . . . [P]olice-prosecutor consultation is customary in all our cases when Fourth Amendment concerns arise. . . . In at least three Maryland jurisdictions, for example, prosecutors are on twenty-four hour call to field search and seizure questions presented by police officers."

Sachs, The Exclusionary Rule: A Prosecutor's Defense, 1 Crim. Justice Ethics 28, 30 (Summer/Fall 1982). *See also* LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U.Pitt.L.Rev. 307, 319 (1982); Mertens & Wasserstrom, *supra*, at 394-401.

[Footnote 2/14]

The authors of a recent study of the warrant process in seven cities concluded that application of a good faith exception where an officer relies upon a warrant

"would further encourage police officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall. Consequently, the benefits of adoption of a broad good faith exception in terms of a few additional prosecutions appears to be outweighed by the harm to the quality of the entire search warrant process and the criminal justice system in general."

R. Van Duizend, L. Sutton, & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, and Practices 8-12 (Review Draft, National Center for State Courts, 1983). *See also* Stewart, 83 Colum.L.Rev. at 1403.

[Footnote 2/15]

Just last Term, in *Illinois v. Gates*, 462 U. S. 213 (1983), the Court noted:

"Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."

Id. at 462 U. S. 239. After today's decisions, there will be little reason for reviewing courts to conduct such a conscientious review; rather, these courts will be more likely to focus simply on the question of police good faith. Despite the Court's confident prediction that such review will continue to be conducted, *see ante* at 468 U. S. 924-925, it is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate's decision before considering the officer's good faith.

[Footnote 2/16]

As the Court of Appeals for the Second Circuit has observed in this regard:

"If a magistrate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since, once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause. . . . For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required."

United States v. Karathanos, 53 F.2d 26, 34 (1976).

[Footnote 2/17]

See Kamisar, *Gates*, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L.Rev. 551, 588-589 (1984); Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am.Crim.L.Rev. 257 (1984); LaFave, 43 U.Pitt.L.Rev. at 307.

JUSTICE STEVENS, concurring in the judgment in No. 82963, *post*, p. 468 U. S. 981, and dissenting in No. 82-1771.

It is appropriate to begin with the plain language of the Fourth Amendment:

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

The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was "reasonable" for the police to conduct them. In my opinion, an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time. The doctrinal vice in the Court's holding is its failure to consider the separate purposes of the two prohibitory Clauses in the Fourth Amendment. The first Clause prohibits unreasonable searches and seizures, and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized. We have, of course, repeatedly held that warrantless searches are presumptively unreasonable, [Footnote 3/1]

and that there are only a few carefully delineated exceptions to that basic presumption. [Footnote 3/2] But when such an exception has been recognized, analytically we have necessarily concluded that the warrantless activity was not "unreasonable" within the meaning of the first Clause. Thus, any Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless "reasonable" within the meaning of the first. On these questions, the constitutional text requires that we speak with one voice. We cannot intelligibly assume, *arguendo*, that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable.

I

In No. 82-963, the Supreme Judicial Court of Massachusetts determined that a warrant which purported to authorize a search of respondent's home had been issued in violation of the Warrant Clause. In its haste to make new law, this Court does not tarry to consider this holding. Yet, as I will demonstrate, this holding is clearly wrong; I would reverse the judgment on that ground alone.

In No. 82-1771, there is also a substantial question whether the warrant complied with the Fourth Amendment. There was a strong dissent on the probable cause issue when *Leon* was before the Court of Appeals, and that dissent has been given added force by this Court's intervening decision in *Illinois v. Gates*, 462 U. S. 213(1983), which constituted a significant development in the law. It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*. Adherence to our normal

practice following the announcement of a new rule would therefore postpone, and probably obviate, the need for the promulgation of the broad new rule the Court announces today. [Footnote 3/3]

It is, of course, disturbing that the Court chooses one case in which there was no violation of the Fourth Amendment, and another in which there is grave doubt on the question, in order to promulgate a "good faith" exception to the Fourth Amendment's

exclusionary rule. The Court's explanation for its failure to decide the merits of the Fourth Amendment question in No. 82-963 is that it "is a fact-bound issue of little importance," *Massachusetts v. Sheppard*, *post* at 468 U. S. 988, n. 5. In No. 82-1771, the Court acknowledges that the case could be remanded to the Court of Appeals for reconsideration in light of *Gates*, yet does not bother to explain why it fails to do so except to note that it is "within our power" to decide the broader question in the case. *United States v. Leon*, *ante* at 468 U. S. 905. The Court seems determined to decide these cases on the broadest possible grounds; such determination is utterly at odds with the Court's traditional practice, as well as any principled notion of judicial restraint. Decisions made in this manner are unlikely to withstand the test of time.

Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures, and then adhering to them, courts of law ensure that justice is administered with an even hand.

"These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."

Offutt v. United States, 348 U. S. 11, 348 U. S. 14 (1954). Of course, this Court has a duty to face questions of constitutional law when necessary to the disposition of an actual case or controversy. *Marbury v. Madison,* 1 Cranch

137, 5 U. S. 177 (1803). But when the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy, rather than adhering to its judicial role. I do not believe the Court should reach out to decide what is undoubtedly a profound question concerning the administration of criminal justice before assuring itself that this question is actually and of necessity presented by the concrete facts before the Court. Although it may appear that the Court's broad holding will serve the public interest in enforcing obedience to the rule of law, for my part, I remain firmly convinced that "the preservation of order in our communities will be best ensured by adherence to established and respected procedures." *Groppi v. Leslie*,436 F.2d 331, 336 (CA7 1971) (en banc) (Stevens, J., dissenting), *rev'd*, 404 U. S. 496(1972).

II

In No. 82-963, there is no contention that the police officers did not receive appropriate judicial authorization for their search of respondent's residence. A neutral and detached judicial officer had correctly determined that there was probable cause to conduct a search. Nevertheless, the Supreme Judicial Court suppressed the fruits of the search because the warrant did not particularly describe the place to be searched and the things to be seized.

The particularity requirement of the Fourth Amendment has a manifest purpose — to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search is carefully tailored to its justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit. [Footnote 3/4] In this

case the warrant did not come close to authorizing a general search. [Footnote 3/5]

The affidavit supporting the application for the warrant correctly identified the things to be seized, and on its face the affidavit indicated that it had been presented to the judge who had issued the warrant. [Footnote 3/6] Both the police officers and the judge were fully aware of the contents of the affidavit, and therefore knew precisely what the officers were authorized to search for. Since the affidavit was available for after-the-fact review, the Massachusetts courts could readily ascertain the limits of the officers' authority under the warrant. In short, the judge who issued the warrant, the police officers who executed it, and the reviewing courts all were able easily to ascertain the precise scope of the authorization provided by the warrant.

All that our cases require is that a warrant contain a description sufficient to enable the officers who execute it to ascertain with reasonable effort where they are to search and what they are to seize. [Footnote 3/7] The test is whether the executing officers' discretion has been limited in a way that forbids a general search. [Footnote 3/8] Here there was no question that the

executing officers' discretion had been limited — they, as well as the reviewing courts, knew the precise limits of their authorization. There was simply no "occasion or opportunity for officers to rummage at large," *Zurcher v. Stanford Daily*, 436 U. S. 547, 436 U. S. 566 (1978). [Footnote 3/9]

The only Fourth Amendment interest that is arguably implicated by the "defect" in the warrant is the citizen's interest in being able to ascertain the limits of the officers' authorization by examining the warrant. [Footnote 3/10] Respondent, however, was not home at the time the warrant was executed, and therefore had no occasion to see the warrant. The two persons who were present when the warrant was executed, respondent's mother and sister, did not read the warrant or ask to have it read.

"[T]he general rule [is] that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

Alderman v. United States, 394 U. S. 165, 394 U. S. 174 (1969). Thus, respondent, who has standing to assert only his own Fourth Amendment interests, [Footnote 3/11] cannot complain that his interest in ascertaining the limits of the officers' authority under the search warrant was infringed. [Footnote 3/12] In short, our

precedents construing the particularity requirement of the Warrant Clause unambiguously demonstrate that this warrant did not violate the Fourth Amendment.

III

Even if it be assumed that there was a technical violation of the particularity requirement in No. 82-963, it by no means follows that the "warrantless" search in that case was "unreasonable" within the meaning of the Fourth Amendment. For this search posed none of the dangers to which the Fourth Amendment is addressed. It was justified by a neutral magistrate's determination of probable cause, and created no risk of a general search. It was eminently "reasonable."

In No. 82-1771, however, the Government now admits — at least for the tactical purpose of achieving what it regards as a greater benefit — that the substance, as well as the letter, of the Fourth Amendment was violated. The Court therefore assumes that the warrant in that case was not supported by probable cause, but refuses to suppress the evidence obtained thereby because it considers the police conduct to satisfy a "newfangled" nonconstitutional standard of reasonableness. [Footnote 3/13] Yet if the Court's assumption is correct — if there was no probable cause — it must follow that it was "unreasonable"

for the authorities to make unheralded entries into and searches of private dwellings and automobiles. The Court's conclusion that such searches undertaken without probable cause can nevertheless be "reasonable" is totally without support in our Fourth Amendment jurisprudence.

Just last Term, the Court explained what probable cause to issue a warrant means:

"The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Illinois v. Gates, 462 U.S. at 462 U. S. 238. Moreover, in evaluating the existence of probable cause, reviewing courts must give substantial deference to the magistrate's determination. [Footnote 3/14] In doubtful cases, the warrant

should be sustained. [Footnote 3/15] The judgment as to whether there is probable cause must be made in a practical and nontechnical manner. [Footnote 3/16] The probable cause standard therefore gives law enforcement officers ample room to engage in any reasonable law enforcement activity. What is more, the standard has been familiar to the law enforcement profession for centuries. [Footnote 3/17] In an opinion written in 1949, and endorsed by the Court last Term in *Gates*, we explained:

"These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Brinegar v. United States, 338 U. S. 160, 338 U. S. 176.

Thus, if the majority's assumption is correct, that even after paying heavy deference to the magistrate's finding and resolving all doubt in its favor, there is no probable cause here, then by definition — as a matter of constitutional law —

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the officers' conduct was unreasonable. [Footnote 3/18] The Court's own hypothesis is that there was no fair likelihood that the officers would find evidence of a crime, and hence there was no reasonable law enforcement justification for their conduct. [Footnote 3/19]

The majority's contrary conclusion rests on the notion that it must be reasonable for a police officer to rely on a magistrate's finding. Until today, that has plainly not been the law; it has been well settled that, even when a magistrate issues a warrant, there is no guarantee that the ensuing search and seizure is constitutionally reasonable. Law enforcement officers have long been on notice that, despite the magistrate's decision, a warrant will be invalidated if the officers did not provide sufficient facts to enable the magistrate to evaluate the existence of probable cause responsibly and independently. [Footnote 3/20] Reviewing courts have always inquired into whether the magistrate acted properly in issuing the warrant — not merely whether the officers acted properly in executing it. *See Jones v. United States*, 362 U. S. 257, 362 U. S. 271-272 (1960). [Footnote 3/21] Indeed, just last Term, in *Gates*, after noting

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that

""the duty of a reviewing court is simply to ensure that the magistrate had a *substantial basis for conclud[ing]' that probable cause existed,*""

462 U.S. at 462 U. S. 238-239 (quoting *Jones*, 362 U.S. at 362 U. S. 271), the Court added:

"Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."

462 U.S. at 462 U. S. 239. [Footnote 3/22]

Thus, under our cases, it has never been "reasonable" for the police to rely on the mere fact that a warrant has issued; the police have always known that, if they fail to supply the magistrate with sufficient information, the warrant will be held invalid, and its fruits excluded. [Footnote 3/23]

The notion that a police officer's reliance on a magistrate's warrant is automatically appropriate is one the Framers of

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the Fourth Amendment would have vehemently rejected. The precise problem that the Amendment was intended to address was *the unreasonable issuance of warrants.* As we have often observed, the Amendment was actually motivated by the practice of issuing general warrants — warrants which did not satisfy the particularity and probable cause requirements. [Footnote 3/24] The resentments which led to the Amendment were directed at the issuance of warrants unjustified by particularized evidence of wrongdoing. [Footnote 3/25] Those who sought to amend the Constitution to include a Bill of Rights repeatedly voiced the view that the evil which had to be addressed was the issuance of warrants on insufficient evidence. [Footnote 3/26] As Professor Taylor has written:

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"[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches. . . ."

T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds, the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia. [Footnote 3/27]

IV

In *Brinegar*, Justice Jackson, after observing that

"[i]ndications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position,"

338 U.S. at 338 U. S. 180 (dissenting opinion), continued:

"These, I protest, are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and

seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."

"* * * *"

"Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear."

"Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty. . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman."

Id. at 338 U. S. 180-181. Justice Jackson's reference to his experience at Nuremberg should remind us of the importance of considering the consequences of today's decision for "Everyman."

The exclusionary rule is designed to prevent violations of the Fourth Amendment. [Footnote 3/28]

"Its purpose is to deter — to compel

respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it."

Elkins v. United States, 364 U. S. 206, 364 U. S. 217 (1960). [Footnote 3/29] If the police cannot use evidence obtained through warrants issued on less than probable cause, they have less incentive to seek those warrants, and magistrates have less incentive to issue them.

Today's decisions do grave damage to that deterrent function. Under the majority's new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait. No longer must they hesitate and seek additional evidence in doubtful cases. Thus, what we

said two Terms ago about a rule that would prevent exclusion except in cases in which the authorities violate well-settled law applies fully to the rule the Court adopts today:

"If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.'"

United States v. Johnson, 457 U. S. 537, 457 U. S. 561 (1982) (emphasis in original) (footnote omitted) (quoting *Desist v. United States*, 394 U. S. 244, 394 U. S. 277(1969) (Fortas, J., dissenting)). [Footnote 3/30]

The Court is, of course, correct that the exclusionary rule cannot deter when the authorities have no reason to know that their conduct is unconstitutional. But when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances, well-trained professionals must know that they are violating the Constitution. The Court's approach —

which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful — can only lead to an increased number of constitutional violations.

Thus, the Court's creation of a double standard of reasonableness inevitably must erode the deterrence rationale that still supports the exclusionary rule. But we should not ignore the way it tarnishes the role of the judiciary in enforcing the Constitution. For the original rationale for the exclusionary rule retains its force as well as its relevance:

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Weeks v. United States, 232 U. S. 383, 232 U. S. 392 (1914). [Footnote 3/31] Thus,

"Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional

rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . ."

Terry v. Ohio, 392 U. S. 1, 392 U. S. 13 (1968). [Footnote 3/32] As the Court correctly notes, [Footnote 3/33] we have refused to apply the exclusionary rule to collateral contexts in which its marginal efficacy is questionable; until today, however, every time the police have violated the applicable commands of the Fourth Amendment a court has been prepared to vindicate that Amendment by preventing the use of evidence so obtained in the prosecution's case in chief against those whose rights have been violated. [Footnote 3/34] Today, for the first time, this Court holds that, although the Constitution has been violated, no court should do anything about it at any time and in any proceeding. [Footnote 3/35] In my judgment,

the Constitution requires more. Courts simply cannot escape their responsibility for redressing constitutional violations if they admit evidence obtained through unreasonable searches and seizures, since the entire point of police conduct that violates the Fourth Amendment is to obtain evidence for use at trial. If such evidence is admitted, then the courts become not merely the final and necessary link in an unconstitutional chain of events, but its actual motivating force.

"If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."

Olmstead v. United States, 277 U. S. 438, 277 U. S. 470 (1928) (Holmes, J., dissenting). Nor should we so easily concede the existence of a constitutional violation for which there is no remedy. [Footnote 3/36] To do so is to convert a Bill of *Rights* into an unenforced honor code that the police may follow in their discretion. The Constitution requires more; it requires a *remedy.* [Footnote 3/37] If the Court's new rule is to be followed, the Bill of Rights should be renamed.

It is, of course, true that the exclusionary rule exerts a high price — the loss of probative evidence of guilt. But that price is one courts have often been required to pay to serve important social goals. [Footnote 3/38] That price is also one the Fourth Amendment requires us to pay, assuming as we must that the Framers intended that its strictures "shall not be violated." For in all such cases, as Justice Stewart has observed,

"the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place. [Footnote 3/39]"

"[T]he forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught."

Harris v. United States, 331 U. S. 145, 331 U. S. 198 (1947) (Jackson, J., dissenting). [Footnote 3/40]

We could, of course, facilitate the process of administering justice to those who violate the criminal laws by ignoring the commands of the Fourth Amendment — indeed, by ignoring

the entire Bill of Rights — but it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency. In a just society, those who govern, as well as those who are governed, must obey the law.

While I concur in the Court's judgment in No. 82-963, I would vacate the judgment in No. 82-1771 and remand the case to the Court of Appeals for reconsideration in the light of *Gates*. Accordingly, I respectfully dissent from the disposition in No. 82-1771.

[Footnote 3/1]

See, e.g., Payton v. New York, 445 U. S. 573, 445 U. S. 586 (1980); *Chimel v. California*,395 U. S. 752, 395 U. S. 762-763 (1969).

[Footnote 3/2]

See, e.g., Coolidge v. New Hampshire, 403 U. S. 443, 403 U. S. 474-475 (1971); *Vale v. Louisiana*, 399 U. S. 30 (1970).

[Footnote 3/3]

In his petition for certiorari in *Leon*, the Solicitor General did not seek plenary review, but only that the petition "be disposed of as appropriate in light of the Court's decision in *Illinois v. Gates*," Pet. for Cert. in *United States v. Leon*, No. 82-1771, p. 10.

[Footnote 3/4]

See Andresen v. Maryland, 427 U. S. 463, 427 U. S. 480 (1976); *Stanley v. Georgia*, 394 U. S. 557, 394 U. S. 569-572 (1969) (Stewart, J., concurring in result); *Stanford v. Texas*, 379 U. S. 476, 379 U. S. 481-482, 485 (1965); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 282 U. S. 357 (1931); *Marron v. United States*, 275 U. S. 192, 275 U. S. 195-196 (1927).

[Footnote 3/5]

Indeed, the "defect" in the warrant was that it authorized — albeit mistakenly — a search for quite particular "things to be seized," controlled substances, rather than the evidence described in the affidavit supporting the warrant application. This "defect" posed no risk of a general search. On its face, the warrant correctly identified the place to be searched. Thus, the threshold invasion of privacy — entry into respondent's home — was properly and specifically authorized. Moreover, the four corners of the warrant plainly indicate that it was not intended to authorize a search for controlled substances. On the cover of the warrant the caption "Controlled Substances" had been crossed out, and an "addendum" to the warrant authorized a search for and seizure of a rifle and ammunition, indicating that the warrant was not limited to controlled substances.

[Footnote 3/6]

The issuing judge attested to the affiant's signature on the affidavit.

[Footnote 3/7]

See Steele v. United States, 267 U. S. 498, 267 U. S. 503 (1925).

[Footnote 3/8]

See Lo-Ji Sales, Inc. v. New York, 442 U. S. 319, 442 U. S. 325 (1979); *Andresen v. Maryland*, 427 U.S. at 427 U. S. 480-482; *Marcus v. Search Warrant*, 367 U. S. 717,367 U. S. 732-733 (1961).

[Footnote 3/9]

See also Coolidge v. New Hampshire, 403 U.S. at 403 U. S. 467.

[Footnote 3/10]

See Illinois v. Gates, 462 U. S. 213, 462 U. S. 236 (1983); *United States v. Chadwick*, 433 U. S. 1, 433 U. S. 9 (1977); *Camara v. Municipal Court*, 387 U. S. 523, 387 U. S. 532(1967).

[Footnote 3/11]

See, e.g., Rawlings v. Kentucky, 448 U. S. 98, 448 U. S. 104-106 (1980); *Rakas v. Illinois*,439 U. S. 128 (1978).

[Footnote 3/12]

Even if respondent had standing to assert his right to be able to ascertain the officers' authority from the four corners of the warrant, it is doubtful that he could succeed. On its face, the warrant authorized a search of respondent's residence, "42 Deckard Street." Had respondent read the warrant, he would have had no reason to question the officers' right to enter the premises. Moreover, the face of the warrant indicated that the caption "Controlled Substances" had been stricken, and at the bottom of the warrant an addendum authorized the search for and seizure of a rifle and ammunition. The supporting affidavit, which the police had with them when they executed the warrant, and which was attested by the same judge who had issued the warrant, described in detail the items which the police were authorized to search for and to seize.

[Footnote 3/13]

I borrow the adjective from Justice Clark, who so characterized the warrants authorized by the Court in *Camara v. Municipal Court*, 387 U. S. 523 (1967), but not authorized by the Constitution itself. In an opinion joined by Justice Harlan and Justice Stewart, he wrote:

"Today the Court renders this municipal experience, which dates back to Colonial days, for naught by overruling *Frank v. Maryland* [359 U.S. 360 (1959)] and by striking down hundreds of city ordinances throughout the country and jeopardizing thereby the health, welfare, and safety of literally millions of people."

"But this is not all. It prostitutes the command of the Fourth Amendment that 'no Warrants shall issue, but upon probable cause' and sets up in the health and safety codes area inspection a newfangled 'warrant' system that is entirely foreign to Fourth Amendment standards. It is regrettable that the Court wipes out such a long and widely accepted practice and creates in its place such enormous confusion in all of our towns and metropolitan cities in one fell swoop."

See v. City of Seattle, 387 U. S. 541, 387 U. S. 547 (1967) (dissenting in both *Camara*and *See*).

The kind of doctrinal difficulties in the two lines of cases engendered by the Court's creation of a newfangled warrant, *compare Marshall v. Barlow's, Inc.*, 436 U. S. 307(1978), *with Donovan v. Dewey*, 452 U. S. 594 (1981), can be expected to grow out of the Court's creation of a new double standard of reasonableness today. Ironically, as I have previously suggested, the failure to consider both Clauses of the Amendment infects both lines of decision. *See Michigan v. Clifford*, 464 U. S. 287,464 U. S. 301-303 (1984) (STEVENS, J., concurring in judgment); *Dewey*, 452 U.S. at452 U. S. 606-608 (STEVENS, J., concurring); *Michigan v. Tyler*, 436 U. S. 499, 436 U. S. 513 (1978) (STEVENS, J., concurring in part and concurring in judgment); *Barlow's*,436 U.S. at 436 U. S. 325-339 (STEVENS J., dissenting).

[Footnote 3/14]

See Massachusetts v. Upton, 466 U. S. 727, 466 U. S. 732-733 (1984) (per curiam); *Illinois v. Gates*, 462 U.S. at 462 U. S. 236; *United States v. Harris*, 403 U. S. 573, 403 U. S. 577-583 (1971) (plurality opinion); *Spinelli v. United States*, 393 U. S. 410, 393 U. S. 419 (1969); *Aguilar v. Texas*, 378 U. S. 108, 378 U. S. 111 (1964); *Jones v. United States*,362 U. S. 257, 362 U. S. 271 (1960).

[Footnote 3/15]

See Illinois v. Gates, 462 U.S. at 462 U. S. 237, n. 10; *United States v. Ventresca*, 380 U. S. 102, 380 U. S. 109 (1965).

[Footnote 3/16]

See Massachusetts v. Upton, 466 U.S. at 466 U. S. 732 (per curiam); *Illinois v. Gates*,462 U.S. at 462 U. S. 231; *United States v. Ventresca*, 380 U.S. at 380 U. S. 108.

[Footnote 3/17]

See, e.g., 2 M. Hale, Pleas of the Crown 150 (1st Am. ed. 1847).

[Footnote 3/18]

"[I]f nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable cause requirement is not satisfied. In the absence of some other showing of reasonableness, the ensuing search violates the Fourth Amendment."

Zurcher v. Stanford Daily, 436 U. S. 547, 436 U. S. 583 (1978) (STEVENS, J., dissenting).

[Footnote 3/19]

As the majority recognizes, *United States v. Leon, ante* at 468 U. S. 915, n. 13, an officer's good faith cannot make otherwise "unreasonable" conduct reasonable.*See Terry v. Ohio*, 392 U. S. 1, 392 U. S. 22 (1968); *Beck v. Ohio*, 379 U. S. 89, 379 U. S. 97 (1964); *Henry v. United States*, 361 U. S. 98, 361 U. S. 102 (1959). The majority's failure to appreciate the significance of that recognition is inexplicable.

[Footnote 3/20]

See Franks v. Delaware, 438 U. S. 154, 438 U. S. 165, 438 U. S. 169-170 (1978), *Whiteley v. Warden*, 401 U. S. 560, 401 U. S. 564 (1971); *Spinelli v. United States*, 393 U.S. at 393 U. S. 415-416; *United States v. Ventresca*, 380 U.S. at 380 U. S. 108-109; *Aguilar v. Texas*, 378 U.S. at 378 U. S. 113-115; *Nathanson v. United States*, 290 U. S. 41 (1933); *Byars v. United States*, 273 U. S. 28 (1927).

[Footnote 3/21]

In making this point in *Franks v. Delaware*, 438 U. S. 154 (1978), JUSTICE BLACKMUN wrote for the Court:

"We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which is also subject to a post-search examination, and the question of its integrity."

Id. at 438 U. S. 171. Yet today the Court justifies its holding in part by distinguishing veracity claims, *United States v. Leon, ante* at 468 U. S. 922-923, thereby distinguishing what we previously held could not be distinguished on a principled basis. Just why it should be less reasonable for an innocent officer to rely on a warrant obtained by another officer's fraud than for him to rely on a warrant that is not supported by probable cause is entirely unclear to me.

[Footnote 3/22]

Judicial review of magisterial determinations is all the more necessary since the magistrate acts without benefit of adversarial presentation; his determination partakes of the unreliability inherent in any *ex parte* proceeding. *See Franks v. Delaware*, 438 U.S. at 438 U. S. 169.

[Footnote 3/23]

The majority seems to be captivated by a vision of courts invalidating perfectly reasonable police conduct because of "technical" violations of the Fourth Amendment. In my view, there is no such thing as a "technical" violation of the Fourth Amendment. No search or seizure can be unconstitutional unless it is "unreasonable." By definition, a Fourth Amendment violation cannot be reasonable. My analysis of No. 82-963 illustrates this point.

[Footnote 3/24]

See, e.g., Steagald v. United States, 451 U. S. 204, 451 U. S. 220 (1981); *Payton v. New York*, 445 U.S. at 445 U. S. 583-584; *Lo-Ji Sales, Inc. v. New York*, 442 U.S. at 442 U. S. 325; *Marshall v. Barlow's, Inc.*, 436 U.S. at 436 U. S. 327-328 (STEVENS, J., dissenting); *United States v. Chadwick*, 433 U.S. at 433 U. S. 7-8; *Chimel v. California*, 395 U.S. at395 U. S. 760-762; *Stanford v. Texas*, 379 U.S. at 379 U. S. 480-485; *Marcus v. Search Warrant*, 367 U.S. at 367 U. S. 727-729; *Henry v. United States*, 361 U.S. at 361 U. S. 100-101; *Frank v. Maryland*, 359 U. S. 360, 359 U. S. 363-365 (1959); *United States v. Rabinowitz*, 339 U. S. 56, 339

U. S. 69-70 (1950) (Frankfurter, J., dissenting); *Marron v. United States*, 275 U.S. at 275 U. S. 195-196; *Weeks v. United States*, 232 U. S. 383,232 U. S. 390-391 (1914); *Boyd v. United States*, 116 U. S. 616, 116 U. S. 624-630 (1886).

[Footnote 3/25]

See J. Landynski, Search and Seizure and the Supreme Court 19-47 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 53-98 (1937); R. Rutland, The Birth of the Bill of Rights 11 (rev. ed.1983); Marke, The Writs of Assistance Case and the Fourth Amendment, in Essays in Legal History in Honor of Felix Frankfurter 351 (M. Forkosch ed.1966).

[Footnote 3/26]

See 1 The Bill of Rights: A Documentary History 473, 488-489, 508 (B. Schwartz ed.1971); 2 *id.* at 658, 665, 730, 733-734, 805-806, 815, 841-842, 913, 968. In fact, the original version of the Fourth Amendment contained only one clause providing that the right to be protected against unreasonable searches and seizures "shall not be violated by warrants issuing. . . ." The change to its present form broadened the coverage of the Amendment, but did not qualify the unequivocal prohibition against the issuance of warrants without probable cause. *See* 2 *id.* at 1112; N. Lasson, *supra*, <l=|468 u.s.="" 897fn3="" 25|="">n. 25, at 101-103. </l=|468>

[Footnote 3/27]

"It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper."

United States v. Rabinowitz, 339 U.S. at 339 U. S. 69 (Frankfurter, J., dissenting).

[Footnote 3/28]

For at least two reasons, the exclusionary rule is a better remedy than a civil action against an offending officer. Unlike the fear of personal liability, it should not create excessive deterrence; moreover, it avoids the obvious unfairness of subjecting the dedicated officer to the risk of monetary liability for a misstep while endeavoring to enforce the law. Society, rather than the individual officer, should accept the responsibility for inadequate training or supervision of officers engaged in hazardous police work. What THE CHIEF JUSTICE wrote, some two decades ago, remains true today:

"It is the proud claim of a democratic society that the people are masters and all officials of the state are servants of the people. That being so, the ancient rule of *respondeat superior* furnishes us with a simple, direct and reasonable basis for refusing to admit evidence secured in violation of constitutional or statutory provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible, and society is 'penalized' by refusing it the benefit of evidence secured by the illegal action. This satisfies me more than the other explanations because it seems to me that society — in a country like ours — is involved in and is responsible for what is done in its name and by its agents. Unlike the Germans of the 1930's and early '40's, we cannot say 'it is all The Leader's doing. I am not responsible.' In a representative democracy, we are responsible, whether we like it or not. And so each of us is involved and each is in this sense responsible when a police officer breaks rules of law established for our common protection."

Burger, Who Will Watch the Watchman?, 14 Am.U.L.Rev. 1, 14 (1964) (emphasis in original) (footnote omitted).

[Footnote 3/29]

See Stone v. Powell, 428 U. S. 465, 428 U. S. 484 (1976); *United States v. Janis*, 428 U. S. 433, 428 U. S. 443, n. 12 (1976); *United States v. Calandra*, 414 U. S. 338, 414 U. S. 347-348 (1974); *Terry v. Ohio*, 392 U.S. at 392 U. S. 29; *Tehan v. United States ex rel. Shott*, 382 U. S. 406, 382 U. S. 413 (1966); *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 656(1961).

[Footnote 3/30]

See also LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U.Pitt.L.Rev. 307, 358 (1982); Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum.L.Rev. 1365, 1401-1403 (1983); Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am.Crim.L.Rev. 257, 395-397(1984).

[Footnote 3/31]

The Court continued:

"The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the things for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and, under color of his office, undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

232 U.S. at 232 U. S. 393-394.

[Footnote 3/32]

See United States v. Peltier, 422 U. S. 531, 422 U. S. 536 (1975); *Lee v. Florida*, 392 U. S. 378, 392 U. S. 385-386 (1968); *Berger v. New York*, 388 U. S. 41, 388 U. S. 50 (1967); *Mapp v. Ohio*, 367 U.S. at 367 U. S. 647-650; *Byars v. United States*, 273 U.S. at 273 U. S. 33-34.

[Footnote 3/33]

United States v. Leon, *ante* at 468 U. S. 908-913.

[Footnote 3/34]

Indeed, we have concluded that judicial integrity is not compromised by the refusal to apply the exclusionary rule to collateral contexts precisely because the defendant is able to vindicate his rights in the primary context — his trial and direct appeal therefrom. *See Stone v. Powell*, 428 U.S. at 428 U. S. 485-486.

[Footnote 3/35]

As the majority recognizes, *United States v. Leon*, *ante* at 468 U. S. 922-923, and n. 23, in all cases in which its "good faith" exception to the exclusionary rule would operate, there will also be immunity from civil damages. *See also United States v. Ross*, 456 U. S. 798, 456 U. S. 823, n. 32 (1982); *Stadium Films, Inc. v. Baillargeon*, 542 F.2d 577, 578 (CA1 1976); *Madison v. Maner*, 441 F.2d 537 (CA1 1971). *See generally Pierson v. Ray*, 386 U. S. 547 (1967). The Court amazingly suggests that, in some cases in which suppression would not be appropriate, courts should nevertheless adjudicate the merits of Fourth Amendment claims to provide guidance to police and magistrates, but not a remedy. *United States v. Leon*, *ante* at 468 U. S. 925. Not only is the propriety of deciding constitutional questions in the absence of the strict necessity to do so open to serious question, *see Bowen . United States*, 422 U. S. 916, 422 U. S. 920 (1975), but such a proceeding, in which a court would declare that the Constitution had been violated but that it was unwilling to do anything about it, seems almost a mockery:

"[T]he assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."

Mapp v. Ohio, 367 U.S. at 367 U. S. 655. *See also Segura v. United States*, *ante* at 468 U. S. 838-840 (STEVENS, J., dissenting).

[Footnote 3/36]

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Marbury v. Madison, 1 Cranch 137, 5 U. S. 163 (1803). *See generally* Schrock & Welsh, Up From *Calandra:* The Exclusionary Rule as a Constitutional Requirement, 59 Minn.L.Rev. 251, 350-372 (1974).

[Footnote 3/37]

See Stewart, 83 Colum.L.Rev. at 1383-1384 (footnotes omitted) ("In my opinion, however, the framers did not intend the Bill of Rights to be no more than unenforceable guiding principles — no more than a code of ethics under an honor system. The proscriptions and guarantees in the amendments were intended to create legal rights and duties"). *See also* Ervin, The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment, 1983 S.Ct.Rev. 283. In fact, if the Constitution of the United States does not compel use of the exclusionary rule, *Mapp v. Ohio*,367 U. S. 643 (1961), which the majority does not purport to question, could not have been decided as it was. *See id.* at 367 U. S. 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

[Footnote 3/38]

The exclusion of probative evidence in order to serve some other policy is by no means unique to the Fourth Amendment. In his famous treatise on evidence, Dean Wigmore devoted an entire volume to such exclusionary rules, which are common in the law of evidence. *See* 8 J. Wigmore, Evidence (J. McNaughton rev.1961) (discussing, *inter alia*, marital privilege, attorney-client privilege, communications among jurors, state secrets privilege, physician-patient privilege, priest-penitent privilege).

[Footnote 3/39]

Stewart, 83 Colum.L.Rev. at 1392 (footnote omitted). *See also* Traynor, *Mapp v. Ohio*at Large in the Fifty States, 1962 Duke L.J. 319, 322 ("Ah, but surely the guilty should not go free? However grave the question, it seemed improperly directed at the exclusionary rule. The hard answer is in the United States Constitution, as well as in state constitutions. They make it clear that the guilty would go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them").

[Footnote 3/40]

See also United States v. Di Re, 332 U. S. 581, 332 U. S. 595 (1948).

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5.7: Amos v. United States 255 U.S. 313 (1921)

U.S. Supreme Court

Amos v. United States, 255 U.S. 313 (1921)

Amos v. United States

No. 114

Argued December 13, 1920

Decided February 28, 1921

255 U.S. 313

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

Syllabus

1. When it is clear and undisputed that property used in evidence against a defendant on a criminal trial was procured by the Government through an unconstitutional search and seizure in his home, his petition for its return is not too late when made immediately after the jury was sworn, and his motion to exclude the property, and testimony concerning it, from evidence should not be denied as inviting a collateral issue. P. 255 U. S. 316.

2. The act of a man's wife in allowing government officers to enter his home without a warrant upon their demand for admission for the purpose of making a search is *held* not to be a waiver of his constitutional

Home Page 255 U. S. 314

privilege against unreasonable search and seizure, even assuming that a wife may waive her husband's right in that regard. P. 255 U. S. 317.

Reversed.

MR. JUSTICE CLARKE delivered the opinion of the Court.

The plaintiff in error, whom we shall designate defendant, as he was in the court below, was tried on an indictment containing six counts. He was found not guilty on the first four counts, but guilty on the fifth, which charged him with having removed whisky on which the revenue tax had not been paid to a place other than a government warehouse, and also on the sixth, which charged him with having sold whisky on which the tax required by law had not been paid.

After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was averred the District Attorney intended to use in evidence at the trial and which had been seized by P. J. Coleman and C. A. Rector, officers of the Government, in a search of defendant's house and store "within his curtilage," made unlawfully and without warrant of any kind, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Upon reading of this petition and hearing of the application,

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it was denied, and, exception being noted, the trial proceeded.

Coleman and Rector were called as witnesses by the Government, and testified: that, as deputy collectors of internal revenue, they went to defendant's home, and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers and had come to search the premises "for violations of the revenue law"; that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half pint of illicitly distilled whisky, which they called "blockade whisky"; and that they then went into the home of defendant, and, on searching, found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whisky. The Government introduced in evidence a pint bottle containing whisky, which the witness Coleman stated

"was not one of the bottles found by him, but that the whisky contained in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated."

On cross-examination, both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

After these two government witnesses had described how the search was made of defendant's home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by government agents without warrant of any kind, in plain violation of the Fourth and Fifth Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States*, 232 U. S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, and also denied his motion to exclude such property and the testimony relating thereto given by the government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

The answer of the Government to the claim that the trial court erred in the two rulings we have described is that the petition for the return of defendant's property was properly denied because it came too late when presented after the jury was impaneled and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

Plainly, the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, *Gouled v. United States*, *ante*, 255 U. S. 298.

There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court by the Government itself. The petition should have been granted, but, it having been denied, the motion should have been sustained.

The contention that the constitutional rights of defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected.

It results that the judgment of the District Court must be reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed.

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5.8: Johnson v. United States 333 U.S. 10 (1948) Annotate this Case

U.S. Supreme Court

Johnson v. United States, 333 U.S. 10 (1948)

Johnson v. United States

No. 329

Argued December 18, 1947

Decided February 2, 1948

333 U.S. 10

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

Syllabus

1. Where officers detected the odor of burning opium emanating from a hotel room, entered without a search warrant and without knowing who was there, arrested the only occupant, searched the room and found opium and smoking apparatus, the search violated the Fourth Amendment to the Federal Constitution, and a conviction for a violation of the federal narcotic laws based on the evidence based on the evidence thus obtained cannot be sustained. Pp. 333 U. S. 11-17.

2. As a general rule, the question when the right of privacy must reasonably yield to the right of search must be decided by a judicial officer, not by a policeman or government enforcement agent. Pp. 333 U. S. 13-14.

3. There were no exceptional circumstances in this case sufficient to justify the failure of the officer to obtain a search warrant. Pp. 333 U. S. 14-15.

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4. It being conceded that the officer did not have probable cause to arrest petitioner until he entered the room and found her to be the sole occupant, the search cannot be sustained as being incident to a valid arrest. Pp. 333 U. S. 15-16.

5. The Government cannot at the same time justify an arrest by a search and justify the search by the arrest. Pp. 333 U. S. 16-19.

6. An officer gaining access to private living quarters under color of his office and of the law must then have some valid basis in law for the intrusion. P. 333 U. S. 17.

162 F.2d 562, reversed.

Petitioner was convicted in a Federal District Court on evidence obtained by a search made without a warrant. The Circuit Court of Appeals affirmed. 162 F.2d 562. This Court granted certiorari. 332 U.S. 807. *Reversed,* p. 333 U. S. 17.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner was convicted on four counts charging violation of federal narcotic laws. [Footnote 1] The only question which brings the case here is whether it was lawful, without a warrant of any kind, to arrest petitioner and to search her living quarters.

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Taking the Government's version of disputed events, decision would rest on these facts:

At about 7:30 p.m. Detective Lieutenant Belland, an officer of the Seattle police force narcotic detail, received information from a confidential informer, who was also a known narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. Belland communicated with federal narcotic agents, and between 8:30 and 9 o'clock, went back to the hotel with four such agents. All were experienced in narcotic work and recognized at once a strong odor of burning opium, which to them was distinctive and unmistakable. The odor led to Room 1. The officers did not know who was occupying that room. They knocked and a voice inside asked who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the

room and then the defendant opened the door. The officer said, “I want to talk to you a little bit.” She then, as he describes it, “stepped back acquiescently and admitted us.” He said, “I want to talk to you about the opium smell in the room here.” She denied that there was such a smell. Then he said, “I want you to consider yourself under arrest, because we are going to search the room.” The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. This evidence the District Court refused to suppress before trial and admitted over defendant’s objection at the trial. Conviction resulted and the Circuit Court of Appeals affirmed. [Footnote 2]

The defendant challenged the search of her home as a violation of the rights secured to her in common with others, by the Fourth Amendment to the Constitution.

The Government defends the search as legally justifiable, more particularly as incident to what it urges was a lawful arrest of the person.

I

The Fourth Amendment to the Constitution of the United States provides:

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

Entry to defendant’s living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority, rather than as an understanding and intentional waiver of a constitutional right. *Cf. Amos v. United States*, 255 U. S. 313.

At the time entry was demanded, the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant’s contention, erroneously made on the strength of *Taylor v. United States*, 286 U. S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

The point of the Fourth Amendment which often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. [Footnote 3] Any assumption that evidence sufficient to support a magistrate”s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity, and leave the people”s homes secure only in the discretion of police officers. [Footnote 4] Crime, even in the privacy of one’s own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate’s warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

II

The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty. [Footnote 5]

The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant. [Footnote 6] It points out specifically, referring to the time just before entry,

"For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den."

And it says,

". . . that when the agents were admitted to the room and found only the petitioner present, they had a reasonable basis for believing that she had been smoking opium, and thus illicitly possessed the narcotic."

Thus, the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest. [Footnote 7]

Thus, the Government is obliged to justify the arrest by the search and at the same time to justify the search by} the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," [Footnote 8] and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE BURTON dissent.

[Footnote 1]

Two counts charged violation of § 2553(a) of the Internal Revenue Code, 26 U.S.C. § 2553(a), 26 U.S.C.A. Int.Rev.Code, § 2553(a), and two counts charged violation of the Narcotic Drugs Import and Export Act, as amended, 21 U.S.C. § 174.

[Footnote 2]

9 Cir., 162 F.2d 562.

[Footnote 3]

In *United States v. Lefkowitz*, 285 U. S. 452, 285 U. S. 464, this Court said:

". . . the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. . . ."

[Footnote 4]

"Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

Agnello v. United States, 269 U. S. 20, 269 U. S. 33

[Footnote 5]

This is the Washington law. *State v. Symes*, 20 Wash. 484, 55 P. 626; *State v. Lindsey*,192 Wash. 356, 73 P.2d 738; *State v. Krantz*, 24 Wash.2d 350, 164 P.2d 453; *State v. Robbins*, 25 Wash.2d 110, 169 P.2d 246. State law determines the validity of arrests without warrant. *United States v. Di Re*, 332 U. S. 581.

[Footnote 6]

The Government brief states that the question presented is

“whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for contraband opium where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room.”

[Footnote 7]

The Government also suggests that, “In a sense, the arrest was made in *hot pursuit.'*” . . .

However, we find no element of “hot pursuit” in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape. Nor would these facts seem to meet the requirements of the Washington “Uniform Law on Fresh Pursuit.” Session Laws 1943, ch. 261.

[Footnote 8]

In *Gouled v. United States*, 255 U. S. 298, 255 U. S. 302, 255 U. S. 303, this Court said:

“It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S. 616, in *Weeks v. United States*, 232 U. S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two (Fourth and Fifth) Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the ‘full enjoyment of personal security, personal liberty, and private property’; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen — the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of courts or by well intentioned, but mistakenly overzealous, executive officers.”

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5.9: Bumper v. North Carolina 391 US 543 (1968)

U.S. Supreme Court

Bumper v. North Carolina, 391 U.S. 543 (1968)

Bumper v. North Carolina

No. 1016

Argued April 24-25, 1968

Decided June 3, 1968

391 U.S. 543

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner was tried for rape in North Carolina, an offense punishable by death unless the jury recommends life imprisonment. The prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. A rifle which was introduced at the trial was obtained by a search of petitioner's grandmother's house, where he resided. Four officers appeared at the home, announced that they had a warrant to search it, and were told by the owner to "[g]o ahead." At the hearing on a motion to suppress, which was denied, the prosecutor stated that he did not rely on a warrant to justify the search, but on consent. The jury found petitioner guilty, but recommended life imprisonment, and the State Supreme Court affirmed.

Held:

1. Petitioner has adduced no evidence to support his claim that a jury from which those who are opposed to capital punishment or have conscientious scruples against imposing the death penalty are excluded for cause is necessarily "prosecution prone," warranting reversal of his conviction for denial of his Sixth and Fourteenth Amendment rights to an impartial jury. *Witherspoon v. Illinois*, *ante*,p. 391 U. S. 510. P. 391 U. S. 545.

2. A search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant; there is no consent under such circumstances. Pp.391 U. S. 546-550.

3. Because the rifle, which was erroneously admitted into evidence, was plainly damaging against petitioner, its admission was not harmless error. *Chapman v. California*, 386 U. S. 18. P. 391 U. S. 550.

270 N.C. 521, 155 S.E.2d 173, reversed and remanded.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in a North Carolina court upon a charge of rape, an offense punishable in that State by death unless the jury recommends life imprisonment. [Footnote 1] Among the items of evidence introduced by the prosecution at the trial was a .22-caliber rifle allegedly used in the commission of the crime. The jury found the petitioner guilty, but recommended a sentence of life imprisonment. [Footnote 2] The trial court-imposed that sentence, and the Supreme Court of North Carolina affirmed the judgment. [Footnote 3] We granted certiorari [Footnote 4] to consider two separate constitutional claims pressed unsuccessfully by the petitioner throughout the litigation in the North Carolina courts. First, the petitioner argues that his constitutional right to an impartial jury was violated in this capital case when the prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. Secondly, the petitioner contends that the .22-caliber rifle introduced in evidence against him was obtained by the State in a search and seizure violative of the Fourth and Fourteenth Amendments.

I

In *Witherspoon v. Illinois*, *ante*, p. 391 U. S. 510, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in *Witherspoon* does not govern the present case, because here, the jury recommended a sentence of life imprisonment. The petitioner argues, however, that a jury qualified under such

standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Duncan v. Louisiana*, *ante*, p. 391 U. S. 145; *Turner v. Louisiana*, 379 U. S. 466, 379 U. S. 471-473; *Irvin v. Dowd*, 366 U. S. 717, 366 U. S. 722-723. We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone," [Footnote 5] and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon*.[Footnote 6] Accordingly, we decline to reverse the judgment of conviction upon this basis.

II

The petitioner lived with his grandmother, Mrs. Hattie Leath, a 66-year-old Negro widow, in a house located in a rural area at the end of an isolated mile-long dirt road. Two days after the alleged offense, but prior to the petitioner's arrest, four white law enforcement officers — the county sheriff, two of his deputies, and a state investigator — went to this house and found Mrs. Leath there with some young children. She met the officers at the front door. One of them announced, "I have a search warrant to search your house." Mrs. Leath responded, "Go ahead," and opened the door. In the kitchen the officers found the rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

At the hearing on this motion, the prosecutor informed the court that he did not rely upon a warrant to justify the search, but upon the consent of Mrs. Leath. [Footnote 7] She testified at the hearing, stating, among other things:

"Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, 'I have a search warrant to search your house,' and I walked out and told them to come on in. . . . He just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant."

"* * * *"

". . . He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. They didn't tell me nothing about my grandson. [Footnote 8]"

Upon the basis of Mrs. Leath's testimony, the trial court found that she had given her consent to the search, and denied the motion to suppress. [Footnote 9] The Supreme Court of North Carolina approved the admission of the evidence on the same basis. [Footnote 10]

The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. [Footnote 11] We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. [Footnote 12] This burden cannot be discharged by Homeshowing no more than acquiescence to a claim of lawful authority. [Footnote 13] A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. [Footnote 14] The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all. [Footnote 15]

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion, there cannot be consent.

We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner. *Mapp v. Ohio*, 367 U. S. 643. Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error. *Chapman v. California*, 386 U. S. 18. [Footnote 16]

The judgment of the Supreme Court of North Carolina is, accordingly, reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS joins Part II of the opinion of the Court. Since, however, the record shows that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment, he would also reverse on the ground that petitioner was denied the right to trial on the issue of guilt by a jury representing a fair cross-section of the community. *Witherspoon v. Illinois*, *ante* at 391 U. S. 523(separate opinion). Under North Carolina law, rape is punishable by death unless the jury recommends life imprisonment. N.C.Gen.Stat. § 14-21 (1953). But an indictment for rape includes the lesser offense of an assault with intent to commit rape, and the court has the duty to submit to the jury the lesser degrees of the offense of rape which are supported by the evidence. *State v. Green*, 246 N.C. 717, 100 S.E.2d 52 (1957). *See* N.C.Gen.Stat. §§ 15-169, 15-170 (1953). These include assault with intent to commit rape, for which the range of punishment is one to 15 years' imprisonment (N.C.Gen.Stat. § 14-22), and assault (N.C.Gen.Stat. § 14-33). In the instant case, the trial judge did, in fact, charge the jury with respect to these lesser offenses.

[Footnote 1]

"Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

N.C.Gen.Stat. § 14-21 (1953).

[Footnote 2]

The petitioner was also convicted upon two charges of felonious assault and sentenced to consecutive 10-year prison terms.

[Footnote 3]

270 N.C. 521, 155 S.E.2d 173.

[Footnote 4]

389 U.S. 1034.

[Footnote 5]

He did submit affidavits to the North Carolina Supreme Court referring to studies by W. C. Wilson and F. J. Goldberg, *see Witherspoon v. Illinois*, *ante* at 391 U. S. 517, n. 10. The court made no findings with respect to those studies, and did not mention them in its opinion.

[Footnote 6]

In addition to the materials mentioned in *Witherspoon*, *ante* at 391 U. S. 517, n. 10, the petitioner's brief in this Court cites in unpublished dissertation by R. Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (Western Reserve University, January 1966), involving a sample of 72 jurors in Ohio.

[Footnote 7]

"THE COURT: There is a motion here that says the property [was] seized against the will of Mrs. Hattie Leath and without a search warrant. Now, the question is, are we going into the search warrant?"

"MR. COOPER: The State is not relying on the search warrant."

"THE COURT: Are you stating so for the record?"

"MR. COOPER: Yes, sir."

[Footnote 8]

She also testified at another point:

"I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all."

"* * * *"

"I just give them a free will to look because I felt like the boy wasn't guilty."

The transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; *i.e.*, the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the case of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions.

[Footnote 9]

"The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given, and is not the result of coercion from the officers."

[Footnote 10]

That court also stated:

"The fact that [the search] did reveal the presence of the guilty weapon . . . justifies the search. . . . [The petitioner's] rights have not been violated. Rather, his wrongs have been detected."

270 N.C. at 530-531, 155 S.E.2d at 180.

Any idea that a search can be justified by what it turns up was long ago rejected in our constitutional jurisprudence. "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . ." *Byars v. United States*,273 U. S. 28, 273 U. S. 29. *See also United States v. Di Re*, 332 U. S. 581, 332 U. S. 595; *Henry v. United States*, 361 U. S. 98, 361 U. S. 103.

[Footnote 11]

Mrs. Leath owned both the house and the rifle. The petitioner concedes that her voluntary consent to the search would have been binding upon him. Conversely, there can be no question of the petitioner's standing to challenge the lawfulness of the search. He was the "one against whom the search was directed," *Jones v. United States*, 362 U. S. 257, 362 U. S. 261, and the house searched was his home. The rifle was used by all members of the household, and was found in the common part of the house.

[Footnote 12]

Wren v. United States, 352 F.2d 617; *Simmons v. Bomar*, 349 F.2d 365; *Judd v. United States*, 89 U.S.App.D.C. 64, 190 F.2d 649; *Kovach v. United States*, 53 F.2d 639.

[Footnote 13]

See, e.g., Amos v. United States, 255 U. S. 313, 255 U. S. 317; *Johnson v. United States*,333 U. S. 10, 333 U. S. 13; *Higgins v. United States*, 93 U.S.App.D.C. 340, 209 F.2d 819; *United States v. Marra*, 40 F.2d 271; *MacKenzie v. Robbins*, 248 F.Supp. 496.

[Footnote 14]

"Orderly submission to law enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution."

United States v. Elliott, 210 F.Supp. 357, 360.

"One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant, and his permission is construed as an intention to abide by the law, and not resist the search under the warrant, rather than an invitation to search."

Bull v. Armstrong, 254 Ala. 390, 394, 48 So.2d 467, 470.

"One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law. . . . The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law."

Melo v. State, 197 Ind. 16, 24, 164 N.E. 93, 96.

See also Salata v. United States, 286 F. 125; *Brown v. State*, 42 Ala.App. 429, 167 So.2d 281; *Mattingly v. Commonwealth*, 199 Ky. 30, 250 S.W. 105. *Cf. Gibson v. United States*,80 U.S.App.D.C. 81, 149 F.2d 381; *Naples v. Maxwell*, 271 F.Supp. 850; *Atwood v. State*, 44 Okla.Cr. 206, 280 P. 319; *State v. Watson*, 133 Miss. 796, 98 So. 241.

[Footnote 15]

During the course of the argument in this case, we were advised that the searching officers did, in fact, have a warrant. But no warrant was ever returned, and there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause.

[Footnote 16]

It is suggested in dissent that,

"[e]ven assuming . . . that there was no consent to search and that the rifle . . . should not have been admitted into evidence, . . . the conviction should stand."

This suggestion seems to rest on the "horrible" facts of the case, and the assumption that the petitioner was guilty. But it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States.

In view of the discursive factual recital contained in the dissenting opinion, however, an additional word may be in order. There can be no doubt that the crimes were grave and shocking. There can be doubt that the petitioner was their perpetrator. The crimes were committed at night. When, at first, the victims separately viewed a lineup that included the petitioner, each of the victims identified the same man as their assailant. That man was not the petitioner. Later, the victims together viewed another lineup, and every man in the lineup was made to speak his name for "voice identification." This time, the victims identified the petitioner as their assailant. At the time of the lineups, a local newspaper had reported that a man named Wayne Bumper was being held by the sheriff as the "prime suspect" in the case, and at least one of the victims knew of that fact. Earlier, both victims had been shown a collection of photographs. One victim identified a picture of the petitioner; the petitioner's name was written on the back of the photograph.

MR. JUSTICE HARLAN, concurring.

While I join in the judgment of the Court and in Part II of its opinion, I am prompted to add a brief note.

I share, as I am sure every member of the majority does, MR. JUSTICE BLACK's abhorrence of the brutal crime of which petitioner stands convicted. To avoid any misapprehension, I wish to make it perfectly clear that reversal of this conviction is not a "penalty" imposed on the State for infringement of federal constitutional rights. Reversal by this Court results, as always, only from a decision that petitioner was not constitutionally proved guilty, and hence there is no legally valid basis for imposition of a penalty upon him.

In determining whether a criminal defendant was convicted "according to law," the test is not, and cannot be, simply whether this Court finds credible the evidence against him. Crediting or discrediting evidence is the function of the trier of fact, in this case a jury. The jury's verdict is a lawful verdict, however, only if it is based upon evidence constitutionally admissible. When it is not, as it is not here, reversal rests on the oldest and most fundamental principle of our criminal jurisprudence — that a defendant is entitled to put the prosecution to its lawful proof.

The evidence against petitioner consisted in part of a gun that he alleged was unlawfully taken from the home of Mrs. Leath, where petitioner was living. The State contended that Mrs. Leath had consented to the search of her home. However, this "consent" was obtained immediately after a sheriff told Mrs. Leath that he had a search warrant, that is, that he had a lawful right to enter her home with or without consent. Nothing Mrs. Leath said in response to that announcement can be taken to mean that she considered

the officers welcome in her home with or without a warrant. What she would have done if the sheriff had not said he had a warrant is, on this record, a hypothetical question about an imaginary situation that Mrs. Leath never faced.

Of course, if the officers had a valid search warrant, no consent was required to make the search lawful. There was a search warrant in this case, and it remains possible that this warrant was issued under circumstances meeting all the requirements of the Federal Constitution. Consequently, if this were a situation where a state court had simply chosen the wrong line of constitutional analysis of this search, I would vote to remand the case to give the prosecution an opportunity to justify the search on proper grounds. However, as noted by the Court, the prosecution here explicitly and repeatedly renounced any reliance on the warrant. Like all other parties to lawsuits, a prosecutor has an obligation to the courts (including this Court) and to other parties to present its claims at the earliest appropriate time, and to create an adequate record. *Cf. Ciucci v. Illinois*, 356 U. S. 571, 356 U. S. 573 (separate note of Mr. Justice Frankfurter and MR. JUSTICE HARLAN).

Finally, if I were persuaded that the admission of the gun was "harmless error," I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed the crimes charged, so that the error was "harmless" in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result.

I do not think this can be said here. The critical question was the identity of the perpetrator of these crimes. The State introduced eyewitness identification of petitioner by his two victims, and a gun with which there was evidence these victims were shot, together with testimony that it had been found in petitioner's place of abode. The jury could, of course, have found the testimony of the victims credible beyond a reasonable doubt, and convicted petitioner on this basis alone. But it might well not have. The addition of a tangible cross-check linking petitioner with the crime can hardly be said, from the judicial vantage point, to have been harmless surplusage.

MR. JUSTICE BLACK, dissenting.

I

This case, like *Witherspoon v. Illinois*, *ante*, p. 391 U. S. 510, decided today, was brought to this Court primarily to decide the question whether the constitutional rights of a criminal defendant are violated when prospective jurors who state they are opposed to capital punishment or who have conscientious scruples against imposing the death penalty are excluded for cause. As the Court in *Witherspoon*limited its holding to the question of punishment, and not of guilt, [Footnote 2/1] the jury issue became moot in this case, since petitioner had been sentenced to life imprisonment. Ironically, however, this case now becomes about as good an example as can be found of the fallacious assumption of the holding in *Witherspoon.* For the *Witherspoon* decision rests on the premise that a jury "[c]ulled of all who harbor doubts about the wisdom of capital punishment" is somehow prosecution-prone, callous or even lacking in "charity." [Footnote 2/2] Yet the jury in this case, from which had been excluded all persons who stated they were opposed to the death penalty, unanimously recommended life imprisonment in a case where, but for their recommendation, the death sentence would have been automatic. [Footnote 2/3] And this is a case where the evidence conclusively showed that the accused twice raped a young woman at gunpoint, shot both the woman and her companion while they were tied helplessly to trees with the announced intention of killing them, and left them for dead. Even with these horrible facts before it, this so-called "prosecution-prone," "callous," and "uncharitable" jury refused to allow imposition of the death penalty and recommended life imprisonment instead. In these circumstances, where the real reason for granting certiorari in the case has disappeared, it seems to me that the Court should dismiss the petition as improvidently granted. This is especially true here, where, as I point out at the end of this opinion, there is an open-and-shut case of guilt, and the petitioner received the lightest sentence available under state law.

II

Passing over the jury issue, the Court still reverses the conviction in this case and sends it back for a new trial on the ground that the rifle, which the record shows was used to shoot the victims, and which is held by the majority to have been obtained through an unconstitutional search and seizure, was admitted into evidence at petitioner's trial. One of the reasons that I cannot agree with the Court's reversal is because I believe the searching officers had valid permission to conduct their search. The facts surrounding the search are these: Petitioner had been raised by his grandmother, Mrs. Hattie Leath, with whom he was living at the time the rape

and assaults were committed. Shortly after the victims were able to recount to the police what had happened to them, the county sheriff, with two of his deputies and a state police officer, went to Mrs. Leath's house. One of the deputies went up on the porch of the house and stated to Mrs. Leath, who was standing inside the screen door, that he had a warrant to search her house. He did not appear to have any paper in his hand, and he did not read anything to her. Mrs. Leath's *immediate* response, without mentioning anything about a warrant or asking to see it or read it or have it read to her, was to tell the deputy "to come on in." At the trial, Mrs. Leath described her reaction to the visit of the law officers as follows:

"He did tell me he had a search warrant. I don't know if Sheriff Stockard was with him. I was not paying much attention. I told Mr. Stockard [after he had come up on the porch] to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and *it was all my own free will*. Nobody forced me at all."

(Emphasis added.)

My study of the record in this case convinces me that Mrs. Leath voluntarily consented to this search, [Footnote 2/4] and in fact that she actually wanted the officers to search her house — to prove to them that she had nothing to hide. Mrs. Leath's readiness to permit the search was the action of a person so conscious of her innocence, so proud of her own home, [Footnote 2/5] that she was not going to require a search warrant, thus indicating a doubt about the rectitude of her household. There are such people in this world of ours, [Footnote 2/6] and the evidence in this case causes me to believe Mrs. Leath is one of them. As she herself testified, "I just give them a free will to look, because I felt like the boy wasn't guilty."

Despite the statements of Mrs. Leath cited above, and despite the clear finding of consent by the trial judge, who personally saw and heard Mrs. Leath testify, [Footnote 2/7] this Court, refusing to accept Mrs. Leath's sworn testimony that she did freely consent and, overruling the trial judge's findings, concludes on its own that she did not consent. I do not believe the Court should substitute what it believes Mrs. Leath should have said for what she actually said — "it was all my own free will." I cannot accept what I believe to be an unwarranted conclusion by the Court.

III

Even assuming for the purposes of argument that there was no consent to search and that the rifle which was seized from Mrs. Leath's house should not have been admitted into evidence, I still believe the conviction should stand. For the overwhelming evidence in this case, even when the rifle and related testimony are excluded, amply demonstrates petitioner's guilt. Unfortunately, to show this, it is necessary to go into the sordid facts of the case. The victims were a young man and his girlfriend. At trial, both testified in detail to the following: they were parked shortly after dusk on a country road not far from where the petitioner Bumper lived. Bumper approached the car, stuck a rifle barrel up to the window and ordered the girl to get out of the car, indicating that, if she refused he would shoot her. Both got out of the car and Bumper ordered the girl to undress, stating that "I want a white girl's p____." When the girl adamantly refused, Bumper pointed the rifle at the young man, and the girl, understanding that she must submit or her boy friend would be killed, followed Bumper's orders. Bumper then forced the young man into the rear seat of the car, requiring him to stay down on the floor, while Bumper raped the girl on the back of the car. A short time after this, Bumper forced the couple to drive to another spot. Here he made them get out of the car and walk down a dirt road into some bushes. At this time Bumper told the couple he was going to kill them, and when they pleaded with him to let them go, he replied, "I can't do it; you will go to the cops." The couple then suggested that, if Bumper would tie them up and blindfold them that he could get away with no problem. This Bumper did, tying each to a separate tree. But he did not leave. Instead he raped the girl again while she was tied to the tree. After this, Bumper went over to the young man and felt his chest, asking him where his heart was and if he was scared. He then cooly proceeded to shoot the young man where he thought his heart was. The girl, tied to the tree and blindfolded, heard the shot, and a moment later herself was shot through the left breast close to her heart. Bumper then took the car and drove away, obviously believing he had killed the young couple. They were able to free themselves, however, and with much difficulty made their way to a nearby house where the owner got them to a hospital. [Footnote 2/8] The time during which the couple was held captive was approximately an hour and a half. During that time, they clearly got to know who their assailant was. Both got a plain view of Bumper right at the beginning of their ordeal when they opened the car doors and saw his face in the light coming from the inside of the car. Moreover, the undisputed evidence in the record shows that the night of the attack was a bright moonlit night. Both testified positively at trial that it was Bumper. [Footnote 2/9] Also there was substantial corroborating evidence outside

of that relating to the rifle. Here we have the clear and convincing testimony of the two victims, whose characters were in no way impeached or challenged. The only witnesses at the trial were state witnesses (the two victims plus medical and police testimony), and none of their testimony was refuted or denied in any way. Thus, this is a case where every word of evidence introduced at trial pointed to guilt, and there was no challenge to the truthfulness of the State's evidence, nor to the character of any of its witnesses. Yet even with all this, the Court persists in reversing the case, thus requiring the State to hold a new trial if it wishes to punish Bumper for his crimes.

When it is clear beyond all shadow of a doubt, as here, that a defendant committed the crimes charged, I do not believe that this Court should enforce on the States a "*per se*" rule automatically requiring a new trial in every case where this Court concludes that some part of the evidence was obtained by an unreasonable search and seizure. The primary reason the "exclusionary rule" was adopted by this Court was to deter unreasonable searches and seizures in violation of the Fourth Amendment. *Mapp v. Ohio*, 367 U. S. 643. *But see* my concurring opinion at 367 U. S. 661-666. I believe that the deterrence desired by some can be served adequately without blind adherence to a mechanical formula that requires automatic reversal in every case where the exclusionary rule is violated. While little is known about the effect the exclusionary rule really has on actual police practices, I think it is a fair assumption that refusal to reverse a conviction of a defendant, because of the admission of illegally seized evidence, where other evidence conclusively demonstrates his guilt, is not going to lessen police sensitivity to the exclusionary rule, thereby reducing its deterrent effect. Obviously, at the time a search is carried out, the police are not going to know whether the evidence they hope to obtain is going to be necessary for the prosecution's case, and, of course, if they know it will not be necessary, no search is needed. Thus, the only effect of not automatically reversing all cases in which there has been a violation of the exclusionary rule will be to allow state convictions of obviously guilty defendants to stand. And they should stand.

IV

In this case, as I have shown, the evidence of the two victims points positively to guilt without any doubt. When there is added to this the fact that the rifle, from which came the bullets which went into the bodies of the two victims, was found where Bumper lived, which was not far from the scene of the assault, this makes, as the North Carolina Supreme Court pointed out, assurance doubly sure. Whether one views the evidence of guilt with or without the rifle, the conclusion is inescapable that this defendant committed the crimes for which the jury convicted him. In these circumstances, no State should be forced to give a new trial; justice does not require it. [Footnote 2/10]

[Footnote 2/1]

See ante at 391 U. S. 522, n. 21.

[Footnote 2/2]

See ante at 391 U. S. 520, n. 17.

[Footnote 2/3]

See N.C.Gen.Stat. § 121. The Court imposed additional sentences of 10 years' imprisonment, to run consecutively, on the two felonious assault charges.

[Footnote 2/4]

Mrs. Leath's voluntary consent was sufficient to validate the search, since she owned the house which was searched and the rifle that was taken. It should also be noted that the rifle was not found in petitioner's private room, nor in any part of the house assigned to him, but in the kitchen behind the door.

[Footnote 2/5]

Mrs. Leath owned the house in which she was living, and, throughout her questioning, repeatedly referred to "my house."

[Footnote 2/6]

See Commonwealth v. Tucker, 189 Mass. 457, 469, 76 N.E. 127, 131. In this case, a mother consented for officers who were looking for broken pieces of a knife used in a murder to search her home. The Court found that officers went

"to the door of the house where Tucker resided, and stated to his mother, at the outside door of the house that they had this search warrant to search for the article named therein . . . , that she . . . invited the officers to make all the search they desired, saying that

she knew her son to be innocent, and thereupon the officers made search, not upon the warrant, but in consequence of her invitation. . . ."

The knife blade was admitted against the contention that it was barred by the Fourth and Fourteenth Amendments.

[Footnote 2/7]

The finding of the court was as follows:

"The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given, and is not the result of coercion from the officers."

[Footnote 2/8]

It was on these facts and this testimony, it must be remembered, that this jury, selected in the way *Witherspoon* holds is designed to produce a "hanging" jury, recommended a life sentence for petitioner.

[Footnote 2/9]

The Court's opinion attempts to convey the impression that the victims were not sure of their assailant's identification because of an alleged mistake during a police lineup. *See* majority opinion, n 16. This completely overlooks the fact, however, that, before Bumper was arrested, and before the victims had any idea of their attacker's name or where he was from, the girl, while still in the hospital, identified Bumper's picture from a number of others. The young man also had identified Bumper's picture days before the lineup was held. After the girl went through the lineup the first time she confessed that she was too scared to look at the men and that she had made no real attempt at identification. And it should not be forgotten that she testified positively under oath at trial that "In my own mind, I am certain [that Bumper was my assailant], and nothing could really dissuade me from it. I haven't made up my mind; I know."

[Footnote 2/10]

28 U.S.C. § 2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances.*"

(Emphasis added.)

MR. JUSTICE WHITE, dissenting.

When "consent" to a search is given after the occupant has been told by police officers that they have a warrant for the search, it seems reasonable to me for Fourth Amendment purposes to view the consent as conditioned on there being a valid warrant, absent clear proof that the consent was actually unconditional. The evidence in this record does not show unconditional consent with sufficient clarity, and perhaps this would be the result in most cases. But this does not mean that every search following conditional consent is invalid. If upon a motion to suppress or upon an objection to evidence offered at the trial, the State produces a valid warrant for the search, there is no good reason to exclude the evidence simply because police at the time of the search relied on the consent and neither served nor returned the warrant. In the case before us the State represented in this Court that there was a warrant for the challenged search. Unlike the Court and MR. JUSTICE HARLAN, I would not brush this matter aside. Since the existence and validity of the warrant have not been determined in the state courts, the case is not ripe for reversal or affirmance. I would therefore not reverse, but vacate, this conviction, returning the case to the state courts for a determination of the validity of the warrant. If because of the absence of probable cause or for some other reason, the warrant would not have been a proper predicate for the search, *Mapp v. Ohio*, 367 U. S. 643 (1961), would require reversal of the conviction unless it is saved under the harmless error rule of *Chapman v. California*, 386 U. S. 18 (1967). *

* Of course, if it was determined that the grandmother's consent was not good against petitioner, who had standing to raise the validity of the search, it would be unnecessary to deal with the issues which have been argued and determined in this case

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5.10: Chimel v. California 395 US 752 (1969)

U.S. Supreme Court

Chimel v. California, 395 U.S. 752 (1969)

Chimel v. California

No. 770

Argued March 27, 1969

Decided June 23, 1969

395 U.S. 752

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Police officers, armed with an arrest warrant but not a search warrant, were admitted to petitioner's home by his wife, where they awaited petitioner's arrival. When he entered, he was served with the warrant. Although he denied the officers' request to "look around," they conducted a search of the entire house "on the basis of the lawful arrest." At petitioner's trial on burglary charges, items taken from his home were admitted over objection that they had been unconstitutionally seized. His conviction was affirmed by the California appellate courts, which held, despite their acceptance of petitioner's contention that the arrest warrant was invalid, that, since the arresting officers had procured the warrant "in good faith," and since, in any event, they had had sufficient information to constitute probable cause for the arrest, the arrest was lawful. The courts also held that the search was justified as incident to a valid arrest.

Held: Assuming the arrest was valid, the warrantless search of petitioner's house cannot be constitutionally justified as incident to that arrest. Pp. 395 U. S. 755-768.

(a) An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search the area "within the immediate control" of the person arrested, meaning the area from which he might gain possession of a weapon or destructible evidence. Pp. 395 U. S. 762-763.

(b) For the routine search of rooms other than that in which an arrest occurs, or for searching desk drawers or other closed or concealed areas in that room itself, absent well recognized exceptions, a search warrant is required. P. 395 U. S. 763.

(c) While the reasonableness of a search incident to arrest depends upon "the facts and circumstances — the total atmosphere of the case," those facts and circumstances must be viewed in the light of established Fourth Amendment principles, and the only reasoned distinction is one between (1) a search of the person arrested and the area within his reach, and (2) more extensive searches. Pp. 395 U. S. 765-766.

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(d) *United Ste v. Rabinowitz*, 339 U. S. 56, and *Harris v. United States*, 331 U. S. 145, on their facts, and insofar as the principles they stand for are inconsistent with this decision, are no longer to be followed. P. 395 U. S. 768.

(e) The scope of the search here was unreasonable under the Fourth and Fourteenth Amendments, as it went beyond petitioner's person and the area from within which he might have obtained a weapon or something that could have been used as evidence against him, and there was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. P. 395 U. S. 768.

68 Cal.2d 436, 439 P.2d 333, reversed.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked

on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that,

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"on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. In some rooms, the search was relatively cursory. In the master bedroom and sewing room, however, the officers directed the petitioner's wife to open drawers and

"to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary."

After completing the search, they seized numerous items — primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour.

At the petitioner's subsequent state trial on two charges of burglary, the items taken from his house were admitted into evidence against him over his objection that they had been unconstitutionally seized. He was convicted, and the judgments of conviction were affirmed by both the California Court of Appeal, 61 Cal.Rptr. 714, and the California Supreme Court, 68 Cal.2d 436, 439 P.2d 333. Both courts accepted the petitioner's contention that the arrest arrant was invalid because the supporting affidavit was set out in conclusory terms, [Footnote 1] but held that, since the arresting officers had procured the warrant "in good faith," and since, in any event, they had had sufficient information to constitute probable cause for the petitioner's arrest, that arrest had been lawful. From this conclusion, the appellate courts went on to hold that the search of the petitioner's home

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had been justified, despite the absence of a search warrant, on the ground that it had been incident to a valid arrest. We granted certiorari in order to consider the petitioner's substantial constitutional claims. 393 U.S. 958.

Without deciding the question, we proceed on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution. This brings us directly to the question whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. The decisions of this Court bearing upon that question have been far from consistent, as even the most cursory review makes evident.

Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 as dictum in *Weeks v. United States*, 232 U. S. 383, in which the Court stated:

"What then is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."

Id. at 232 U. S. 392. That statement made no reference to any right to search the place where an arrest occurs, but was limited to a right to search the "person." Eleven years later, the case of *Carroll v. United States*, 267 U. S. 132, brought the following embellishment of the *Weeks* statement:

"When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held

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as evidence in the prosecution."

Id. at 276 U. S. 158. (Emphasis added.) Still, that assertion too was far from a claim that the "place" where one is arrested may be searched so long as the arrest is valid. Without explanation, however, the principle emerged in expanded form a few months later in *Agnello v. United States*, 269 U. S. 20 — although still by way of dictum:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it

was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. *See Carroll v. United States*, 267 U. S. 132, 267 U. S. 158; *Weeks v. United States*, 232 U. S. 383, 232 U. S. 392."

269 U.S. at 269 U. S. 30. And in *Marron v. United States*, 275 U. S. 192, two years later, the dictum of *Agnello* appeared to be the foundation of the Court's decision. In that case, federal agents had secured a search warrant authorizing the seizure of liquor and certain articles used in its manufacture. When they arrived at the premises to be searched, they saw "that the place was used for retailing and drinking intoxicating liquors." *Id.* at 275 U. S. 194. They proceeded to arrest the person in charge and to execute the warrant. In searching a closet for the items listed in the warrant, they came across an incriminating ledger, concededly not covered by the warrant, which they also seized. The Court upheld the seizure of the ledger by holding that, since the agents had made a lawful arrest,

"[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."

Id. at 275 U. S. 199.

That the *Marron* opinion did not mean all that it seemed to say became evident, however, a few years later in *Go-Bart Importing Co. v. United States*, 282 U. S. 344, and *United States v. Lefkowitz*, 285 U. S. 452. In each of those cases, the opinion of the Court was written by Mr. Justice Butler, the author of the opinion in *Marron.* In *Go-Bart*, agents had searched the office of persons whom they had lawfully arrested, [Footnote 2] and had taken several papers from a desk, a safe, and other parts of the office. The Court noted that no crime had been committed in the agents' presence, and that, although the agent in charge "had an abundance of information and time to swear out a valid [search] warrant, he failed to do so." 282 U.S. at 282 U. S. 358. In holding the search and seizure unlawful, the Court stated:

"Plainly the case before us is essentially different from *Marron v. United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall, who, in pursuance of a conspiracy, was actually engaged in running a saloon. As an incident to the arrest, they seized a ledger in a closet where the liquor or some of it was kept, and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force, or general search, or rummaging of the place."

282 U.S. at 282 U. S. 358. This limited characterization of *Marron* was reiterated in *Lefkowitz*, a case in which the Court held unlawful a search of desk drawers and a cabinet despite the fact that the search had accompanied a lawful arrest. 285 U.S. at 285 U. S. 465.

The limiting views expressed in *Go-Bart* and *Lefkowitz* were thrown to the winds, however, in *Harris v. United*

States, 331 U. S. 145, decided in 1947. In that case, officers had obtained a warrant for Harris' arrest on the basis of his alleged involvement with the cashing and interstate transportation of a forged check. He was arrested in the living room of his four-room apartment, and, in an attempt to recover two canceled checks thought to have been used in effecting the forgery, the officers undertook a thorough search of the entire apartment. Inside a desk drawer, they found a sealed envelope marked "George Harris, personal papers." The envelope, which was then torn open, was found to contain altered Selective Service documents, and those documents were used to secure Harris' conviction for violating the Selective Training and Service Act of 1940. The Court rejected Harris' Fourth Amendment claim, sustaining the search as "incident to arrest." *Id.* at 331 U. S. 151.

Only a year after *Harris*, however, the pendulum swung again. In *Trupiano v. United States*, 334 U. S. 699, agents raided the site of an illicit distillery, saw one of several conspirators operating the still, and arrested him, contemporaneously "seiz[ing] the illicit distillery." *Id.* at 334 U. S. 702. The Court held that the arrest and others made subsequently had been valid, but that the unexplained failure of the agents to procure a search warrant — in spite of the fact that they had had more than enough time before the raid to do so — rendered the search unlawful. The opinion stated:

"It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . This rule rests upon the desirability of having magistrates, rather than police officers, determine when

searches and seizures are permissible and what limitations should be placed upon such activities. . . . To provide the necessary security against unreasonable intrusions upon the private lives of

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individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement."

"* * * *"

"A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest."

Id. at 334 U. S. 705, 334 U. S. 708.

In 1950, two years after *Trupiano*, [Footnote 3] came *United States v. Rabinowitz*, 339 U. S. 56, the decision upon which California primarily relies in the case now before us. In *Rabinowitz*, federal authorities had been informed that the defendant was dealing in stamps bearing forged overprints. On the basis of that information, they secured a warrant for his arrest, which they executed at his one-room business office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half," *id.* at 339 U. S. 59, and seized 573 stamps with forged overprints. The stamps were admitted into evidence at the defendant's trial, and this Court affirmed his conviction, rejecting the contention that the warrantless search had been unlawful. The Court held that the search in its entirety fell within the principle giving law enforcement authorities "[t]he right *to search the place where the arrest is made in order to find and seize things connected with the crime. . . .'" Id. at 339 U. S. 61. Harris was regarded as "ample authority" for that conclusion. Id. at 339 U. S. 63. The opinion rejected the rule of Trupiano that,*

"in seizing goods and articles, law enforcement agents must secure and use search warrants

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wherever reasonably practicable."

The test, said the Court, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 339 U. S. 66.

Rabinowitz has come to stand for the proposition, *inter alia*, that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested. [Footnote 4] And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.

Even limited to its own facts, the *Rabinowitz* decision was, as we have seen, hardly founded on an unimpeachable line of authority. As Mr. Justice Frankfurter commented in dissent in that case, the "hint" contained in *Weeks* was, without persuasive justification, "loosely turned into dictum and finally elevated to a decision." 339 U.S. at 339 U. S. 75. And the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.

Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment's proscription of "unreasonable searches and seizures"

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must be read in light of "the history that gave rise to the words" — a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution. . . ." 339 U.S. at 339 U. S. 69. The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. [Footnote 5] In the scheme of the Amendment, therefore, the requirement that "no Warrants shall issue, but upon probable cause," plays a crucial part. As the Court put it in *McDonald v. United States*, 335 U. S. 451:

"We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals, nor to

make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

Id. at 335 U. S. 455-456.

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Even in the *Agnello* case, the Court relied upon the rule that

"[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

269 U.S. at 269 U. S. 33. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it. . . ." *United States v. Jeffers*, 342 U. S. 48, 342 U. S. 51.

Only last Term, in *Terry v. Ohio*, 392 U. S. 1, we emphasized that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," *id.* at 392 U. S. 20, [Footnote 6] and that "[t]he scope of [a] search must be *strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 392 U. S. 19. The search undertaken by the officer in that "stop and frisk" case was sustained under that test, because it was no more than a "protective . . . search for weapons." Id. at 392 U. S. 29. But in a companion case, Sibron v. New York, 392 U. S. 40, we applied the same standard to another set of facts and reached a contrary result, holding that a policeman's action in thrusting his hand into a suspect's pocket had been neither motivated by nor limited to the objective of protection. [Footnote 7] Rather, the search had been made in order to find narcotics, which were, in fact, found.*

A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an

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arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. [Footnote 8] The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

This is the principle that underlay our decision in *Preston v. United States*, 376 U. S. 364. In that case, three men had been arrested in a parked car, which had later been towed to a garage and searched by police. We held the search to have been unlawful under the Fourth Amendment, despite the contention that it had

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been incidental to a valid arrest. Our reasoning was straightforward:

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime — things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest."

Id. at 376 U. S. 367. [Footnote 9] The same basic principle was reflected in our opinion last Term in *Sibron.* That opinion dealt with *Peters v. New York,* No. 74, as well as with Sibron's case, and *Peters* involved a search that we upheld as incident to a proper arrest. We sustained the search. however, only because its scope had been "reasonably limited" by the "need to seize weapons" and "to prevent the destruction of evidence," to which *Preston* had referred. We emphasized that the arresting officer

"did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects. He seized him to cut short his flight, and he searched him primarily for weapons."

392 U.S. at 392 U. S. 67.

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police

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conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "reasonable" to search a man's house when he is arrested on his front lawn — or just down the street — than it is when he happens to be in the house at the time of arrest. [Footnote 10] As Mr. Justice Frankfurter put it:

"To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response."

United States v. Rabinowitz, 339 U.S. at 339 U. S. 83 (dissenting opinion). Thus, although "[t]he recurring questions of the reasonableness of searches" depend upon "the facts and circumstances — the total atmosphere of the case," *id.* at 339 U. S. 63, 339 U. S. 66 (opinion of the Court), those facts and circumstances must be viewed in the light of established Fourth Amendment principles.

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It would be possible, of course, to draw a line between *Rabinowitz* and *Harris,* on the one hand, and this case, on the other. For *Rabinowitz* involved a single room, and *Harris* a four-room apartment, while, in the case before us, an entire house was searched. But such a distinction would be highly artificial. The rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. [Footnote 11] The only reasoned distinction is one between a search of the person arrested and the area within his reach, on the one hand, and more extensive searches, on the other. [Footnote 12]

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The petitioner correctly points out that one result of decisions such as *Rabinowitz*and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home, rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his assertion that such a strategy was utilized here, [Footnote 13] but the fact remains that, had he been arrested earlier in the day, at his place of employment, rather than at home, no search of his house could have been made without a search warrant. In any event, even apart from the possibility of such police tactics, the general point so forcefully made by Judge Learned Hand in *United States v. Kirschenblatt,* 16 F.2d 202, remains:

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis, the power would not exist if the supposed offender were not found on the premises;

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but it is small consolation to know that one's papers are safe only so long as one is not at home."

Id. at 203.

Rabinowitz and *Harris* have been the subject of critical commentary for many years, [Footnote 14] and have been relied upon less and less in our own decisions. [Footnote 15] It is time, for the reasons we have stated, to hold that, on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed.

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand. [Footnote 16]

Reversed.

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[Footnote 1]

The affidavit supporting the warrant is set out in the opinion of the Court of Appeal, 61 Cal.Rptr. at 715-716, n. 1, and the State does not challenge its insufficiency under the principles of *Aguilar v. Texas*, 378 U. S. 108, and *Spinelli v. United States*, 393 U. S. 410.

[Footnote 2]

The Court assumed that the arrests were lawful. 282 U.S. at 282 U. S. 356.

[Footnote 3]

See also McDonald v. United States, 335 U. S. 451.

[Footnote 4]

Decisions of this Court since *Rabinowitz* have applied the abstract doctrine of that case to various factual situations with divergent results. *Compare Ker v. California*,374 U. S. 23, 374 U. S. 42; *Abel v. United States*, 362 U. S. 217, *and Draper v. United States*, 358 U. S. 307, *with Kremen v. United States*, 353 U. S. 346 (per curiam). *Cf. Chapman v. United States*, 365 U. S. 610; *Jones v. United States*, 357 U. S. 493, 357 U. S. 499-500.

[Footnote 5]

See generally Boyd v. United States, 116 U. S. 616, 116 U. S. 624-625; *Weeks v. United States*, 232 U. S. 383, 232 U. S. 389-391; *Davis v. United States*, 328 U. S. 582, 328 U. S. 603-605 (dissenting opinion); *Harris v. United States*, 331 U. S. 145, 331 U. S. 157-162 (dissenting opinion); *Stanford v. Texas*, 379 U. S. 476, 379 U. S. 481-482.

[Footnote 6]

See also Davis v. Mississippi, 394 U. S. 721, 394 U. S. 728; *Katz v. United States*, 389 U. S. 347, 389 U. S. 356-358; *Warden v. Hayden*, 387 U. S. 294, 387 U. S. 299; *Preston v. United States*, 376 U. S. 364, 376 U. S. 367.

[Footnote 7]

Our *Sibron* opinion dealt with two case. We refer here to No. 63, involving the appellant Sibron. *See infra* at 395 U. S. 764.

[Footnote 8]

See Katz v. United States, 389 U. S. 347, 389 U. S. 357-358.

[Footnote 9]

Our holding today is, of course, entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants

"where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Carroll v. United States, 267 U. S. 132, 267 U. S. 153; *see Brinegar v. United States*, 338 U. S. 160.

[Footnote 10]

Some courts have carried the *Rabinowitz* approach to just such lengths. *See, e.g., Clifton v. United States*, 224 F.2d 329 (C.A.4th Cir.), *cert. denied*, 350 U.S. 894 (purchaser of illicit whiskey arrested in back yard of seller; search of one room of house sustained); *United States v. Jackson*, 149 F.Supp. 937 (D.C.D.C.), *rev'd on other grounds*, 102 U.S.App.D.C. 109, 250 F.2d 772 (suspect arrested half a block from his rented room; search of room upheld). *But see James v. Louisiana*, 382 U. S. 36 (per curiam).

[Footnote 11]

Cf. Mr. Justice Jackson's dissenting comment in *Harris:*

"The difficulty with this problem for me is that, once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court — and that means to me no limit at all."

331 U.S. at 331 U. S. 197.

[Footnote 12]

It is argued in dissent that, so long as there is probable cause to search the place where an arrest occurs, a search of that place should be permitted even though no search warrant has been obtained. This position seems to be based principally on two premises: first, that, once an arrest has been made, the additional invasion of privacy stemming from the accompanying search is "relatively minor", and second, that the victim of the search may "shortly thereafter" obtain a judicial determination of whether the search was justified by probable cause. With respect to the second premise, one may initially question whether all of the States, in fact, provide the speedy suppression procedures the dissent assumes. More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as "the rights of the criminal" are "protect[ed] . . . against introduction of evidence seized without probable cause." The Amendment is designed to prevent, not simply to redress, unlawful police action. In any event, we cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as "minor." And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

[Footnote 13]

Although the warrant was issued at 10:39 a.m. and the arrest was not made until late in the afternoon, the State suggests that the delay is accounted for by normal police procedures and by the heavy workload of the officer in charge. In addition, that officer testified that he and his colleagues went to the petitioner's house "to keep from approaching him at his place of business to cause him any problem there."

[Footnote 14]

See, e.g., J. Landynski, Search and Seizure and the Supreme Court 87-117 (1966); Way, Increasing Scope of Search Incidental to Arrest, 1959 Wash.U.L.Q. 261, Note, Scope Limitations for Searches Incident to Arrest, 78 Yale L.J. 433 (1969); Note, The Supreme Court 1966 Term, 81 Harv.L.Rev. 69, 117-122 (1967)

[Footnote 15]

Cf. Dyke v. Taylor Implement Mfg. Co., 391 U. S. 216, 391 U. S. 20; *Katz v. United States*,389 U.S. at 389 U. S. 357-358, n. 20; *Warden v. Hayden*, 387 U.S. at 387 U. S. 299; *Stoner v. California*, 376 U. S. 483, 376 U. S. 487. *But see Cooper v. California*, 386 U. S. 58, 386 U. S. 62; *Ker v. California*, 374 U.S. at 374 U. S. 42 (opinion of Clark, J.); *cf. Beck v. Ohio*, 379 U. S. 89, 379 U. S. 91; *Abel v. United States, 362 U.S. at 362 U. S. 236-239; Giordenello v. United States*, 357 U. S. 480, 357 U. S. 488.

[Footnote 16]

The State has made various subsidiary contentions, including arguments that it would have been unduly burdensome to obtain a warrant specifying the coins to be seized and that introduction of the fruits of the search was harmless error. We reject those contentions as being without merit.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with these remarks concerning a factor to which the Court has not alluded.

The only thing that has given me pause in voting to overrule *Harris* and *Rabinowitz*is that as a result of *Mapp v. Ohio*, 367 U. S. 643 (1961), and *Ker v. California*, 374 U. S. 23 (1963), every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that, in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment.

Thus, one is now faced with the dilemma, envisioned in my separate opinion in *Ker*,374 U.S. at 374 U. S. 45-46, of choosing between vindicating sound Fourth Amendment principles at the possible expense of state concerns, long recognized to be consonant with the Fourteenth Amendment before *Mapp* and *Ker* came on the books, or diluting the Federal Bill of Rights in the interest of leaving the States at least some elbow room in their methods of criminal law enforcement. No comparable dilemma exists, of course, with respect to the impact of today's decision within the federal system itself.

This federal-state factor has not been an easy one for me to resolve, but in the last analysis, I cannot in good conscience vote to perpetuate bad Fourth Amendment law.

I add only that this case, together with *Benton v. Maryland*, *post*, p. 395 U. S. 784, *North Carolina v. Pearce*, *ante*, p. 395 U. S. 711, and *Simpson v. Rice*, *ante*, p. 395 U. S. 711, all decided

today, serve to point up, as few other cases have, the profound changes that the "incorporation doctrine" has wrought both in the workings of our federal system and upon the adjudicative processes of this Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search "incident to an arrest." There has been a remarkable instability in this whole area, which has seen at least four major shifts in emphasis. Today's opinion makes an untimely fifth. In my view, the Court should not now abandon the old rule.

I

The modern odyssey of doctrine in this field is detailed in the majority opinion. It began with *Weeks v. United States*, 232 U. S. 383 (1914), where the Court paused to note what the case before it was not.

"It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. . . . Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest *within the control of the accused*."

Id. at 232 U. S. 392. (Emphasis added.) This scope of search incident to arrest, extending to all items under the suspect's "control," was reaffirmed in a dictum in *Carroll v. United States*, 267 U. S. 132, 267 U. S. 158 (1925). *Accord*, *Agnello v. United States*, 269 U. S. 20, 269 U. S. 30 (1925) (holding that "the place where the arrest is made" may be searched "is not to be doubted"). The rule was reaffirmed in *Marron v. United States*, 275 U. S. 192, 275 U. S. 199 (1927), where the Court asserted that authority

to search incident to an arrest "extended to all parts of the premises used for the unlawful purpose."

Within five years, this rule was qualified by two Prohibition Act cases, *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 282 U. S. 356-358 (1931), and *United States v. Lefkowitz*, 285 U. S. 452, 285 U. S. 463-467 (1932).

If *Go-Bart* and *Lefkowitz* represented a retreat from the rule of *Weeks*, *Carroll*, *Agnello*, and *Marron*, the vigor of the earlier rule was reaffirmed in *Harris v. United States*, 331 U. S. 145 (1947), which has, but for one brief interlude, clearly been the law until today. The very next Term after *Harris*, in *Trupiano v. United States*, 334 U. S. 699 (1948), the Court held unjustifiable the seizure of a still incident to the arrest of a man at the still site, even though the still was contraband, had been visible through an open door before entering the premises to be "searched," and although a crime was being committed in the officers' presence. *Accord*, that year, *McDonald v. United States*, 335 U. S. 451 (1948) (gambling game seen through transom before entry). Less than two years later, however, the Court returned to the *Harris* rule in *United States v. Rabinowitz*, 339 U. S. 56 (1950), where the Court held that

the reasonableness of a search does not depend upon the practicability of obtaining a search warrant, and that the fact of a valid arrest is relevant to reasonableness. *Trupiano* was *pro tanto* overruled.

Such rapid reversals have occurred before, [Footnote 2/1] but they are rare. Here there had been two about-faces, one following hard upon the other. Justice Frankfurter objected in this language:

"Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of

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chance — for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors."

339 U.S. at 339 U. S. 86. Since that time, the rule of *Weeks*, *Marron*, *Harris*, and *Rabinowitz* has clearly been the law. *E.g.*, *Abel v. United States*, 362 U. S. 217 (1960) (Frankfurter, J., writing for the Court); *Ker v. California*, 374 U. S. 23 (1963). [Footnote 2/2]

II

The rule which has prevailed, but for very brief or doubtful periods of aberration, is that a search incident to an arrest may extend to those areas under the control of the defendant and where items subject to constitutional seizure may be found. The justification for this rule must, under the language of the Fourth Amendment, lie in the reasonableness of the rule. *Terry v. Ohio*, 392 U. S. 1, 392 U. S. 9 (1968); *Sibron v. New York*, 392 U. S. 40 (1968); *Elkins v. United States*, 364 U. S. 206, 364 U. S. 222 (1960). The Amendment provides:

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

In terms, then, the Court must decide whether a given search is reasonable. The Amendment does not proscribe "warrantless searches," but, instead, it proscribes "unreasonable

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searches," and this Court has never held, nor does the majority today assert, that warrantless searches are necessarily unreasonable.

Applying this reasonableness test to the area of searches incident to arrests, one thing is clear at the outset. Search of an arrested man and of the items within his immediate reach must, in almost every case, be reasonable. There is always a danger that the suspect will try to escape, seizing concealed weapons with which to overpower and injure the arresting officers, and there is a danger that he may destroy evidence vital to the prosecution. Circumstances in which these justifications would not apply are sufficiently rare that inquiry is not made into searches of this scope, which have been considered reasonable throughout.

The justifications which make such a search reasonable obviously do not apply to the search of areas to which the accused does not have ready physical access. This is not enough, however, to prove such searches unconstitutional. The Court has always held, and does not today deny, that, when there is probable cause to search and it is "impracticable" for one reason or another to get a search warrant, then a warrantless search may be reasonable. *E.g.* even *Trupiano v. United States*,334 U. S. 699 (1948). This is the case whether an arrest was made at the time of the search or not. [Footnote 2/3]

This is not to say that a search can be reasonable without regard to the probable cause to believe that seizable items are on the premises. But when there are exigent circumstances and probable cause, then the search may be made without a warrant, reasonably. An

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arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search. Again assuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. This must so often be the case that it seems to me as unreasonable to require a warrant for a search of the premises as to require a warrant for search of the person and his very immediate surroundings.

This case provides a good illustration of my point that it is unreasonable to require police to leave the scene of an arrest in order to obtain a search warrant when they already have probable cause to search and there is a clear danger that the items for which they may reasonably search will be removed before they return with a warrant. Petitioner was arrested in his home after an arrest whose validity will be explored below, but which I will now assume was valid. There was doubtless probable cause not only to arrest petitioner, but also to search his house. He had obliquely admitted, both to a neighbor and to the owner of the burglarized store, that he had committed the burglary. [Footnote 2/4] In light of this, and the fact that the neighbor had seen other

admittedly stolen property in petitioner's house, there was surely probable cause on which a warrant could have issued to search the house for the stolen coins. Moreover, had the police simply arrested petitioner, taken him off to the station house, and later returned with a warrant, [Footnote 2/5] it seems very likely that petitioner's wife, who, in view of petitioner's generally garrulous nature, must have known of the robbery, would have removed the coins. For the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable. [Footnote 2/6]

III

This line of analysis, supported by the precedents of this Court, hinges on two assumptions. One is that the arrest of petitioner without a valid warrant [Footnote 2/7] was constitutional as the majority assumes; the other is that the police were not required to obtain a search warrant in advance, even though they knew that the effect of the arrest might well be to alert petitioner's wife that the coins had better be removed soon. Thus, it is necessary to examine the constitutionality of the arrest, since, if it was illegal, the exigent circumstances which it created may not, as the consequences of a lawless act, be used to justify the contemporaneous warrantless search. But for the arrest, the warrantless search may not be justified. [Footnote 2/8] And if circumstances can justify the warrantless arrest, it would be strange to say that the Fourth Amendment bars the warrantless search, regardless of the circumstances, since the invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.

Congress has expressly authorized a wide range of officials to make arrests without any warrant in criminal cases. United States Marshals have long had this power, [Footnote 2/9] which is also vested in the agents of the Federal

Bureau of Investigation, [Footnote 2/10] and in the Secret Service [Footnote 2/11] and the narcotics law enforcement agency. [Footnote 2/12] That warrantless arrest power may apply even when there is time to get a warrant without fear that the suspect may escape is made perfectly clear by the legislative history of the statute granting arrest power to the FBI.

In *United States v. Coplon*, 185 F.2d 629, 633-636 (C.A.2d Cir.1950), the court held that an arrest and search were invalid because there was an insufficient showing of danger of escape, and therefore there was time to obtain a warrant. The opinion, written by Judge Learned Hand and joined by Judges Swan and Frank, reviewed the common law power of arrest, which permitted arrests for felonies committed in the past "if [the officer] had reasonable ground to suppose that the person arrested had committed the felony." However, the court concluded that this power of warrantless arrest had been limited by the congressional requirement that there must be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

The next month, the Congress was moved by this very decision to amend the law, consciously deleting the language upon which Judge Hand had relied so as to make it clear that warrantless arrests were authorized even if there was time to procure a warrant. Act of January 10, 1951, c. 1221, § 1, 64 Stat. 1239; H.R.Rep. No. 3228, 81st Cong., 2d Sess. (1950). [Footnote 2/13] Thereupon, the Court of

Appeals for the District of Columbia Circuit, passing on the very same arrest which had induced the congressional action, held that this "unmistakable" revision made it clear that there was in the FBI a power to arrest without warrant even when there was time to procure one. For this reason, the court upheld the arrest and contemporaneous search. *Coplon v. United States*, 89 U.S.App.D.C. 103, 191 F.2d 749 (1951). Certiorari was denied in both *Coplon* cases. 342 U.S. 920, 926 (1952). Moreover, the statute under which the FBI exercises that power was later said by this Court to state the constitutional standard, *Henry v. United States*, 361 U. S.

98,361 U. S. 100 (1959), since it requires "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony, 18 U.S.C. § 3052, before a warrantless arrest my be made. And the Court today has declined to review a warrantless arrest under the narcotics agent statute. *Jamison v. United States*, *post*, p. 986. *See also* my dissent in *Shipley v. California*, *post*, p. 395 U. S. 821.

The judgment of Congress is that federal law enforcement officers may reasonably make warrantless arrests upon probable cause, and no judicial experience suggests that this judgment is infirm. Indeed, past cases suggest precisely the contrary conclusion. The validity of federal arrests was long governed by state law, *United States v. Di Re*, 332 U. S. 581, 332 U. S. 589-592 (1948), and no requirement that warrants be sought whenever there is time to do so was imposed either by common law history [Footnote 2/14] or by decisions of this Court. This Court has upheld an executive

arrest warrant for deportation, permitting the arrest to occur without prior judicial scrutiny, *Abel v. United States*, 362 U. S. 217 (1960). And this Court has regularly affirmed the validity of warrantless arrests without any indication whatever that there was no time to get a warrant, and indeed where all the circumstances pointed to the opposite conclusion. *E.g.*, *Ker v. California*, 374 U. S. 23 (1963); *Draper v. United States*, 358 U. S. 307 (1959). The lower federal courts have certainly been of the view that warrants are unnecessary even where there is time to obtain them. *Dailey v. United States*, 261 F.2d 870 (C.A. 5th Cir.1958), *cert. denied*, 359 U.S. 969 (1959) (statutory warrantless arrest by federal narcotics agents); *Smith v. United States*, 103 U.S.App.D.C. 48, 52, 254 F.2d 751, 755, *cert. denied*, 357 U.S. 937 (1958); *Mills v. United States*, 90 U.S.App.D.C. 365, 196 F.2d 600, *cert. denied*, 344 U.S. 826 (1952) (*sub silentio*).

In light of the uniformity of judgment of the Congress, past judicial decisions, and common practice rejecting the proposition that arrest warrants are essential wherever it is practicable to get them, the conclusion is inevitable that such arrests and accompanying searches are reasonable, at least until experience teaches the contrary. It must very often be the case that, by the time probable cause to arrest a man is accumulated, the man is aware of police interest in him or for other good reasons is on the verge of flight. Moreover, it will likely be very difficult to determine the probability of his flight. Given this situation, it may be best in all cases simply to allow the arrest if there is probable cause, especially since that issue can be determined very shortly after the arrest.

Nor are the stated assumptions at all fanciful. It was precisely these facts which moved the Congress to grant to the FBI the power to arrest without a warrant without any showing of probability of flight. Both the

Senate and House committees quoted the letter of the Acting Deputy Attorney General, Peter Campbell Brown, who in asking for the new legislation asserted:

"Although it is recognized that, in any felony case, the person to be arrested may attempt to flee, it is also recognized that, in any such case in which the defendant is arrested without a warrant in an emergency situation, such defendant may be able to present a rather convincing argument that he did not intend to flee."

S.Rep. No. 2464, 81st Cong., 2d Sess., 2 (1950); H.R.Rep. No. 3228, 81st Cong., 2d Sess., 2 (1950). Some weight should be accorded this factual judgment by law enforcement officials, adopted by the Congress.

IV

If circumstances so often require the warrantless arrest that the law generally permits it, the typical situation will find the arresting officers lawfully on the premises without arrest or search warrant. Like the majority, I would permit the police to search the person of a suspect and the area under his immediate control either to assure the safety of the officers or to prevent the destruction of evidence. And like the majority, I see nothing in the arrest alone furnishing probable cause for a search of any broader scope. However, where, as here, the existence of probable cause is independently established and would justify a warrant for a broader search for evidence, I would follow past cases and permit such a search to be carried out without a warrant, since the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed, and also alerts the suspect to the fact of the search so that he can immediately seek judicial determination of probable cause in an adversary proceeding, and appropriate redress.

This view, consistent with past cases, would not authorize the general search against which the Fourth

Amendment was meant to guard, nor would it broaden or render uncertain in any way whatsoever the scope of searches permitted under the Fourth Amendment. The issue in this case is not the breadth of the search, since there was clearly probable cause for the search which was carried out. No broader search than if the officers had a warrant would be permitted. The only issue is whether a search warrant was required as a precondition to that search. It is agreed that such a warrant would be required absent exigent circumstances. [Footnote 2/15] I would hold that the fact of arrest supplies such an exigent circumstance, since the police had lawfully gained entry to the premises to effect the arrest and since delaying the search to secure a warrant would have involved the risk of not recovering the fruits of the crime.

The majority today proscribes searches for which there is probable cause and which may prove fruitless unless carried out immediately. This rule will have no added effect whatsoever in protecting the rights of the criminal accused at trial against introduction of evidence seized without probable cause. Such evidence could not be introduced under the old rule. Nor does the majority

today give any added protection to the right of privacy of those whose houses there is probable cause to search. A warrant would still be sworn out for those houses, and the privacy of their owners invaded. The only possible justification for the majority's rule is that, in some instances, arresting officers may search when they have no probable cause to do so, and that such unlawful searches might be prevented if the officers first sought a warrant from a magistrate. Against the possible protection of privacy in that class of cases, in which the privacy of the house has already been invaded by entry to make the arrest — an entry for which the majority does not assert that any warrant is necessary — must be weighed the risk of destruction of evidence for which there is probable cause to search, as a result of delays in obtaining a search warrant. Without more basis for radical change than the Court's opinion reveals, I would not upset the balance of these interests which has been struck by the former decisions of this Court.

In considering searches incident to arrest, it must be remembered that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and, having been arrested, he will soon be brought into contact with people who can explain his rights. As MR. JUSTICE BRENNAN noted in a dissenting opinion, joined by THE CHIEF JUSTICE and JUSTICES BLACK and DOUGLAS, in *Abel v. United States*, 362 U. S. 217, 362 U. S. 249-250 (1960), a search contemporaneous with a warrantless arrest is specially safeguarded, since

"[s]uch an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, *see Henry v. United States*, 361 U. S. 98, 361 U. S. 100, and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of

probable cause is to be inquired into. Fed.Rules Crim.Proc. 5(a) and (c). . . . *Mallory v. United States*, 354 U. S. 449; *McNabb v. United States*, 318 U. S. 332."

And, since that time, the Court has imposed on state and federal officers alike the duty to warn suspects taken into custody, before questioning them, of their right to a lawyer. *Miranda v. Arizona*, 384 U. S. 436 (1966); *Orozco v. Texas*, 394 U. S. 324(1969).

An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding. I would uphold the constitutionality of this search contemporaneous with an arrest, since there were probable cause both for the search and for the arrest, exigent circumstances involving the removal or destruction of evidence, and satisfactory opportunity to dispute the issues of probable cause shortly thereafter. In this case, the search was reasonable.

[Footnote 2/1]

Murdock v. Pennsylvania, 319 U. S. 105 (1943), overruled *Jones v. Opelika*, 316 U. S. 584 (1942); *Legal Tender Cases*, 12 Wall. 457 (1871), overruled *Hepburn v. Griswold*, 8 Wall. 603 (1870).

[Footnote 2/2]

The majority cites *Kremen v. United States*, 353 U. S. 346 (1957), as suggesting an inconsistency. There, however, in a per curiam opinion, the Court merely overturned a general search in which the entire contents of a cabin, which it took 11 pages of fine print

for the Court to inventory, were seized. *See Abel v. United States*, 362 U. S. 217, 362 U. S. 239 (1960) (*Kremen* distinguished as a "mass seizure").

[Footnote 2/3]

Even Mr. Justice Frankfurter, joined in dissent in *Rabinowitz* by Mr. Justice Jackson, admitted that there was an exception to the search warrant requirement in cases of necessity, and noted that this applied, for example, to vehicles which could readily be moved. 339 U. S. 56, at 339 U. S. 73.

[Footnote 2/4]

Before the burglary of the coin store, petitioner had told its owner that he was planning a big robbery, had inquired about the alarm system in the store, the state of the owner's insurance, and the location of the owner's most valuable coins. Petitioner wandered about the store the day before the burglary. After the burglary, petitioner called the store's owner and accused him of robbing the store himself for the insurance proceeds on a policy which, as petitioner knew, had just been reduced from $50,000 to $10,000 coverage. On being told that the robbery had been sloppy, petitioner excitedly claimed that it had been "real professional," but then denied the robbery. On the night of the robbery itself, petitioner declined an invitation to a bicycle ride, saying he was "going to knock over a place" and that a coin shop was "all set." After the robbery,m he told the same neighbor that he had started to break into the coin shop, but had stopped, and then denied the whole incident. The neighbor had earlier seen stacks of typewriters in petitioner's house, Asked whether they were "hot," petitioner replied, "Hotter than a $3 bill." On reading a newspaper description of the coin store burglary, the neighbor called the police.

[Footnote 2/5]

There were three officers at the scene of the arrest, one from the city where the coin burglary had occurred, and two from the city where the arrest was made. Assuming that one policeman from each city would be needed to bring the petitioner in and obtain a search warrant, one policeman could have been left to guard the house. However, if he not only could have remained in the house against petitioner's wife will, but followed her about to assure that no evidence was being tampered with, the invasion of her privacy would be almost as great as that accompanying an actual search. Moreover, had the wife summoned an accomplice, one officer could not have watched them both.

[Footnote 2/6]

A second arrest and search of petitioner's house occurred three days later. It relates to an entirely separate robbery of which petitioner was separately convicted and for which he was concurrently sentenced. Since no evidence was seized in the second search, and since it did not in any way affect petitioner's trial so far as the record discloses, there is no occasion to consider its propriety.

[Footnote 2/7]

An arrest warrant was, in fact, issued, but it was issued on an inadequate supporting affidavit, and was therefore invalid, so that the case must be considered as though no warrant had been issued.

[Footnote 2/8]

This in turn assumes that, where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant must be obtained to validate the search. This is the holding of past cases, and I do not question it.

[Footnote 2/9]

Act of June 15, 1935, c. 259, § 2, 49 Stat. 378, as amended, 18 U.S.C. § 3053.

[Footnote 2/10]

Act of June 18, 1934, c. 595, 48 Stat. 1008, as amended, 18 U.S.C. § 3052.

[Footnote 2/11]

Act of Sept. 29, 1965, 79 Stat. 890, as amended, 18 U.S.C. § 3056 (1964 ed., Supp. IV).

[Footnote 2/12]

Act of July 18, 1956, as amended, Tit. I, § 104(a), 70 Stat. 570, 26 U.S.C. § 7607(2).

[Footnote 2/13]

Congress' expedition was possible partly because the same change had earlier been approved by a Senatorial committee. S.Rep. No. 2464, 81st Cong., 2d Sess. (1950).

[Footnote 2/14]

There was no dispute between the two *Coplon* courts on this point, since it was well established that even a private person could make a warrantless arrest at common law for a felony which had actually been committed, and a peace officer could make such an arrest if he had reasonable cause to believe the offense had been committed. 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown 71-104 (first American ed. 1847).

[Footnote 2/15]

A search without a warrant

"can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones v. United States*, 357 U. S. 493, 357 U. S. 499; *United States v. Jeffers*, 342 U. S. 48, 342 U. S. 51."

Rios v. United States, 364 U. S. 253, 364 U. S. 261 (1960); *Stoner v. California*, 376 U. S. 483, 376 U. S. 486 (1964). And

"a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. *Angello v. United States*, 269 U. S. 20."

Stoner v. California, *supra*, at 357 U. S. 486; *James v. Louisiana*, 382 U. S. 36, 382 U. S. 37 (1965). There is thus no question that a warrant to search petitioner's house would have been required had he not been arrested there. In such cases, the officers are not already lawfully on the premises, and there is not so often the same risk of the destruction of evidence nor the necessity to make an immediate search without the delay involved in securing a warrant.

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5.11: New York v. Belton 453 U.S. 454 (1981)

U.S. Supreme Court

New York v. Belton, 453 U.S. 454 (1981)

New York v. Belton

No. 80-328

Argued April 27, 1981

Decided July 1, 1981

453 U.S. 454

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Syllabus

An automobile in which respondent was one of the occupants was stopped by a New York State policeman for traveling at an excessive rate of speed. In the process of discovering that none of the occupants owned the car or was related to the owner, the policeman smelled burnt marihuana and saw on the floor of the car an envelope suspected of containing marihuana. He then directed the occupants to get out of the car and arrested them for unlawful possession of marihuana. After searching each of the occupants, he searched the passenger compartment of the car, found a jacket belonging to respondent, unzipped one of the pockets, and discovered cocaine. Subsequently, respondent was indicted for criminal possession of a controlled substance. After the trial court had denied his motion to suppress the cocaine seized from his jacket pocket, respondent pleaded guilty to a lesser included offense, while preserving his claim that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. The Appellate Division of the New York Supreme Court upheld the constitutionality of the search and seizure, but the New York Court of Appeals reversed.

Held: The search of respondent's jacket was a search incident to a lawful custodial arrest, and hence did not violate the Fourth and Fourteenth Amendments. The jacket, being located inside the passenger compartment of the car, was "within the arrestee's immediate control" within the meaning of *Chimel v. California*, 395 U. S. 752, wherein it was held that a lawful custodial arrest creates a situation justifying the contemporaneous warrantless search of the arrestee and of the immediately surrounding area. Not only may the police search the passenger compartment of the car in such circumstances, they may also examine the contents of any containers found in the passenger compartment. And such a container may be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Pp. 453 U. S. 457-463.

50 N.Y.2d 447, 407 N.E.2d 420, reversed.

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

filed a concurring statement, *post*, p. 453 U. S. 463. STEVENS, J., filed a statement concurring in the judgment, *post*, p. 453 U. S. 463. BRENNAN, J., *post*, p. 453 U. S. 463, and WHITE, J., *post*, p. 453 U. S. 472, filed dissenting opinions, in which MARSHALL, J., joined.

JUSTICE STEWART delivered the opinion of the Court.

When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding? That is the question at issue in the present case.

I

On April 9, 1978, Trooper Douglas Nicot, a New York State policeman driving an unmarked car on the New York Thruway, was passed by another automobile traveling at an excessive rate of speed. Nicot gave chase, overtook the speeding vehicle, and ordered

its driver to pull it over to the side of the road and stop. There were four men in the car, one of whom was Roger Belton, the respondent in this case. The policeman asked to see the driver's license and automobile registration, and discovered that none of the men owned the vehicle or was related to its owner. Meanwhile, the policeman had smelled burnt marihuana, and had seen on

the floor of the car an envelope marked "Supergold" that he associated with marihuana. He therefore directed the men to get out of the car, and placed them under arrest for the unlawful possession of marihuana. He patted down each of the men and "split them up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other." He then picked up the envelope marked "Supergold" and found that it contained marihuana. After giving the arrestees the warnings required by *Miranda v. Arizona*, 384 U. S. 436, the state policeman searched each one of them. He then searched the passenger compartment of the car. On the back seat, he found a black leather jacket belonging to Belton. He unzipped one of the pockets of the jacket and discovered cocaine. Placing the jacket in his automobile, he drove the four arrestees to a nearby police station.

Belton was subsequently indicted for criminal possession of a controlled substance. In the trial court, he moved that the cocaine the trooper had seized from the jacket pocket be suppressed. The court denied the motion. Belton then pleaded guilty to a lesser included offense, but preserved his claim that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments.*See Lefkowitz v. Newsome*, 420 U. S. 283. The Appellate Division of the New York Supreme Court upheld the constitutionality of the search and seizure, reasoning that, "[o]nce defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband." 68 App.Div.2d 198, 201, 416 N.Y.S.2d 922, 925.

The New York Court of Appeals reversed, holding that

"[a] warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article."

50 N.Y.2d 447, 449, 407 N.E.2d 420, 421. Two judges dissented.

They pointed out that the

"search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters. . . ."

Id. at 454, 407 N.E.2d at 424. We granted certiorari to consider the constitutionally permissible scope of a search in circumstances such as these. 449 U.S. 1109.

II

It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so. This Court has recognized, however, that "the exigencies of the situation" may sometimes make exemption from the warrant requirement "imperative." *McDonald v. United States*, 335 U. S. 451, 335 U. S. 456. Specifically, the Court held in *Chimel v. California*, 395 U. S. 752, that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape," and the need to prevent the concealment or destruction of evidence. *Id.* at 395 U. S. 763.

The Court's opinion in *Chimel* emphasized the principle that, as the Court had said in *Terry v. Ohio*, 392 U. S. 1, 392 U. S. 19, "[t]he scope of [a] search must be *strictly tied to and justified by' the circumstances which rendered its initiation permissible." Quoted in Chimel v. California, supra, at 395 U. S. 762. Thus, while the Court in Chimelfound "ample justification" for a search of "the area from within which [an arrestee]*

might gain possession of a weapon or destructible evidence," the Court found

"no comparable justification . . . for routinely searching any room other than that in which an arrest occurs — or, for that matter for searching through all the desk drawers or other closed or concealed areas in that room itself."

395 U.S. at 395 U. S. 763.

Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases. Yet, as one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments

"can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The *Robinson* Dilemma, 1974 S.Ct.Rev. 127, 142. This is because

"Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities, and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"

Id. at 141. In short,

"[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

Dunaway v. New York, 442 U. S. 200, 442 U. S. 213-214.

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So it was that, in *United States v. Robinson*, 414 U. S. 218, the Court hewed to a straightforward rule, easily applied, and predictably enforced:

"[I]n the case of a lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

Id. at 442 U. S. 235. In so holding, the Court rejected the suggestion that

"there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."

Ibid.

But no straightforward rule has emerged from the litigated cases respecting the question involved here — the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants. The difficulty courts have had is reflected in the conflicting views of the New York judges who dealt with the problem in the present case, and is confirmed by a look at even a small sample drawn from the narrow class of cases in which courts have decided whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it. On the one hand, decisions in cases such as *United States v. Sanders*, 631 F.2d 1309 (CA8 1980); *United States v. Dixon*, 558 F.2d 919 (CA9 1977); and *United States v. Frick*, 490 F.2d 666 (CA5 1973), have upheld such warrantless searches as incident to lawful arrests. On the other hand, in cases such as *United States v. Benson*, 631 F.2d 1336 (CA8 1980), and *United States v. Rigales*, 630 F.2d 364 (CA5 1980), such searches, in comparable factual circumstances, have been held constitutionally invalid. [Footnote 1]

When a person cannot know how a court will apply a

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settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority. While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the

immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant. Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." *Chimel*, 395 U.S. at 395 U. S. 763. In order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that, when a policeman has made a lawful custodial arrest of the occupant of an automobile, [Footnote 2] he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. [Footnote 3]

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. [Footnote 4] *United States v. Robinson, supra; 358 U. S. S. 461*[illegible] v. United States, *358 U. S. 307*. *Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Thus, while the Court in* Chimel@ held that the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the Court noted that drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police. 395 U.S. at 395 U. S. 763.

It is true, of course, that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested. However, in *United States v. Robinson*, the Court rejected the argument that such a container — there a "crumpled up cigarette package" — located during a search of Robinson incident to his arrest could not be searched:

"The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."

414 U.S. at 414 U. S. 235.

The New York Court of Appeals relied upon *United States v. Chadwick*, 433 U. S. 1, and *Arkansas v. Sanders*, 442 U. S. 753, in concluding that the search and seizure in the present case were constitutionally invalid. [Footnote 5] But neither of those

cases involved an arguably valid search incident to a lawful custodial arrest. As the Court pointed out in the *Chadwick* case:

"Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency."

433 U.S. at 433 U. S. 15. And in the *Sanders* case, the Court explicitly stated that it did not

"consider the constitutionality of searches of luggage incident to the arrest of its possessor. *See, e.g., United States v. Robinson*, 414 U. S. 218 (1973). The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search."

442 U.S. at 442 U. S. 764, n. 11. (The suitcase in question was in the trunk of the taxicab. *See* n 4, *supra*.)

III

It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marihuana. The search of the respondent's jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case. [Footnote 6] The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments. Accordingly, the judgment is reversed.

It is so ordered.

[Footnote 1]

The state court cases are in similar disarray. *Compare, e.g., Hinkel v. Anchorage*, 618 P.2d 1069 (Alaska 1980), *with Ulesky v. State*, 379 So.2d 121 (Fla.App.1979).

[Footnote 2]

The validity of the custodial arrest of Belton has not been questioned in this case.*Cf. Gustafson v. Florida*, 414 U. S. 260, 414 U. S. 266 (concurring opinion) .

[Footnote 3]

Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.

[Footnote 4]

"Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile, and does not encompass the trunk.

[Footnote 5]

It seems to have been the theory of the Court of Appeals that the search and seizure in the present case could not have been incident to the respondent's arrest, because Trooper Nicot, by the very act of searching the respondent's jacket and seizing the contents of its pocket, had gained "exclusive control" of them. 50 N.Y.2d 447, 451, 407 N.E.2d 420, 422. But, under this fallacious theory, no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive control."

[Footnote 6]

Because of this disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called "automobile exception." *Chambers v. Maroney*, 399 U. S. 42; *Carroll v. United States*, 267 U. S. 132.

JUSTICE REHNQUIST, concurring.

Because it is apparent that a majority of the Court is unwilling to overrule *Mapp v. Ohio*, 367 U. S. 643 (1961), and because the Court does not find it necessary to consider the "automobile exception" in its disposition of this case, *ante* at 453 U. S. 462-463, n. 6, *see Robbins v. California*, *ante* p. 453 U. S. 437 (REHNQUIST, J., dissenting), I join the opinion of the Court.

JUSTICE STEVENS concurring in the judgment.

For the reasons stated in my dissenting opinion in *Robbins v. California*, *ante* p. 453 U. S. 444, I agree with JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE REHNQUIST that these two cases should be decided in the same way, and I also agree with THE CHIEF JUSTICE, JUSTICE STEWART, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST that this judgment should be reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In *Chimel v. California*, 395 U. S. 752 (1969), this Court carefully analyzed more than 50 years of conflicting precedent governing the permissible scope of warrantless searches incident to custodial arrest. The Court today turns its back on the product of that analysis, formulating an arbitrary "bright-line" rule applicable to "recent" occupants of automobiles that fails to reflect *Chimel's* underlying policy justifications. While the Court claims to leave *Chimel* intact, *see ante* at 453 U. S. 460, n. 3, I fear that its unwarranted abandonment of the principles underlying that decision may signal a wholesale retreat from our carefully developed "search incident to arrest" analysis. I dissent.

I

It has long been a fundamental principle of Fourth Amendment analysis that exceptions to the warrant requirement are to be narrowly construed. *Arkansas v. Sanders*, 442 U. S. 753, 442 U. S. 759-760 (1979); *Mincey v. Arizona*, 437 U. S. 385,437 U. S.

393-394 (1978); *Coolidge v. New Hampshire*, 403 U. S. 443, 403 U. S. 454-455 (1971); *Vale v. Louisiana*, 399 U. S. 30, 399 U. S. 34 (1970); *Katz v. United States*,389 U. S. 347, 389 U. S. 357 (1967); *Jones v. United States*, 357 U. S. 493, 357 U. S. 499(1958). Predicated on the Fourth Amendment's essential purpose of "shield[ing] the citizen from unwarranted intrusions into his privacy," *Jones v. United States*, *supra*, at 357 U. S. 498, this principle carries with it two corollaries. First, for a search to be valid under the Fourth Amendment, it must be "*strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry v. Ohio*,*392 U. S. 1*, *392 U. S. 19 (1968), quoting Warden v. Hayden*, *387 U. S. 294*, *387 U. S. 310(1967) (Fortas, J., concurring). See Chimel v. California*, *supra*, *at 395 U. S. 762; Cupp v. Murphy*, *412 U. S. 291*, *412 U. S. 295 (1973). Second, in determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception, rather than on any bright-line rule of general application. See Sibron v. New York*, *392 U. S. 40*, *392 U. S. 59 (1968); Preston v. United States*, *376 U. S. 364*, *376 U. S. 367 (1964). [Footnote 2/1]*

The *Chimel* exception to the warrant requirement was designed with two principal concerns in mind: the safety of the arresting officer and the preservation of easily concealed or destructible evidence. Recognizing that a suspect might have

access to weapons or contraband at the time of arrest, the Court declared:

"When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."

395 U.S. at 395 U. S. 762-763.

The *Chimel* standard was narrowly tailored to address these concerns: it permits police officers who have effected a custodial arrest to conduct a warrantless search

"of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

Id. at 395 U. S. 763. It thus places a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search "*is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.'" Shipley v. California*, *395 U. S. 818*, *395 U. S. 819(1969), quoting Stoner v. California*, *376 U. S. 483*, *376 U. S. 486 (1964). See United States v. Chadwick*, *433 U. S. 1*, *433 U. S. 14-15 (1977); Dyke v. Taylor Implement Mfg. Co.*, *391 U. S. 216*, *391 U. S. 220 (1968); Preston v. United States*, *supra*, *at 376 U. S. 367; United States v. Edwards*, *415 U. S. 800*, *415 U. S. 810 (1974) (STEWART, J., dissenting). [Footnote 2/2] When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying Chimel's limited exception to the warrant requirement cease to apply: at that point, there is no possibility that the arrestee could reach weapons or contraband. See Chimel v. California*, *supra*, *at 395 U. S. 764.*

In its attempt to formulate a

"'single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront,'"

ante at 453 U. S. 458, quoting *Dunaway v. New York*, 442 U. S. 200, 442 U. S. 213-214 (1979) the Court today disregards these principles, and instead adopts a fiction — that the interior of a car is always within the immediate control of an arrestee who has recently been in the car. The Court thus holds:

"[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] may also examine the contents of any containers found within the passenger compartment. . . ."

Ante at 453 U. S. 460. In so holding, the Court ignores both precedent and principle, and fails to achieve its objective of providing police officers with a more workable standard for determining the permissible scope of searches incident to arrest.

II

As the facts of this case make clear, the Court today substantially expands the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest. These facts demonstrate that at the time Belton and his three companions were placed under custodial arrest — which was after they had been removed from the car patted down, and separated — none of them could have reached the jackets that had been left on the back seat of the car. The

New York Court of Appeals described the sequence of events as follows:

"On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point, the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana."

"*After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then reentered the vehicle, searched the passenger compartment*, and seized the marihuana cigarette butts lying in the ashtrays. He also *rifled through the pockets of five jackets on the back seat.* Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification."

50 N.Y.2d 447, 449, 407 N.E.2d 420, 421 (1980) (emphasis added). [Footnote 2/3] Concluding that a

"warrantless search of the zippered pockets of an *unaccessible jacket* may not be upheld as a search incident to a lawful arrest where there is *no longer any danger that the arrestee or a confederate might gain access to the article*,"

ibid. (emphasis added), the court further stated:

"One searches the record in vain for support of the dissenter's claim that, at the time of the arrest — the point from which the predicate for the warrantless search is measured — 'the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer.'"

Id. at 452, n. 2, 407 N.E.2d at 423, n. 2, quoting *id.* at 454, 407 N.E.2d at 424 (dissenting opinion).

By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*. Disregarding the principle "that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement," *Cupp v. Murphy*, 412 U.S. at 412 U. S. 295, the Court for the first time grants police officers authority to conduct a warrantless "area" search under circumstances where there is no chance that the arrestee "might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. at 395 U. S. 763. Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.

This expansion of the *Chimel* exception is both analytically unsound and inconsistent with every significant "search incident to arrest" case we have decided in which the issue was whether the police could lawfully conduct a warrantless search of the area surrounding the arrestee. *See, e.g., United States v. Chadwick*, 433 U.S. at 433 U. S. 15 (search of footlocker "conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody" not incident to arrest); *Coolidge v. New Hampshire*, 403 U.S. at 403 U. S. 456-457, and n. 11 (search of car in driveway not incident to arrest in house); *Chambers v. Maroney*, 399 U. S. 42, 399 U. S. 47 (1970) (warrantless search of car invalid once arrestee has been placed in police custody); *Vale v. Louisiana*, 399 U.S. at 399 U. S. 35 (area of immediate control does not extend to inside of house when suspect is arrested on front step); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. at 391 U. S. 220

(search of car after occupant placed in custody and taken to courthouse not valid as incident to arrest); *Preston v. United States*, 376 U.S. at 376 U. S. 368 (search of car not valid as incident to arrest: although suspects were in car when arrested, they were in custody at police station when car was searched). These cases demonstrate that the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it at the time of arrest and search. If

not, the officer's failure to obtain a warrant may not be excused. [Footnote 2/4] By disregarding this settled doctrine, the Court does a great disservice not only to *stare decisis*, but to the policies underlying the Fourth Amendment, as well.

III

The Court seeks to justify its departure from the principles underlying *Chimel* by proclaiming the need for a new "bright-line" rule to guide the officer in the field. As we pointed out in *Mincey v. Arizona*, 437 U.S. at 437 U. S. 393, however, "the mere fact that law enforcement may be made more efficient can never, by itself, justify disregard of the Fourth Amendment." Moreover, the Court's attempt to forge a "bright-line" rule fails on its own terms. While the "interior/trunk" distinction may provide a workable guide in certain routine cases — for example, where the officer arrests the driver of a car and then immediately searches the seats and floor — in the long run, I suspect it will create far more problems than it solves. The Court's new approach leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers.

Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car? And *why* is the rule announced today necessarily limited to searches of cars? What if a suspect is seen walking out of a house where the police, peering in from outside, had formed probable cause to believe a crime was being committed? Could the police then arrest that suspect and enter the house to conduct a search incident to arrest? Even assuming today's rule is limited to searches of the "interior" of cars — an assumption not demanded by logic — what is meant by "interior"? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container, even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"? *Compare ante* at 453 U. S. 460-461. n. 4, *with ante* at 453 U. S. 461.

The Court does not give the police any "bright-line" answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.* As we warned in *Chimel:*

"No consideration relevant to the Fourth Amendment suggests any point of rational limitation once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items."

395 U.S. at 395 U. S. 766. *See also Mincey v. Arizona, supra,* at 437 U. S. 393. By failing to heed this warning, the Court has undermined, rather than furthered, the goal of consistent law enforcement: it has failed to offer any principles to guide the police and the courts in their application of the new rule to nonroutine situations.

The standard announced in *Chimel* is not nearly as difficult to apply as the Court suggests. To the contrary, I continue to believe that *Chimel* provides a sound, workable rule for determining the constitutionality of a warrantless search incident to arrest. Under *Chimel*, searches incident to arrest may be conducted without a warrant only if limited to the person of the arrestee, *see United States v. Robinson*,414 U. S. 218 (1973), or to the area within the arrestee's "immediate control." While it may be difficult in some cases to measure the exact scope of the arrestee's immediate control, relevant factors would surely include the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container. [Footnote 2/5] Certainly there will be some close cases, but when in doubt, the police can always turn to the rationale underlying *Chimel* — the need to prevent the arrestee from reaching weapons or contraband — before exercising their judgment. A rule based on that rationale should provide more guidance than the rule announced by the Court today. Moreover, unlike the Court's rule, it would be faithful to the Fourth Amendment.

[Footnote 2/1]

As we noted in *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 282 U. S. 357(1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

[Footnote 2/2]

"'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.'"

Chambers v. Maroney, 399 U. S. 42, 399 U. S. 47 (1970), quoting *Preston v. United States*, 376 U.S. at 376 U. S. 367.

[Footnote 2/3]

See also 50 N.Y.2d at 454, n. 2, 407 N.E.2d at 423, n. 2; Tr. Of Oral Arg. 4-5; App. A-36.

[Footnote 2/4]

"'We cannot be true to [the Fourth Amendment] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative.'"

Chimel v. California, 395 U.S. at 395 U. S. 761, quoting *McDonald v. United States*, 335 U. S. 451, 335 U. S. 456 (1948).

[Footnote 2/5]

The Court sets up a strawman when it claims that, under the "exclusive control" approach taken by the Court of Appeals,

"no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'"

Ante at 453 U. S. 461-462, n. 5. If a police officer could obtain exclusive control of an article by simply holding it in his hand, I would certainly agree with the Court. But as we recognized in *United States v. Chadwick*, 433 U. S. 1, 433 U. S. 14-15 (1977), exclusive control means more than that. It means sufficient control that there is no significant risk that the arrestee or his confederates "might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. at 395 U. S. 763. The issue of exclusive control presents a question of fact to be decided under the circumstances of each case, just as the New York Court of Appeals has decided it here.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Robbins v. California*, *ante* p. 453 U. S. 420, it was held that a wrapped container in the trunk of a car could not be searched without a warrant even though the trunk itself could be searched without a warrant because there was probable cause to search the car, and even though there was probable cause to search the container as well. This was because of the separate interest in privacy with respect to the container. The Court now holds that, as incident to the arrest of the driver or any other person in an automobile, the interior of the car and any container found therein, whether locked or not, may be not only seized, but also searched, even absent probable cause to believe that contraband or evidence of crime will be found. As to luggage, briefcases, or other containers, this seems to me an extreme extension of *Chimel*, and one to which I cannot subscribe. Even if the decision in *Robbins* had been otherwise and *United States v. Chadwick*, 433 U. S. 1 (1977), and *Arkansas v. Sanders*, 442 U. S. 753 (1979), had been overruled, luggage found in the trunk of a car could not be searched without probable cause to believe it contained contraband or evidence. Here, searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest. This calls for more caution than the Court today exhibits, and, with respect, I dissent.

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5.12: Florida v. Riley 488 US 445 (1989)

U.S. Supreme Court

Florida v. Riley, 488 U.S. 445 (1989)

Florida v. Riley

No. 87-764

Argued October 3, 1988

Decided January 23, 1989

488 U.S. 445

A Florida county sheriff's office received an anonymous tip that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not observe from Found level the contents of a greenhouse on the property — which was enclosed on two sides and obscured from view on the other, open sides by trees, shrubs, and respondent's nearby home — he circled twice over the property in a helicopter at the height of 400 feet and made naked-eye observations through openings in the greenhouse roof and its open sides of what he concluded were marijuana plants. After a search pursuant to a warrant obtained on the basis of these observations revealed marijuana growing in the greenhouse, respondent was charged with possession of that substance under Florida law. The trial court granted his motion to suppress the evidence. Although reversing, the State Court of Appeals certified the case to the State Supreme Court on the question whether the helicopter surveillance from 400 feet constituted a "search" for which a warrant was required under the Fourth Amendment. Answering that question in the affirmative, the court quashed the Court of Appeals' decision and reinstated the trial court's suppression order.

Held: The judgment is reversed.

511 So.2d 282, reversed.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that the Fourth Amendment does not require the police traveling in the public airways at an altitude of 400 feet to obtain a warrant in order to observe what is visible to the naked eye. *California v. Ciraolo*, 476 U. S. 207— which held that a naked-eye police inspection of the backyard of a house from a fixed-wing aircraft at 1,000 feet was not a "search" — is controlling. Thus, respondent could not reasonably have expected that the contents of his greenhouse were protected from public or official inspection from the air, since he left the greenhouse's sides and roof partially open. The fact that the inspection was made from a helicopter is irrelevant, since, as in the case of fixed-wing planes, private and commercial flight by helicopter is routine. Nor, on the facts of this case, does it make a difference for Fourth Amendment purposes that the helicopter was flying below 500 feet, the Federal Aviation Administration's lower limit upon the navigable airspace for fixed-wing craft. Since the FAA permits helicopters to fly below that limit, the helicopter here was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Although an aerial inspection of a house's curtilage may not always pass muster under the Fourth Amendment simply because the aircraft is within the navigable airspace specified by law, there is nothing in the record here to suggest that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude. Moreover, there is no evidence that the helicopter interfered with respondent's normal use of his greenhouse or other parts of the curtilage, that intimate details connected with the use of the home or curtilage were observed, or that there was undue noise, wind, dust, or threat of injury. Pp. 488 U. S. 449-452.

JUSTICE O'CONNOR concluded that the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations, which are intended to promote air safety, and not to protect the right to be secure against unreasonable searches and seizures. Whether respondent had a reasonable expectation of privacy from aerial observation of his curtilage does not depend on whether the helicopter was where it had a right to be, but, rather, on whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as "reasonable." Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because respondent introduced no evidence to the contrary before the state courts, it must be concluded that his expectation of privacy here was not reasonable. However, public use of altitudes lower than 400 feet —

particularly public observations from helicopters circling over the curtilage of a home — may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA regulations. Pp.488 U. S. 452-455.

WHITE, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C.J., and SCALIA and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 488 U. S. 452. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 488 U. S. 456. BLACKMUN, J., filed a dissenting opinion, *post*, p. 488 U. S. 467.

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5.13: Terry v. Ohio 392 US 1 (1968)

U.S. Supreme Court

Terry v. Ohio, 392 U.S. 1 (1968)

Terry v. Ohio

No. 67

Argued December 12, 1967

Decided June 10, 1968

392 U.S. 1

CERTIORARI TO THE SUPREME COURT OF OHIO

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

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. [Footnote 1] Following

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the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, [Footnote 2] by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that, while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35, and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years, and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case, when I looked over, they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet

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away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece — in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time, Officer McFadden had become thoroughly suspicious. He testified that, after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with

them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified

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himself as a police officer and asked for their names. At this point, his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat, Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns, the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer

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McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for, without it, "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State v. Terry*, 5 Ohio App.2d 122, 214 N.E.2d 114 (1966). The Supreme Court of Ohio dismissed their appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U.S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*, 367 U. S. 643(1961). We affirm the conviction.

I

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." This inestimable right of

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personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized,

"No right is held more sacred, or is more carefully guarded, by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 251 (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U. S. 347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *id.* at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U. S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck v. Ohio*, 379 U. S. 89 (1964); *Rios v. United States*, 364 U. S. 253 (1960); *Henry v. United States*, 361 U. S. 98 (1959); *United States v. Di Re*, 332 U. S. 581 (1948); *Carroll v. United States*, 267 U. S. 132 (1925). The question is whether, in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity — issues which have never before been squarely

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presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk" — as it is sometimes euphemistically termed — suspicious persons.

On the one hand, it is frequently argued that, in dealing with the rapidly unfolding and often dangerous situations on city streets, the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose, it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." [Footnote 3] Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," [Footnote 4] which can properly be imposed upon the

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citizen in the interest of effective law enforcement on the basis of a police officer's suspicion. [Footnote 5]

On the other side, the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. [Footnote 6] It is contended with some force that there is not — and cannot be — a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen, and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent

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in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U. S. 10, 14 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities. [Footnote 7]

In this context, we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk'). [Footnote 8]" But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. *See Weeks v. United States*, 232 U. S. 383, 391-393 (1914). Thus, its major thrust is a deterrent one, *see Linkletter v.*

Walker, 381 U. S. 618, 629-635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that, without it, the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, 367 U. S. 643, 655 (1961). The rule also serves another vital function — "the imperative of judicial integrity." *Elkins*

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v. United States, 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus, in our system, evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts, the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. [Footnote 9] Doubtless some

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police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, [Footnote 10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, [Footnote 11] will not be

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stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary, and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.

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Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry, and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. [Footnote 12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the stationhouse and prosecution for crime — "arrests" in traditional terminology. It must be recognized that, whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure

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performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." [Footnote 13] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly. [Footnote 14]

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search," is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And, by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. [Footnote 15] This Court has held, in

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the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen v. United States*, 353 U. S. 346 (1957); *Go-Bart Importing Co. v.*

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United States, 282 U. S. 344, 356-358 (1931); *see United States v. Di Re*, 332 U. S. 581, 586-587 (1948). The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden v. Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring); *see, e.g., Preston v. United States*, 376 U. S. 364, 367-368 (1964); *Agnello v. United States*, 269 U. S. 20, 30-31 (1925).

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment — the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case, there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether, at that point, it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. [Footnote 16] And, in determining whether the seizure and search were "unreasonable," our inquiry

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is a dual one — whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, *see, e.g., Katz v. United States*, 389 U. S. 347 (1967); *Beck v. Ohio*, 379 U. S. 89, 96 (1964); *Chapman v. United States*, 365 U. S. 610 (1961), or that, in most instances, failure to comply with the warrant requirement can only be excused by exigent circumstances, *see, e.g., Warden v. Hayden*, 387 U. S. 294 (1967) (hot pursuit); *cf. Preston v. United States*, 376 U. S. 364,

367-368 (1964). But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and, as a practical matter, could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. [Footnote 17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon

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the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara v. Municipal Court*, 387 U. S. 523, 534-535, 536-537 (1967). And, in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. [Footnote 18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that, at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. [Footnote 19] And, in making that assessment, it is imperative that the facts be judged against an objective standard: would the facts

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available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? *Cf. Carroll v. United States*, 267 U. S. 132 (1925); *Beck v. Ohio*, 379 U. S. 89, 96-97 (1964). [Footnote 20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. *See, e.g., Beck v. Ohio, supra; Rios v. United States*, 364 U. S. 253 (1960); *Henry v. United States*, 361 U. S. 98 (1959). And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck v. Ohio, supra*, at 97.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is, of course, that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which, taken together, warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people

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in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly, and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but, rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he

is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

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Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives. [Footnote 21]

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is, in fact, carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe,

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though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers, in properly discharging their investigative function, may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v. United States*, 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to

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arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden v. Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus, it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here — the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. [Footnote 22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that, because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that

kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for

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the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. *See Camara v. Municipal Court, supra.*

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man, in the circumstances, would be warranted in the belief that his safety or that of others was in danger. *Cf. Beck v. Ohio*, 379 U. S. 89, 91 (1964); *Brinegar v. United States*, 338 U. S. 160, 174-176 (1949); *Stacey v. Emery*, 97 U. S. 642, 645 (1878). [Footnote 23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. *Cf. Brinegar v. United States supra.*

IV

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception

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and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think, on the facts and circumstances Officer McFadden detailed before the trial judge, a reasonably prudent man would have been warranted in believing petitioner was armed, and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery — which, it is reasonable to assume, would be likely to involve the use of weapons — and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store, he had observed enough to make it quite reasonable to fear that they were armed, and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who, in the course of an investigation, had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the

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scope of governmental action as by imposing preconditions upon its initiation.*Compare Katz v. United States*, 389 U. S. 347, 354-356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States v. Poller*, 43 F.2d 911, 914 (C.A.2d Cir.1930); *see, e.g., Linkletter v. Walker*, 381 U. S. 618, 629-635 (1965); *Mapp v. Ohio*, 367 U. S. 643 (1961); *Elkins v. United States*, 364 U. S. 206, 216-221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden v. Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. *See*

Sibron v. New York, *post*, p. 40, decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. *See Preston v. United States*, 376 U. S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had

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felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

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Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz v. United States*and the concurring opinion in *Warden v. Hayden.*

MR. JUSTICE HARLAN, concurring.

While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is, of course, bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that, while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority could be constitutionally reasonable. Concealed weapons create an immediate

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and severe danger to the public, and though that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us, Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.

The state courts held, instead, that, when an officer is lawfully confronting a possibly hostile person in the line of duty, he has a right, springing only from the necessity of the situation, and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him, but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person

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addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however, make explicit what I think is implicit in affirmance on

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the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

Upon the foregoing premises, I join the opinion of the Court.

MR. JUSTICE WHITE, concurring.

I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked,

but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will follow.

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If none is found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards unless there was "probable cause" [Footnote 1] to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that

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was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; [Footnote 2] and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again. [Footnote 3]

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In other words, police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant, they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry v. United States*, 361 U. S. 98, 100-102:

"The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required."

"* * * *"

"That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant

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for arrest. And that principle has survived to this day. . . ."

". . . It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause. . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U. S. 160, 175.

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

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Until the Fourth Amendment, which is closely allied with the Fifth, [Footnote 4] is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

Footnotes

[Footnote 1]

Ohio Rev.Code § 2923.01 (1953) provides in part that "[n]o person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

[Footnote 2]

Terry and Chilton were arrested, indicted, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time, and sentenced the two men at the same time. They prosecuted their state court appeals together through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

[Footnote 3]

Both the trial court and the Ohio Court of Appeals in this case relied upon such a distinction. *State v. Terry*, 5 Ohio App.2d 122, 125-130, 214 N.E.2d 114, 117-120 (1966). *See also, e.g., People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U.Ill.L.F. 241, 249-254; Warner, The Uniform Arrest Act, 28 Va.L.Rev. 315 (1942); Note, Stop and Frisk in California, 18 Hastings L.J. 623, 629-632 (1967).

[Footnote 4]

People v. Rivera, *supra*, n 3, at 447, 201 N.E.2d at 36, 252 N.Y.S.2d at 464.

[Footnote 5]

The theory is well laid out in the *Rivera* opinion:

"[T]he evidence needed to make the inquiry is not of the same degree of conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . ."

"* * * *"

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately, the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing — senses upon which police customarily act." *People v. Rivera*, 14 N.Y.2d 441, 445, 447, 201 N.E.2d 32, 34, 35, 252 N.Y.S.2d 458, 461, 463 (1964), *cert. denied*, 379 U.S. 978 (1965).

[Footnote 6]

See, e.g., Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J.Crim.L.C. & P.S. 402 (1960).

[Footnote 7]

See n 11, *infra.*

[Footnote 8]

Brief for Respondent 2.

[Footnote 9]

See L. Tiffany, D. McIntyre D. Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 186 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

[Footnote 10]

See Tiffany, McIntyre & Rotenberg, *supra*, n 9, at 100-101; Comment, 47 Nw.U.L.Rev. 493, 497-499 (1952).

[Footnote 11]

The President's Commission on Law Enforcement and Administration of Justice found that, "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "[m]isuse of field interrogations" increases "as more police departments adopt 'aggressive patrol,' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.* at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, *see* Tiffany, McIntyre & Rotenberg, *supra*, n 9, at 47-48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Ibid.*

[Footnote 12]

In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential." *State v. Terry*, 5 Ohio App.2d 122, 130, 214 N.E.2d 114, 120 (1966). *See also, e.g., Ellis v. United States*, 105 U.S.App.D.C. 86, 88, 264 F.2d 372, 374 (1959); Comment, 65 Col.L.Rev. 848, 860, and n. 81 (1965).

[Footnote 13]

Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J.Crim.L.C. & P.S. 481 (1954).

[Footnote 14]

See n 11, *supra*, and accompanying text.

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

[Footnote 15]

These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965), rested squarely on the notion that a "frisk" was not a "search," *see* nn. 3-5*supra*, it was compelled to recognize, in *People v. Taggart*, 20 N.Y.2d 335, 342, 229 N.E.2d 581, 586, 283 N.Y.S.2d 1, 8 (1967), that what it had actually authorized in *Rivera* and subsequent decisions, *see, e.g., People v. Pugach*, 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964), *cert. denied*, 380 U.S. 936 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera* — as an essentially unlimited examination of the person for any and all seizable items — and merely noted that the cases had upheld police intrusions which went far beyond the original limited conception of a "frisk." Thus, principally because it failed to consider limitations upon the scope of searches in individual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People v. Taggart, supra*, at 340, 214 N.E.2d at 584, 283 N.Y.S.2d at 6.

In our view, the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. *Cf. Brinegar v. United States*, 338 U. S. 160, 183 (1949) (Mr. Justice Jackson, dissenting). *Compare Camara v. Municipal Court*, 387 U. S. 523, 537 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," and which turns in part upon a judge-made hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

[Footnote 16]

We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that, up to that point, no intrusion upon constitutionally protected rights had occurred.

[Footnote 17]

See generally Leagre, The Fourth Amendment and the Law of Arrest, 54 J.Crim.L.C. & P.S. 393, 396 403 (1963).

[Footnote 18]

This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. *See Beck v. Ohio*, 379 U. S. 89, 96-97 (1964); *Ker v. California*, 374 U. S. 23, 34-37 (1963); *Wong Sun v. United States*, 371 U. S. 471, 479-484 (1963); *Rios v. United States*, 364 U. S. 253, 261-262 (1960); *Henry v. United States*, 361 U. S. 98, 100-102 (1959); *Draper v. United States*, 358 U. S. 307, 312-314 (1959); *Brinegar v. United States*, 338 U. S. 160, 175-178 (1949); Johnson v. United States, 333 U. S. 10, 15-17 (1948); *United States v. Di Re*, 332 U. S. 581, 593-595 (1948); *Husty v. United States*, 282 U. S. 694, 700-701 (1931); *Dumbra v. United States*, 268 U. S. 435, 441 (1925); *Carroll v. United States*, 267 U. S. 132, 159-162 (1925); *Stacey v. Emery*, 97 U. S. 642,6 45 (1878).

[Footnote 19]

See, e.g., Katz v. United States, 389 U. S. 347, 354-357 (1967); *Berger v. New York*, 388 U. S. 41, 54-60 (1967); *Johnson v. United States*, 333 U. S. 10, 13-15 (1948); *cf. Wong Sun v. United States*, 371 U. S. 471, 479-480 (1963). *See also Aguilar v. Texas*, 378 U. S. 108, 110-115 (1964).

[Footnote 20]

See also cases cited in n 18, *supra.*

[Footnote 21]

Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. *See* Federal Bureau of Investigation, Uniform Crime Reports for the United States — 1966, at 45-48, 152 and Table 51.

The easy availability of firearms to potential criminals in this country is well known, and has provoked much debate. *See, e.g.*, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239-243 (1967). Whatever the merits of gun control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

[Footnote 22]

See generally W. LaFave, Arrest — The Decision to Take a Suspect into Custody 1-13 (1965).

[Footnote 23]

See also cases cited in n. 18, *supra.*

[Footnote 1]

The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed.*See, e.g., 70 U. S.* 3 Wall. 155; *Stacey v. Emery*, 97 U. S. 642; *Director General v. Kastenbaum*, 263 U. S. 25; *Carroll v. United States*, 267 U. S. 132; *United States v. Di Re*, 332 U. S. 581; *Brinegar v. United States*, 338 U. S. 160; *Draper v. United States*, 358 U. S. 307; *Henry v. United States*, 361 U. S. 98. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T]here is no war between the Constitution and common sense," *Mapp v. Ohio*, 367 U. S. 643, 657. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

[Footnote 2]

Ohio Rev.Code § 2923.01.

[Footnote 3]

This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. *See, e.g., Carroll v. United States*, 267 U. S. 132, 156, 161-162; *Johnson v. United States*, 333 U. S. 10, 13-15; *McDonald v. United States*, 335 U. S. 451, 455-456; *Henry v. United States*, 361 U. S. 98; *Wong Sun v. United States*, 371 U. S. 471, 479-484. To give

power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them more authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun v. United States*, 371 U. S. 471, with respect to requirements for arrests without warrants:

"Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained."

Id. at 479. And we said in *Brinegar v. United States*, 338 U. S. 160, 176:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see Johnson v. United States, 333 U. S. 10, 14-15; *Wrightson v. United States*, 95 U.S.App.D.C. 390, 393-394, 222 F.2d 556, 559-560 (1955).

[Footnote 4]

See Boyd v. United States, 116 U. S. 616, 633:

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the Fifth Amendment, and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

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5.14: Hester v. United States 413 US 266 (1973)

OCTOBER TERM, 2000

Syllabus

KYLLO *v.* UNITED STATES

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

No. 99-8508. Argued February 20, 200l-Decided June 11,2001

Suspicious that marijuana was being grown in petitioner Kyllo's home in a triplex, agents used a thermal-imaging device to scan the triplex to determine if the amount of heat emanating from it was consistent with the high-intensity lamps typically used for indoor marijuana growth. The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units. Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing. After Kyllo was indicted on a federal drug charge, he unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea. The Ninth Circuit ultimately affirmed, upholding the thermal imaging on the ground that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home. Even if he had, ruled the court, there was no objectively reasonable expectation of privacy because the thermal imager did not expose any intimate details of Kyllo's life, only amorphous hot spots on his home's exterior.

Held: Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant. Pp. 31-41.

(a) The question whether a warrantless search of a home is reasonable and hence constitutional must be answered no in most instances, but the antecedent question whether a Fourth Amendment "search" has occurred is not so simple. This Court has approved warrantless visual surveillance of a home, see *California* v. *Ciraolo*, 476 U. S. 207, 213, ruling that visual observation is no "search" at all, see *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 234-235, 239. In assessing when a search is not a search, the Court has adapted a principle first enunciated in *Katz* v. *United States*, 389 U. S. 347, 361: A "search" does not occur-even when its object is a house explicitly protected by the Fourth Amendment-unless the individual manifested a subjective expectation of privacy in the searched object, and society is willing to recognize that expectation as reasonable, see, *e. g.*, *California* v. *Ciraolo*, *supra*, at 211. Pp. 31-33.

(b) While it may be difficult to refine the *Katz* test in some instances, in the case of the search of a home's interior-the prototypical and hence most commonly litigated area of protected privacy-there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. Thus, obtaining by sense-enhancing technology any information regarding the home's interior that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman* v. *United States*, 365 U. S. 505, 512, constitutes a search-at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. Pp. 33-35.

(c) Based on this criterion, the information obtained by the thermal imager in this case was the product of a search. The Court rejects the Government's argument that the thermal imaging must be upheld because it detected only heat radiating from the home's external surface. Such a mechanical interpretation of the Fourth Amendment was rejected in *Katz*, where the eavesdropping device in question picked up only sound waves that reached the exterior of the phone booth to which it was attached. Reversing that approach would leave the homeowner at the mercy of advancing technology-including imaging technology that could discern all human activity in the home. Also rejected is the Government's contention that the thermal imaging was constitutional because it did not detect "intimate details." Such an approach would be wrong in principle because, in the sanctity of the home, *all* details are intimate details. See, *e. g.*, *United States* v. *Karo*, 468 U. S. *705; Dow Chemical*, *supra*, at 238, distinguished. It would also be impractical in application, failing to provide a workable accommodation between law enforcement needs and Fourth Amendment interests. See *Oliver* v. *United States*, 466 U. S. 170, 181. Pp. 35-40.

(d) Since the imaging in this case was an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant was supported by probable cause-and if not, whether there is any other basis for supporting admission of that evidence. P. 40.

SCALIA, J., delivered the opinion of the Court, in which SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post,* p. 41.

Kenneth Lerner, by appointment of the Court, 531 U. S. 955, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were former Solicitor General Waxman, Assistant Attorney General Robinson, Irving L. Gornstein, and Deborah Watson. *

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon. Indoor marijuana growth typically requires highintensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth-black

*Briefs of *amici curiae* urging reversal were filed for the Liberty Project by *Julie M. Carpenter;* and for the National Association of Criminal Defense Lawyers et al. by *James* J. *Tomkovicz, Lisa B. Kemler,* and *Steven R. Shapiro.*

is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U. s. C. § 841(a)(1). He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Supp. App. to Pet. for Cert. 39-40. Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, 140 F.3d 1249 (1998), but that

opinion was withdrawn and the panel (after a change in composition) affirmed, 190 F.3d 1041 (1999), with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, id., at 1046, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall," id., at 1047. We granted certiorari. 530 U. S. 1305 (2000).

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See *Illinois* v. *Rodriguez*, 497 U. S. 177, 181 (1990); *Payton* v. *New York*, 445 U. S. 573, 586 (1980).

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, *e. g.*, *Goldman* v. *United States*, 316 U. S. 129, 134-136 (1942); *Olmstead* v. *United States*, 277 U. S. 438, 464-466 (1928). Cf. *Silverman* v. *United States*, *supra*, at 510-512 (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because" 'the

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eye cannot by the laws of England be guilty of a trespass.'" *Boyd* v. *United States*, 116 U. S. 616, 628 (1886) (quoting *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, see *Rakas* v. *III inois*, 439 U. S. 128, 143 (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search" 1 despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See *Minnesota* v. *Carter*, 525 U. S. 83, 104 (1998) (BREYER, J., concurring in judgment). But in fact we have held that visual observation is no "search" at allperhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. See *Dow Chemical Co.* v. *United States*, *476* U. S. 227, 234-235, 239 (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz* v. *United States*, 389 U. S. 347 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth-a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the

1 When the Fourth Amendment was adopted, as now, to "search" meant "[tJo look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

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Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id.*, at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See id., at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur-even when the explicitly protected location of a *house* is concerned-unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Ciraolo*, *supra*, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, *Smith* v. *Maryland*, 442 U. S. 735, 743744 (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo*, *supra; Florida* v. *Riley*, 488 U. S. 445 (1989).

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow* Chemical, we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U. S., at 237, n. 4 (emphasis in original).

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been

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entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. See *Ciraolo*, *supra*, at 215. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

The *Katz* test-whether the individual has an expectation of privacy that society is prepared to recognize as reasonable-has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(d), pp. 393-394 (3d ed. 1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rev. 173, 188; *Carter*, *supra*, at 97 (SCALIA, J., concurring). But see *Rakas*, *supra*, at 143-144, n.12. While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes-the prototypical and hence most commonly litigated area of protected privacythere is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by senseenhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman*, 365 U. S., at 512, constitutes a searchat least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the

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information obtained by the thermal imager in this case was the product of a search.2

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house," Brief for United States 26. The dissent makes this its leading point, see *post*, at 41, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house-and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technologyincluding imaging technology that could discern all human

2 The dissent's repeated assertion that the thermal imaging did not obtain information regarding the interior of the home, *post*, at 43, 44 (opinion of STEVENS, J.), is simply inaccurate. A thermal imager reveals the relative heat of various rooms in the home. The dissent may not find that information particularly private or important, see *post*, at 43-44, 45, 4950, but there is no basis for saying it is not information regarding the interior of the home. The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home-for example, by observing snowmelt on the roof, *post*, at 43-is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. The police might, for example, learn how many people are in a particular house by setting up year-round surveillance; but that does not make breaking and entering to find out the same information lawful. In any event, on the night of January 16, 1992, no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging.

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activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.3 The dissent's reliance on the distinction between "off-the-wall" and "through-the-wall" observation is entirely incompatible with the dissent's belief, which we discuss below, that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal-imaging devices continue

to measure heat "off-the-wall" rather than "through-the-wall"; the dissent's disapproval of those more sophisticated thermalimaging devices, see *post*, at 49, is an acknowledgment that there is no substance to this distinction. As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, see *post*, at 44, that would validate even the "through-the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (i. *e.*, the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States* v. *Karo*, 468 U. S. 705 (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police ac-

3 The ability to "see" through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a "RadarBased Through-the-Wall Surveillance System," "Handheld Ultrasound Through the Wall Surveillance," and a "Radar Flashlight" that "will enable law enforcement officers to detect individuals through interior building walls." www.nlectc.org/techproj/ (visited May 3, 2001). Some devices may emit low levels of radiation that travel "through-the-wall," but others, such as more sophisticated thermal-imaging devices, are entirely passive, or "off-the-wall" as the dissent puts it.

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tivity was held to be a search, and the search was held unlawfu1.4

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas," Brief for United States 22. It points out that in *Dow Chemical* we observed that the enhanced aerial photography did not reveal any "intimate details." 476 U. S., at 238. *Dow Chemical*, however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U. S., at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo*, supra, the only thing detected was a can of ether in the

4 The dissent asserts, *post*, at 44-45, n. 3, that we have misunderstood its point, which is not that inference *insulates* a search, but that inference alone is *not* a search. If we misunderstood the point, it was only in a good-faith effort to render the point germane to the case at hand. The issue in this case is not the police's allegedly unlawful inferencing, but their allegedly unlawful thermal-imaging measurement of the emanations from a house. We say such measurement is a search; the dissent says it is not, because an inference is not a search. We took that to mean that, since the technologically enhanced emanations had to be the basis of inferences before anything inside the house could be known, the use of the emanations could not be a search. But the dissent certainly knows better than we what it intends. And if it means only that an inference is not a search, we certainly agree. That has no bearing, however, upon whether hi-tech measurement of emanations from a house is a search.

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home; and in *Arizona* v. *Hicks*, 480 U. S. 321 (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm-or even how relatively warm-Kyllo was heating his residence.5

Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment," *Oliver* v. *United States*, 466 U. S. 170, 181 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes-which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath-a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that

someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which

5The Government cites our statement in *California* v. *Ciraolo*, *476* U. S. 207 (1986), noting apparent agreement with the State of California that aerial surveillance of a house's curtilage could become "'invasive'" if "'modern technology'" revealed "'those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" *Id.*, at 215, n. 3 (quoting Brief for State of California 14-15). We think the Court's focus in this secondhand dictum was not upon intimacy but upon otherwise-imperceptibility, which is precisely the principle we vindicate today.

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home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up "intimate" detailsand thus would be unable to know in advance whether it is constitutional.

The dissent's proposed standard-whether the technology offers the "functional equivalent of actual presence in the area being searched," *post*, at 47-would seem quite similar to our own at first blush. The dissent concludes that *Katz* was such a case, but then inexplicably asserts that if the same listening device only revealed the volume of the conversation, the surveillance would be permissible, *post*, at 49-50. Yet if, without technology, the police could not discern volume without being actually present in the phone booth, JUSTICE STEVENS should conclude a search has occurred. Cf. *Karo*, 468 U. S., at 735 (STEVENS, J., concurring in part and dissenting in part) ("I find little comfort in the Court's notion that no invasion of privacy occurs until a listener obtains some significant information by use of the device …. A bathtub is a less private area when the plumber is present even if his back is turned"). The same should hold for the interior heat of the home if only a person present in the home could discern the heat. Thus the driving force of the dissent, despite its recitation of the above standard, appears to be a distinction among different types of information-whether the "homeowner would even care if anybody noticed," *post*, at 50. The dissent offers no practical guidance for the application of this standard, and for reasons already discussed, we believe there can be none. The people in their houses, as well as the police, deserve more precision.6

6 The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor. See *post*, at 47. That quarrel,

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We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U. S., at 590. That line, we think, must be not only firm but also brightwhich requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll* v. *United States*, *267* U. S. 132, 149 (1925).

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause-and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

however, is not with us but with this Court's precedent. See *Ciraolo*, supra, at 215 ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet"). Given that we can quite confidently say that thermal imaging is not "routine," we decline in this case to reexamine that factor.

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

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JusTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy.l Moreover, I believe that the supposedly "bright-line" rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

I

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from

1 After an evidentiary hearing, the District Court found:

"[T]he use of the thermal imaging device here was not an intrusion into Kyllo's home. No intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within the home. The device used cannot penetrate walls or windows to reveal conversations or human activities. The device recorded only the heat being emitted from the home." Supp. App. to Pet. for Cert. 40.

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our Fourth Amendment jurisprudence. One of those core principles, of course, is that "searches and seizures *inside a home* without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U. S. 573, 586 (1980) (emphasis added). But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. See id., at 586-587.2 Whether that property is residential or commercial, the basic principle is the same: "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986) (quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967)); see *Florida* v. *Riley*, 488 U. S. 445, 449-450 *(1989); California* v. *Greenwood*, 486 U. S. 35, 40-41 (1988); *Dow Chemical Co.* v. *United States*, 476 U. S. 227, 235-236 *(1986); Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). That is the principle implicated here.

While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," *ante*, at 38-40; see *ante*, at 36, n. 3, this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted

2 Thus, for example, we have found consistent with the Fourth Amendment, even absent a warrant, the search and seizure of garbage left for collection outside the curtilage of a home, *California* v. *Greenwood*, *486* U. S. 35 (1988); the aerial surveillance of a fenced-in backyard from an altitude of 1,000 feet, *California* v. *Ciraolo*, 476 U. S. 207 (1986); the aerial observation of a partially exposed interior of a residential greenhouse from 400 feet above, *Florida* v. *Riley*, 488 U. S. 445(1989); the aerial photography of an industrial complex from several thousand feet above, *Dow Chemical Co.* v. *United States*, 476 U. S. 227 (1986); and the observation of smoke emanating from chimney stacks, *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.*, 416 U. S. 861 (1974).

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from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans

show, see Appendix, *infra*, no details regarding the interior of petitioner's home were revealed. Unlike an x-ray scan, or other possible "throughthe-wall" techniques, the detection of infrared radiation emanating from the home did not accomplish "an unauthorized physical penetration into the premises," *Silverman* v. *United States*, 365 U. S. 505, 509 (1961), nor did it "obtain information that it could not have obtained by observation from outside the curtilage of the house," *United States* v. *Karo*, 468 U. S. 705, 715 (1984).

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

Thus, the notion that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their … houses" against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or

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in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U. S., at 361 (Harlan, J., concurring).

To be sure, the homeowner has a reasonable expectation of privacy concerning what takes place within the home, and the Fourth Amendment's protection against physical invasions of the home should apply to their functional equivalent. But the equipment in this case did not penetrate the walls of petitioner's home, and while it did pick up "details of the home" that were exposed to the public, *ante*, at 38, it did not obtain "any information regarding the *interior* of the home," *ante*, at 34 (emphasis added). In the Court's own words, based on what the thermal imager "showed" regarding the outside of petitioner's home, the officers "concluded" that petitioner was engaging in illegal activity inside the home. *Ante*, at 30. It would be quite absurd to characterize their thought processes as "searches," regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that "the lady of the house [was taking] her daily sauna and bath." *Ante*, at 38. In either case, the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage, see *California* v. *Greenwood*, 486 U. S. 35 (1988), or pen register data, see *Smith* v. *Maryland*, 442 U. S. 735 (1979), or, as in this case, subpoenaed utility records, see 190 F.3d 1041, 1043 (CA9 1999). For the first time in its history, the Court assumes that an inference can amount to a Fourth Amendment violation. See *ante*, at 36-37.3

3 Although the Court credits us with the "novel proposition that inference insulates a search," *ante*, at 36, our point simply is that an inference cannot *be* a search, contrary to the Court's reasoning. See *supra* this page. Thus, the Court's use of *United States* v. *Karo*, 468 U. S. 705

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Notwithstanding the implications of today's decision, there is a strong public interest in avoiding constitutional litigation over the monitoring of emissions from homes, and over the inferences drawn from such monitoring. Just as "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," *Greenwood*, 486 U. S., at 41, so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community. In my judgment, monitoring such emissions with "sense-enhancing technology," *ante*, at 34, and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the

rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 122 (1984) ("The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well

(1984), to refute a point we do not make underscores the fact that the Court has no real answer (either in logic or in law) to the point we do make. Of course, *Karo* itself does not provide any support for the Court's view that inferences can amount to unconstitutional searches. The illegality in that case was "the monitoring of a beeper in a private residence" to obtain information that "could not have [been] obtained by observation from outside," id., at 714-715, rather than any thought processes that flowed from such monitoring.

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justified, that certain facts will not come to the attention of the authorities"). The interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home," *United States* v. *United States Dist. Court for Eastern Dist. of Mich., 407* U. S. 297, 313 (1972), and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.4

II

Instead of trying to answer the question whether the use of the thermal imager in this case was even arguably unreasonable, the Court has fashioned a rule that is intended to provide essential guidance for the day when "more sophisticated systems" gain the "ability to 'see' through walls and other opaque barriers." *Ante*, at 36, and n. 3. The newly minted rule encompasses "obtaining [1] by senseenhancing technology [2] any information regarding the interior of the home [3] that could not otherwise have been obtained without physical intrusion into a constitutionally protected area … [4] at least where (as here) the technology in question is not in general public use." *Ante*, at 34 (internal quotation marks omitted). In my judgment, the

4 This view comports with that of all the Courts of Appeals that have resolved the issue. See 190 F.3d 1041 *(CA9* 1999); *United States* v. *Robinson*, 62 F.3d 1325 (CAll 1995) (upholding warrantless use of thermal imager); *United States* v. *Myers*, 46 F.3d 668 *(CA7* 1995) (same); *United States* v. *Ishmael*, 48 F.3d 850 *(CA5* 1995) (same); *United States* v. *Pinson*, 24 F.3d 1056 *(CA8* 1994) (same). But see *United States* v. *Cusumano*, 67 F.3d 1497 (CAW 1995) (warrantless use of thermal imager violated Fourth Amendment), vacated and decided on other grounds, 83 F.3d 1247 (CAW 1996) (en bane).

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Court's new rule is at once too broad and too narrow, and is not justified by the Court's explanation for its adoption. As I have suggested, I would not erect a constitutional impediment to the use of sense-enhancing technology unless it provides its user with the functional equivalent of actual presence in the area being searched.

Despite the Court's attempt to draw a line that is "not only firm but also bright," *ante*, at 40, the contours of its new rule are uncertain because its protection apparently dissipates as soon as the relevant technology is "in general public use," *ante*, at 34. Yet how much use is general public use is not even hinted at by the Court's opinion, which makes the somewhat doubtful assumption that the thermal imager used in this case does not satisfy that criterion.5 In any event, putting aside its lack of clarity, this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule, *ibid.*, is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States* v. *Place*, 462 U. S. 696, 707 (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the Fourth Amendment," and it must follow that sense-enhancing equipment that identifies nothing but illegal

5 The record describes a device that numbers close to a thousand manufactured units; that has a predecessor numbering in the neighborhood of 4,000 to 5,000 units; that competes with a similar product numbering from 5,000 to 6,000 units; and that is

"readily available to the public" for commercial, personal, or law enforcement purposes, and is just an 800number away from being rented from "half a dozen national companies" by anyone who wants one. App. 18. Since, by virtue of the Court's new rule, the issue is one of first impression, perhaps it should order an evidentiary hearing to determine whether these facts suffice to establish "general public use."

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activity is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule, as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive, even if the devices (like the dog sniffs) are "so limited both in the manner in which" they obtain information and "in the content of the information" they reveal. *Ibid.* If nothing more than that sort of information could be obtained by using the devices in a public place to monitor emissions from a house, then their use would be no more objectionable than the use of the thermal imager in this case.

The application of the Court's new rule to "any information regarding the interior of the home," *ante*, at 34, is also unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the interior of a home should not provide it with constitutional protection. See *supra*, at 47 and this page. The criterion, moreover, is too sweeping in that information "regarding" the interior of a home apparently is not just information obtained through its walls, but also information concerning the outside of the building that could lead to (however many) inferences "regarding" what might be inside. Under that expansive view, I suppose, an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza might conclude that its interior is now occupied by someone who likes pizza, and by doing so the officer would be guilty of conducting an unconstitutional "search" of the home.

Because the new rule applies to information regarding the "interior" of the home, it is too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home. If such equipment

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did provide its user with the functional equivalent of access to a private place-such as, for example, the telephone booth involved in *Katz*, or an office building-then the rule should apply to such an area as well as to a home. See *Katz*, *389* U. S., at 351 ("[T]he Fourth Amendment protects people, not places").

The final requirement of the Court's new rule, that the information "could not otherwise have been obtained without physical intrusion into a constitutionally protected area," *ante*, at 34 (internal quotation marks omitted), also extends too far as the Court applies it. As noted, the Court effectively treats the mental process of analyzing data obtained from external sources as the equivalent of a physical intrusion into the home. See *supra*, at 44. As I have explained, however, the process of drawing inferences from data in the public domain should not be characterized as a search.

The two reasons advanced by the Court as justifications for the adoption of its new rule are both unpersuasive. First, the Court suggests that its rule is compelled by our holding in *Katz*, because in that case, as in this, the surveillance consisted of nothing more than the monitoring of waves emanating from a private area into the public domain. See *ante*, at 35. Yet there are critical differences between the cases. In *Katz*, the electronic listening device attached to the outside of the phone booth allowed the officers to pick up the content of the conversation inside the booth, making them the functional equivalent of intruders because they gathered information that was otherwise available only to someone inside the private area; it would be as if, in this case, the thermal imager presented a view of the heat-generating activity inside petitioner's home. By contrast, the thermal imager here disclosed only the relative amounts of heat radiating from the house; it would be as if, in *Katz*, the listening device disclosed only the rela-

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tive volume of sound leaving the booth, which presumably was discernible in the public domain.6 Surely, there is a significant difference between the general and well-settled expectation that strangers will not have direct access to the contents of private communications, on the one hand, and the rather theoretical expectation that an occasional homeowner would even care if anybody noticed the relative amounts of heat emanating from the walls of his house, on the other. It is pure hyperbole for the Court to

suggest that refusing to extend the holding of *Katz* to this case would leave the homeowner at the mercy of "technology that could discern all human activity in the home." *Ante*, at 35-36.

Second, the Court argues that the permissibility of "through-the-wall surveillance" cannot depend on a distinction between observing "intimate details" such as "the lady of the house [taking] her daily sauna and bath," and noticing only "the nonintimate rug on the vestibule floor" or "objects no smaller than 36 by 36 inches." *Ante*, at 37, 3839. This entire argument assumes, of course, that the thermal imager in this case could or did perform "through-thewall surveillance" that could identify any detail "that would previously have been unknowable without physical intrusion." *Ante*, at 39-40. In fact, the device could not, see n. 1, *supra*, and did not, see Appendix, *infra*, enable its user to identify either the lady of the house, the rug on the vestibule floor, or anything else inside the house, whether smaller or larger than 36 by 36 inches. Indeed, the vague thermal images of petitioner's home that are reproduced in the Appendix were submitted by him to the District Court as part of an expert report raising the question whether the device could even take "accurate, consistent infrared images" of the

6 The use of the latter device would be constitutional given Smith v.

Maryland, 442 U. S. 735, 741 (1979), which upheld the use of pen registers to record numbers dialed on a phone because, unlike "the listening device employed in *Katz* … pen registers do not acquire the *contents* of communications."

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outside of his house. Defendant's Exh. 107, p. 4. But even if the device could reliably show extraordinary differences in the amounts of heat leaving his home, drawing the inference that there was something suspicious occurring inside the residence-a conclusion that officers far less gifted than Sherlock Holmes would readily draw-does not qualify as "through-the-wall surveillance," much less a Fourth Amendment violation.

III

Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.

I respectfully dissent.

[Appendix to opinion of STEVENS, J., follows this page.]

Appendix to opinion of STEVENS, J.

APPENDIX TO OPINION OF STEVENS, J. (Images and text reproduced from defendant's exhibit 107) Top left: Infrared image of a video frame from the videotape submitted as evidence in this case. The thermogram indicates the suspect house as it appeared with the Gain and contrast in its default setting. Only the outline of the house is visible. The camera used was the Thermovision 210. Top Right: Infrared image of a subsequent videoframe taken from the videotape. The gain and contrast settings have been increased in order to make the walls and roof of the structure appear hotter than what it actually is.



Bottom Left: Infrared image of the opposite side of the suspects house. The thermogram is also taken from the same videotape. The camera settings are in the default mode and the outline of the house is barely visible. Only the hot electrical transformer and the street light are identifiable.

Bottom Right: The same image, but with the gain and contrast increased. This change in camera settings cause any object to appear hotter than what it actually is. The arrow indicates the overloading of an area immediately around a hot object in this case the electrical transformer and the streetlight. This overloading of the image is an inherent design flaw in the camera itself.

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5.15: Arizona v. Gant 556 U.S. 332 (2009)

OCTOBER TERM, 2008
ARIZONA V. GANT

SUPREME COURT OF THE UNITED STATES

ARIZONA *v.* GANT

certiorari to the supreme court of arizona

No. 07–542. Argued October 7, 2008—Decided April 21, 2009

Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court distinguished *New York* v. *Belton*, 453 U. S. 454—which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest—on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel* v. *California*, 395 U. S. 752, requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search unreasonable.

Held: Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. Pp. 5–18.

(a) Warrantless searches "are *per se* unreasonable," "subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357. The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U. S., at 763. This Court applied that exception to the automobile context in *Belton*, the holding of which rested in large part on the assumption that articles inside a vehicle's passenger compartment are "generally … within 'the area into which an arrestee might reach.' " 453 U. S., at 460. Pp. 5–8.

(b) This Court rejects a broad reading of *Belton* that would permit a vehicle search incident to a recent occupant's arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying *Chimel*'s exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from *Chimel*, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton* v. *United States*, 541 U. S. 615, 632 (Scalia, J., concurring in judgment). Neither *Chimel*'s reaching-distance rule nor *Thornton*'s allowance for evidentiary searches authorized the search in this case. In contrast to *Belton*, which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. Belton and Thornton were both arrested for drug offenses, but Gant was arrested for driving with a suspended license—an offense for which police could not reasonably expect to find evidence in Gant's car. Cf. *Knowles* v. *Iowa*, 525 U. S. 113, 118. The search in this case was therefore unreasonable. Pp. 8–11.

(c) This Court is unpersuaded by the State's argument that its expansive reading of *Belton* correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The State seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of *Belton* and its importance to law enforcement interests. A narrow reading of *Belton* and *Thornton*, together with this Court's other Fourth Amendment decisions, *e.g.*, *Michigan* v. *Long*, 463 U. S. 103, and *United States* v. *Ross*, 456 U. S. 798, permit an officer to search a vehicle when safety or evidentiary concerns demand. Pp. 11–14.

(d) *Stare decisis* does not require adherence to a broad reading of *Belton.* The experience of the 28 years since *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded, and blind adherence to its faulty assumption would authorize myriad unconstitutional searches. Pp. 15–18.

216 Ariz. 1, 162 P. 3d 640, affirmed.

Stevens, J., delivered the opinion of the Court, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Scalia, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Kennedy, J., joined, and in which Breyer, J., joined except as to Part II–E.

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CHAPTER OVERVIEW

6: Wiretapping- What is permissible?

6.1: Olmstead v. United Stated 277 US 438 (1928)

6.2: Berger v. NY 388 US 41 (1967)

6.3: Katz v. United states 389 US 347 (1967)

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6.1: Olmstead v. United Stated 277 US 438 (1928)

U.S. Supreme Court

Olmstead v. United States, 277 U.S. 438 (1928)

Olmstead v. United States

Nos. 493, 532 and 533

Argued February 20, 21, 1928

Decided June 4, 1928

277 U.S. 438

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

1. Use in evidence in a criminal trial in a federal court of an incriminating telephone conversation voluntarily conducted by the accused and secretly overheard from a tapped wire by a government officer does not compel the accused to be a witness against himself in violation of the Fifth Amendment. P. 277 U. S. 462.

2. Evidence of a conspiracy to violate the Prohibition Act was obtained by government officers by secretly tapping the lines of a telephone company connected with the chief office and some of the residences of the conspirators, and thus clandestinely overhearing and recording their telephonic conversations concerning the conspiracy and in aid of its execution. The tapping connections were made in the basement of a large office building and on public streets, and no trespass was committed upon any property of the defendants. *Held*, that the obtaining of the evidence and its use at the trial did not violate the Fourth Amendment. Pp. 457- 277 U. S. 466.

3. The principle of liberal construction applied to the Amendment to effect its purpose in the interest of liberty will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers, and effects," or so applying "searches and seizures" as to forbid hearing or sight. P. 277 U. S. 465.

4. The policy of protecting the secrecy of telephone messages by making them, when intercepted, inadmissible as evidence in federal criminal trials may be adopted by Congress through legislation, but it is not for the courts to adopt it by attributing an enlarged and unusual meaning to the Fourth Amendment. P. 277 U. S. 465.

5. A provision in an order granting certiorari limiting the review to a single specific question does not deprive the Court of jurisdiction to decide other questions presented by the record. P. 277 U. S. 466.

6. The common law of evidence having prevailed in the State of Washington since a time antedating her transformation from a Territory to a State, those rule apply in the trials of criminal cases in the federal courts sitting in that State. P. 277 U. S. 466.

7. Under the common law, the admissibility of evidence is not affected by the fact of its having been obtained illegally. P. 277 U. S. 467.

8. The rule excluding from the federal Courts evidence of crime procured by government officers by methods forbidden by the Fourth and Fifth Amendments is an exception to the common law rule. *Id.*

9. Without the sanction of an Act of Congress, federal courts have no discretion to exclude evidence, the admission of which is not unconstitutional, because it was unethically procured. P. 277 U. S. 468.

10. The statute of Washington, adopted in 1909, making the interception of telephone messages a misdemeanor cannot affect the rules of evidence applicable in federal courts in criminal cases. *Id.*

19 F. (2d) 842, 848, 850, affirmed.

CERTIORARI, 276 U.S. 609, to judgments of the Circuit Court of Appeals affirming convictions of conspiracy to violate the Prohibition Act. *See* 5 F.2d 712; 7 F.2d 756, 760. The order granting certiorari confined the hearing to the question whether the use in evidence of private telephone conversations, intercepted by means of wiretapping, violated the Fourth and Fifth Amendments.

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

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F.2d 842 and 850. The petition in No. 493 was filed August 30, 1927; in Nos. 532 and 533, September 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully.

It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month, sales amounted to $176,000; the aggregate for a year must have exceeded two millions of dollars.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; eleven others contributed $1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the “stuff,” to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches already referred to

One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room — the ” bull pen.” The call numbers of the telephones were given to those known to be likely customers. At times, the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides —

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

And the Fifth: “No person . . . shall be compelled, in any criminal case, to be a witness against himself.”

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

Boyd v. United States, 116 U. S. 616, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against thirty-five cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in twenty-nine cases previously imported. The fifth section of the Act of June 22, 1874, provided that, in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice belonging to the defendant would tend to prove any allegation made by the United States, might, by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and, if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This Act had succeeded the Act of 1867, which provided that, in such cases, the District Judge, on affidavit of any person interested, might issue a warrant to the marshal to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the Act of 1863 of a similar tenor, except that it directed the warrant to the collector, instead of the marshal. The United States Attorney followed the Act of 1874 and compelled the production of the invoice.

The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 116 U. S. 621): “But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.”

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that, by refusal, he should be conclusively held to admit the incriminating character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is *Weeks v. United States*, 232 U. S. 383 — a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest, other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant’s room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and, on introduction of the papers, contended that the search without warrant was a violation of the Fourth and Fifth Amendments, and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and, upon making seasonable application, he was entitled to have them restored, and that, by permitting their use upon the trial, the trial court erred.

The opinion cited with approval language of Mr. Justice Field in *Ex parte Jackson*, 96 U. S. 727, 96 U. S. 733, saying that the Fourth Amendment, as a principle of protection, was applicable to sealed letters and packages in the mail, and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In *Silverthorne Lumber Company v. United States*, 251 U. S. 385, the defendants were arrested at their homes and detained in custody. While so detained, representatives of the Government, without authority, went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the District Attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

"Thus, the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned, or at all events ratified, the whole performance."

And it held that the illegal character of the original seizure characterized the entire proceeding, and, under the *Weeks* case, the seized papers must be restored.

In *Amos v. United States*, 255 U. S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial, he presented a petition asking that private property seized in a search of his house and store "within his curtilage" without warrant should be returned. This was denied. A woman who claimed to be his wife was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered, and found whiskey. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whiskey and to exclude the testimony was error.

In *Gouled v. The United States*, 255 U. S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty, and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direction of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the U.S. Army, pretending to make a friendly call on him, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents. One of these belonging to Gouled, was delivered to the United States Attorney, and by him introduced in evidence. When produced, it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

Agnello v. United States, 269 U. S. 20, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest, and seized there without a warrant. Under such circumstances, the seizure could not be justified as incidental to the arrest.

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones, They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore, many had supposed that, under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. This was held by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Dana*, 2 Metcalf, 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in *Entick v. Carrington*, 19 Howell State Trials, 1029. Mr. Justice Bradley made effective use of this case in *Boyd v. United States*. But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the *Boyd* case. This appears too in the *Weeks* case, in the *Silverthorne* case, and in the *Amos* case.

Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the record. A representative of the

Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant, and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

The Amendment itself shows that the search is to be of material things — the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.

It is urged that the language of Mr. Justice Field in *Ex parte Jackson*, already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wiretapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Post Office Department and the relations between the Government and those who pay to secure protection of their sealed letters. *See* Revised Statutes, §§ 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and § 3929, which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants.

By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

This Court, in *Carroll v. United States*, 267 U. S. 132, 267 U. S. 149, declared:

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Justice Bradley, in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Hester v. United States, 265 U. S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house, and saw him come out and hand a bottle of whiskey to another was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. *United States v. Lee*, 274 U. S. 559, 274 U. S. 563; *Eversole v. State*, 106 Tex.Cr. 567.

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here, those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below — that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical, and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection, we shall deal with it in both of its phases.

While a Territory, the English common law prevailed in Washington, and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently, are those of the common law. *United States v. Reid,* 12 How. 361,

53 U. S. 363, 53 U. S. 366; *Logan v. United States*, 144 U. S. 263, 144 U. S. 301; *Rosen v. United States*, 245 U. S. 467; *Withaup v. United States*, 127 Fed. 530, 534; *Robinson v. United States*, 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence, is not affected by the illegality of the means by which it was obtained. Professor Greenleaf, in his work on evidence, vol. 1, 12th ed., by Redfield, § 254(a) says:

"It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question."

Mr. Jones, in his work on the same subject, refers to Mr. Greenleaf's statement and says:

"Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute."

Vol. 5, § 2075, note 3.

The rule is supported by many English and American cases cited by Jones in vol. 5, 2075, note 3, and § 2076, note 6, and by Wigmore, vol. 4, § 2183. It is recognized by this Court, in *Adams v. New York*, 192 U. S. 585. The *Weeks* case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. *People v. Defore*, 242 N.Y. 13. But those who do treat it as an exception to the general common law rule, and required by constitutional limitations. *Hughes v. State*, 145 Tenn. 544, 551, 566; *State v. Wills*, 91 W.Va. 659, 677; *State v. Slamon*, 73 Vt. 212, 214, 215; *Gindrat v. People*, 138 Ill. 103, 111; *People v. Castree*, 311 Ill. 392, 396, 397; *State v. Gardner*, 77 Mont. 8, 21; *State v. Fahn*, 53 N.Dak. 203, 210. The common law rule must apply in the case at bar. Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence the admission of which is not unconstitutional because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to, such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 26518) that:

"Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor"

This statute does not declare that evidence obtained by such interception shall be inadmissible, and, by the common law already referred to, it would not be. *People v. McDonald*, 177 App.Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot affect the rules of evidence applicable

in courts of the United States in criminal cases. Chief Justice Taney, in *United States v. Reid*, 12 How. 361, 53 U. S. 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another."

See also Withaup v. United States, 127 Fed. 530, 534.

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

Affirmed.

MR. JUSTICE HOLMES:

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. *Gooch v. Oregon Short line R.R. Co.*, 258 U. S. 22, 258 U. S. 24. But I think, as MR. JUSTICE BRANDEIS says, that, apart from the Constitution, the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and, to that end, that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crime, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that, in future it will pay for the fruits. We have to choose, and, for my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed. *See Silverthorne Lumber Co. v. United States*, 251 U. S. 385. And if all that I have said so far be accepted, it makes no difference that, in this case, wiretapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that, in a criminal proceeding, the Court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks v. United States*, 232 U. S. 383, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

MR. JUSTICE BRANDEIS, dissenting.

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wiretapping was employed on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wiretapping on the ground that the Government's wiretapping constituted an unreasonable search and seizure in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that, if wiretapping can be deemed a search and seizure within the Fourth Amendment, such wiretapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 17 U. S. 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. *See Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 96 U. S. 9; *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135; *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163; *Brooks v. United States*, 267 U. S. 432. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 272 U. S. 387; *Buck v. Bell*, 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said, in *Weems v. United States*, 217 U. S. 349, 217 U. S. 373:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify — a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life — a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. *Boyd v. United States*, 116 U. S. 616, 116 U. S. 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, "in the application of a constitution, our contemplation cannot be only of what has, been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. [Footnote 1] To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." [Footnote 2] Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in *Boyd v. United States*, 116 U. S. 616, 116 U. S. 627-630, a case that will be remembered as long as civil liberty lives in the United States. This Court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in *Entick v. Carrington*, 19 Howell's State Trials 1030:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal

security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other. [Footnote 3]"

In *Ex parte Jackson*, 96 U. S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:

"True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference."

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.

Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in *Gouled v. United States*, 255 U. S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment, rather than at its underlying purpose, would hold, as this Court did in *Ex parte Jackson*, 96 U. S. 727, 96 U. S. 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: "No person shall be compelled in any criminal case to be a witness against himself." Yet we have held not only that the protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 562, 586, but that:

"[i]t applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

McCarthy v. Arndsten, 266 U. S. 34, 266 U. S. 40. The narrow language of the Amendment has been consistently construed in the light of its object,

"to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

Counselman v. Hitchcock, *supra*, p. 142 U. S. 562.

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; [Footnote 4] whether the paper when taken by the federal officers was in the home, [Footnote 5] in an office, [Footnote 6] or elsewhere; [Footnote 7] whether the taking was effected by force, [Footnote 8] by fraud, [Footnote 9] or in the orderly process of a court's procedure. [Footnote 10] From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined — as where they are testified to by a federal officer who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere [Footnote 11] — any such use constitutes a violation of the Fifth Amendment.

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of

his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding. [Footnote 12]

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wiretapping is a crime. [Footnote 13] Pierce's Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. *Compare Harkin v. Brundage*, 276 U. S. 36, *id.*, 604.

The situation in the case at bar differs widely from that presented in *Burdeau v. McDowell*, 256 U. S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wiretapping and of facts ascertained thereby. [Footnote 14] There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

As Judge Rudkin said below:

"Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States."

The Eighteenth Amendment has not, in terms, empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. *Compare Maryland v. Soper*, 270 U. S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction. [Footnote 15]

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation, for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. *Compare The Paquete Habana*, 189 U. S. 453,189 U. S. 465; *O'Reilly deCamara v. Brooke*, 209 U. S. 45, 209 U. S. 52; *Dodge v. United States*, 272 U. S. 530, 272 U. S. 532; *Gambino v. United States*, 275 U. S. 310. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. [Footnote 16] The maxim of unclean hands comes from courts of equity. [Footnote 17] But the principle prevails also in courts of law. Its common

application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling. [Footnote 18]

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. [Footnote 19] Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure, as well. [Footnote 20] A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. [Footnote 21] It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

[Footnote 1]

Otis' Argument against Writs of Assistance. *See* Tudor, James Otis, p. 66; John Adams, Works, Vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, Vol. II, p 95.

[Footnote 2]

Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.

[Footnote 3]

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 154 U. S. 479, the statement made in the *Boyd* case was repeated, and the Court quoted the statement of Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 250:

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

The *Boyd* case has been recently reaffirmed in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, in *Gouled v. United States*, 255 U. S. 298, and in *Byars v. United States*, 273 U. S. 28.

[Footnote 4]

Gouled v. United States, 255 U. S. 298.

[Footnote 5]

Weeks v. United States, 232 U. S. 383; *Amos v. United States*, 255 U. S. 313; *Agnello v. United States*, 269 U. S. 20; *Byars v. United States*, 273 U. S. 28.

[Footnote 6]

Boyd v. United States, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43, 201 U. S. 70; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Gouled v. United States*, 255 U. S. 298; *Marron v. United States*, 275 U. S. 192.

[Footnote 7]

Ex parte Jackson, 96 U. S. 727, 96 U. S. 733; *Carroll v. United States*, 267 U. S. 132, 267 U. S. 156; *Gambino v. United States*, 275 U. S. 310.

[Footnote 8]

Weeks v. United States, 232 U. S. 383; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385; *Amos v. United States*, 255 U. S. 313; *Carroll v. United States*, 267 U. S. 132, 267 U. S. 156; *Agnello v. United States*, 269 U. S. 20; *Gambino v. United States*, 275 U. S. 310.

[Footnote 9]

Gouled v. United States, 255 U. S. 298.

[Footnote 10]

Boyd v. United States, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43, 201 U. S. 70. *See Gouled v. United States*, 255 U. S. 298; *Byars v. United States*, 273 U. S. 28; *Marron v. United States*, 275 U. S. 192.

[Footnote 11]

Silverthorne Lumber Co. v. United States, 251 U. S. 385. *Compare Gouled v. United States*, 255 U. S. 298, 255 U. S. 307. In *Stroud v. United States*, 251 U. S. 15, and *Hester v. United States*, 265 U. S. 57, the letter and articles admitted were not obtained by unlawful search and seizure. They were voluntary disclosures by the defendant. *Compare Smith v. United States*, 2 F.2d 715; *United States v. Lee*, 274 U. S. 559.

[Footnote 12]

The point is thus stated by counsel for the telephone companies, who have filed a brief as *amici curiae:*

"Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wiretapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful."

[Footnote 13]

In the following states, it is a criminal offense to intercept a message sent by telegraph and/or telephone: Alabama, Code, 1923, § 5256; Arizona, Revised Statutes, 1913, Penal Code, § 692; Arkansas, Crawford & Moses Digest, 1921, § 10246; California, Deering's Penal Code, 1927, § 640; Colorado, Compiled Laws, 1921, § 6969; Connecticut, General Statutes, 1918, § 6292; Idaho, Compiled Statutes, 1919, §§ 8574, 8586; Illinois, Revised Statutes, 1927, c. 134, § 21; Iowa, Code, 1927, § 13121; Kansas, Revised Statutes, 1923, c. 17, § 1908; Michigan Compiled Laws, 1915, § 15403; Montana, Penal Code, 1921, § 11518; Nebraska, Compiled Statutes, 1922, § 7115; Nevada, Revised Laws, 1912, §§ 4608, 6572(18); New York, Consolidated Laws, c. 40, § 1423(6); North Dakota, Compiled Laws, 1913, § 10231; Ohio, Page's General Code, 1926, § 13402; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, § 2265; South Dakota, Revised Code, 1919, § 4312; Tennessee, Shannon's Code, 1919, §§ 1839, 1840; Utah, Compiled Laws, 1917, § 8433; Virginia, Code, 1924, § 4477(2), (3); Washington, Pierce's Code, 1921, § 8976(18); Wisconsin, Statutes, 1927, § 348.37; Wyoming, Compiled Statutes, 1920, § 7148. *Compare State v. Behringer*, 19 Ariz. 502; *State v. Norsko*, 76 Wash. 472.

In the following states. it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: Alabama, Code, 1923, §§ 5543, 5545; Arizona, Revised Statutes, 1913, Penal Code, §§ 621, 623, 691; Arkansas, Crawford & Moses Digest, 1921, § 10250; California, Deering's Penal Code, 1927, §§ 619, 621, 639, 641; Colorado, Compiled Laws, 1921, §§ 6966, 6968, 6970; Connecticut, General Statutes, 1918, § 6292; Florida, Revised General Statutes, 1920, §§ 5754, 5755; Idaho, Compiled Statutes, 1919, §§ 8568, 8570; Illinois, Revised Statutes, 1927, c. 134, §§ 7, 7a; Indiana, Burns' Revised Statutes, 1926, § 2862; Iowa, Code, 1924, § 8305; Louisiana, Acts, 1918, c. 134, p. 228; Maine, Revised Statutes, 1916, c. 60, § 24; Maryland, Bagby's Code, 1926, § 489; Michigan, Compiled Statutes, 1915, § 15104; Minnesota, General Statutes, 1923, §§ 10423, 10424; Mississippi, Hemingway's Code, 1927, § 1174; Missouri, Revised Statutes, 1919, § 3605; Montana, Penal Code, 1921, § 11494; Nebraska, Compiled Statutes, 1922, § 7088; Nevada, Revised Laws, 1912, §§ 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes, 1910, p. 5319; New York, Consolidated Laws, c. 40, §§ 552, 553; North Carolina, Consolidated Statutes, 1919, §§ 4497, 4498, 4499; North Dakota, Compiled Laws, 1913, § 10078; Ohio, Page's General Code, 1926, §§ 13388, 13419; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, §§ 2260, 2262, 2266; Pennsylvania, Statutes, 1920, §§ 6306,

6308, 6309; Rhode Island, General Laws, 1923, § 6104; South Dakota, Revised Code, 1919, §§ 4346, 9801; Tennessee, Shannon's Code, 1919, §§ 1837, 1838; Utah, Compiled Laws, 1917, §§ 8403, 8405, 8434; Washington, Pierce's Code, 1921, §§ 8982, 8983, Wisconsin, Statutes, 1927, § 348.36.

The Alaskan Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that,

"if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall willfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, . . . the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court."

The Act of October 29, 1918, c.197, 40 Stat. 1017, provided:

"That whoever, during the period of governmental operation of the telephone and telegraph systems of the United States . . . , shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service, shall divulge the contents of any such telephone or telegraph message to any person not duly authorized to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both."

The Radio Act, February 23, 1927, c. 169, § 27, 44 Stat. 1162, 1172, provides that

"no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."

[Footnote 14]

The above figures relate to Case No. 493. In Nos. 532-533, the Government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wiretapping.

[Footnote 15]

According to the Government's brief, p. 41, "The Prohibition Unit of the Treasury disclaims it [wiretapping], and the Department of Justice has frowned on it." *See also* "Prohibition Enforcement," 69th Congress,2d Session, Senate Doc. No.198, pp. IV, V, 13, 15, referred to Committee, January 25, 1927; *also same*, Part 2.

[Footnote 16]

See Hannay v. Eve, 3 Cranch 242, 7 U. S. 247; *Bank of the United States v. Owens,* 2 Pet. 527, 27 U. S. 538; *Bartle v. Coleman,* 4 Pet. 184, 29 U. S. 188; *Kennett v. Chambers,* 14 How. 38, 55 U. S. 52; *Marshall v. Baltimore & Ohio R.R. Co.,* 16 How. 314, 57 U. S. 334; *Tool Co. v. Norris,* 2 Wall 45, 69 U. S. 54; *The Ouachita Cotton,* 6 Wall. 521, 73 U. S. 532; *Coppell v. Hall,* 7 Wall. 542; *Forsyth v. Woods,* 11 Wall. 484, 78 U. S. 486; *Hanauer v. Doane,* 12 Wall. 342, 79 U. S. 349; *Trist v. Child,* 21 Wall. 441, 88 U. S. 448; *Meguire v. Corwine,* 101 U. S. 108, 101 U. S. 111; *Oscanyan v. Arms Co.,* 103 U. S. 261; *Irwin v. Williar,* 110 U. S. 499, 110 U. S. 510; *Woodstock Iron Co. v. Richmond & Danville Extension Co.,* 129 U. S. 643; *Gibbs v. Consolidated Gas Co.,* 130 U. S. 396,130 U. S. 411; *Embrey v. Jemison,* 131 U. S. 336, 131 U. S. 348; *West v. Camden,* 135 U. S. 507, 135 U. S. 521; *McMullen v. Hoffman,* 174 U. S. 639, 174 U. S. 654; *Hazelton v. Sheckells,* 202 U. S. 71; *Crocker v. United States,* 240 U. S. 74, 240 U. S. 78. *Compare Holman v. Johnson,* 1 Cowp. 341.

[Footnote 17]

See Creath's Administrator v. Sims, 5 How. 192, 46 U. S. 204; *Kennett v. Chambers,* 14 How. 38, 55 U. S. 49; *Randall v. Howard,* 2 Black, 585, 67 U. S. 586; *Wheeler v. Sage,* 1 Wall. 518, 68 U. S. 530; *Dent v. Ferguson,* 132 U. S. 50, 132 U. S. 64; *Pope Manufacturing Co. v. Gormully,* 144 U. S. 224, 144 U. S. 236; *Miller v. Ammon,* 145 U. S. 421, 145 U. S. 425; *Hazelton v. Sheckells,* 202 U. S. 71, 202 U. S. 79. *Compare International News Service v. Associated Press,* 248 U. S. 215, 248 U. S. 245.

[Footnote 18]

Compare State v. Simmons, 39 Kan. 262, 264-265; *State v. Miller*, 44 Mo.App. 159, 163-164; *In re Robinson*, 29 Neb. 135; *Harris v. State*, 15 Tex.App. 629, 634-635, 639.

[Footnote 19]

See Armstrong v. Toler, 11 Wheat. 258; *Brooks v. Martin,* 2 Wall 70; *Planters' Bank v. Union Bank,* 16 Wall. 483, 83 U. S. 499-500; *Houston & Texas Central R.R. Co. v. Texas*,177 U. S. 66, 177 U. S. 99; *Bothwell v. Buckbee, Mears Co.*, 275 U. S. 274.

[Footnote 20]

See Lutton v. Benin, 11 Mod. 50; *Barlow v. Hall*, 2 Anst. 461; *Wells v. Gurney*, 8 Barn. & Cress. 769; *Ilsley v. Nichols*, 12 Pick. 270; *Carpenter v. Spooner*, 2 Sandf. 717; *Metcalf v. Clark*, 41 Barb. 45; *Williams ads. Reed*, 29 N.J.L. 385; *Hill v. Goodrich*, 32 Conn. 588; *Townsend v. Smith*, 47 Wis. 623; *Blandin v. Ostrander*, 239 Fed. 700; *Harkin v. Brundage*, 276 U.S. 36, *id.*, 604.

[Footnote 21]

Coppell v. Hall, 7 Wall. 542, 74 U. S. 558; *Oscanyan v. Arms Co.*, 103 U. S. 261, 103 U. S. 267; *Higgins v. McCrea*, 116 U. S. 671, 116 U. S. 685. *Compare Evans v. Richardson*,3 Mer. 469; *Norman v. Cole*, 3 Esp. 253; *Northwestern Salt Co. v. Electrolytic Alkali Co.*,[1913] 3 K.B. 422.

MR. JUSTICE BUTLER, dissenting.

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases.

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The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions, because they are not within the jurisdiction taken by the order.

The Court is required to construe the provision of the Fourth Amendment that declares:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not-be violated."

The Fifth Amendment prevents the use of evidence obtained through searches and seizures in violation of the rights of the accused protected by the Fourth Amendment.

The single question for consideration is this: may the Government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones?

The United States maintains that

"The 'wiretapping' operations of the federal prohibition agents were not a 'search and seizure' in violation of the security of the 'persons, houses, papers and effects' of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment."

The Court, adhering to and reiterating the principles laid down and applied in prior decisions * construing the search and seizure clause, in substance adopts the contention of the Government.

The question at issue depends upon a just appreciation of the facts.

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Telephones are used generally for transmission of messages concerning official, social, business and personal affairs, including communications that are private and privileged — those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it. Wiretapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

In *Boyd v. United States*, 116 U. S. 616, there was no "search or seizure" within the literal or ordinary meaning of the words, nor was Boyd — if these constitutional provisions were read strictly according to the letter — compelled in a "criminal case" to be a "witness" against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the Government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (*Byars v. United States*,273 U. S. 28, 273 U. S. 32), as well as to those granting governmental powers.*McCulloch v. Maryland,* 4 Wheat. 316, 17 U. S. 404, 17 U. S. 406, 17 U. S. 407, 17 U. S. 421. *Marbury v. Madison,* 1 Cranch 137, 5 U. S. 153, 5 U. S. 176. *Cohens v. Virginia,* 6 Wheat. 264. *Myers v. United States*, 272 U. S. 52.

This Court has always construed the Constitution in the light of the principles upon which it was founded.

The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason, and in full accord with the course of decisions since *McCulloch v. Maryland.* That is the principle directly applied in the *Boyd* case.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

* *Ex parte Jackson*, 96 U. S. 727. *Boyd v. United States*, 116 U. S. 616. *Weeks v. United States*, 232 U. S. 383. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. *Gouled v. United States*, 255 U. S. 298. *Amos v. United States*, 255 U. S. 313.

MR. JUSTICE STONE, dissenting.

I concur in the opinions of MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS. I agree also with that of MR. JUSTICE BUTLER so far as it deals with the merits. The effect of the order granting certiorari was to limit the argument to a single question, but I do not understand that it restrains the Court from a consideration of any question which we find to be presented by the record, for, under Jud.Code, § 240(a), this Court determines a case here on certiorari "with the same power and authority, and with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal."

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6.2: Berger v. NY 388 US 41 (1967)

U.S. Supreme Court

Berger v. New York, 388 U.S. 41 (1967)

Berger v. New York

No. 615

Argued April 13, 1967

Decided June 12, 1967

388 U.S. 41

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Syllabus

Petitioner was indicted and convicted of conspiracy to bribe the Chairman of the New York State Liquor Authority based upon evidence obtained by eavesdropping. An order pursuant to § 813-a of the N.Y.Code of Crim.Proc. permitting the installation of a recording device in an attorney's office for a period of 60 days was issued by a justice of the State Supreme Court, after he was advised of recorded interviews between a complainant and first an Authority employee and later the attorney in question. Section 813-a authorizes the issuance of an "*ex parte* order for eavesdropping" upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department." The oath must state

"that there is reasonable ground to believe that evidence of a crime may be thus obtained, and particularly describing the person or persons whose communications . . . are to be overheard or recorded and the purpose thereof."

The order must specify the duration of the eavesdrop, which may not exceed two months, unless extended. On the basis of leads obtained from this eavesdrop, a second order, also for a 60-day period, permitting an installation elsewhere was issued. After two weeks of eavesdropping a conspiracy, in which petitioner was a "go-between," was uncovered. The New York courts sustained the statute against constitutional challenge.

Held: The language of § 813-a is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area, and is, therefore, violative of the Fourth and Fourteenth Amendments. Pp. 388 U. S. 45-64.

(a) The Fourth Amendment's protections include "conversation," and the use of electronic devices to capture it was a "search" within the meaning of that Amendment. P. 388 U. S. 51.

(b) New York's statute authorizes eavesdropping without requiring belief that any particular offense has been or is being committed, nor that the "property" sought, the conversations, be particularly described. Pp. 388 U. S. 55-58.

(c) The officer is given a roving commission to "seize" any and all conversations, by virtue of the statute's failure to describe with particularity the conversations sought. P. 388 U. S. 59.

(d) Authorization to eavesdrop for a two-month period is equivalent to a series of searches and seizures pursuant to single showing of probable cause, and avoids prompt execution. P. 388 U. S. 59.

(e) The statute permits extensions of the original two-month period on a mere showing that such extension is "in the public interest," without a present showing of probable cause for the continuation of the eavesdrop. P. 388 U. S. 59.

(f) The statute places no termination date on the eavesdrop once the conversation sought is seized, but leaves it to the officer's discretion. Pp. 388 U. S. 59-60.

(g) While there is no requirement for notice in view of the necessity for secrecy, the statute does not overcome this defect by demanding the showing of exigent circumstances. P. 388 U. S. 60.

(h) The statute does not provide for a return on the warrant, thus leaving full discretion in the officer as to the use of the seized conversations of innocent as well as guilty parties. P. 388 U. S. 60.

18 N.Y.2d 638, 219 N.E.2d 295, reversed.

MR. JUSTICE CLARK delivered the opinion of the Court.

This writ tests the validity of New York's permissive eavesdrop statute, N.Y.Code Crim.Proc. § 813-a, [Footnote 1] under the Fourth, Fifth, Ninth, and Fourteenth Amendments. The claim is that the statute sets up a system of surveillance which involves trespassory intrusions into private, constitutionally protected premises, authorizes "general searches" for "mere evidence," [Footnote 2] and is an invasion of the privilege against self-incrimination. The trial court upheld the statute, the Appellate Division affirmed without opinion, 25 App.Div.2d 718, 269 N.Y.S.2d 368, and the Court of Appeals did likewise by a divided vote. 18 N.Y.2d 638, 219 N.E.2d 295. We granted certiorari, 385 U.S. 967 (1966). We have concluded that the language of New York's statute is too broad in its sweep, resulting in a trespassory intrusion into a constitutionally protected area, and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised.

I

Berger, the petitioner, was convicted on two counts of conspiracy to bribe the Chairman of the New York State Liquor Authority. The case arose out of the complaint of one Ralph Pansini to the District Attorney's office that agents of the State Liquor Authority had entered his bar and grill and without cause seized his books and records. Pansini asserted that the raid was in reprisal for his failure to pay a bribe for a liquor license. Numerous complaints had been filed with the District Attorney's office charging the payment of bribes by applicants for liquor licenses. On the direction of that office, Pansini, while equipped with a "minifon" recording device, interviewed an employee of the Authority. The employee advised Pansini that the price for a license was $10,000, and suggested that he contact attorney Harry Neyer. Neyer subsequently told Pansini that he worked with the Authority employee before and that the latter was aware of the going rate on liquor licenses downtown.

On the basis of this evidence, an eavesdrop order was obtained from a Justice of the State Supreme Court, as provided by § 813-a. The order permitted the installation, for a period of 60 days, of a recording device in Neyer's office. On the basis of leads obtained from this eavesdrop, a second order permitting the installation, for a like period, of a recording device in the office of one Harry Steinman was obtained. After some two weeks of eavesdropping, a conspiracy was uncovered involving the issuance of liquor licenses for the Playboy and Tenement Clubs, both of New York City. Petitioner was indicted as "a go-between" for the principal conspirators, who, though not named in the indictment, were disclosed in a bill of particulars. Relevant portions of the recordings were received in evidence at the trial, and were played to the jury, all over the objection of the petitioner. The parties have stipulated that the District Attorney "had no information upon which to proceed to present a case to the Grand Jury, or on the basis of which to prosecute" the petitioner except by the use of the eavesdrop evidence.

Eavesdropping is an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. At one time, the eavesdropper listened by naked ear under the eaves of houses or their windows or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method, as well as its susceptibility to abuse, was immediately recognized. Electricity, however, provided a better vehicle, and, with the advent of the telegraph, surreptitious interception of messages began. As early as 1862, California found it necessary to prohibit the practice by statute. Statutes of California 1862, p. 288, CCLXII. During the Civil War, General J. E. B. Stuart is reputed to have had his own eavesdropper along with him in the field whose job it was to intercept military communications of the opposing forces. Subsequently, newspapers reportedly raided one another's news gathering lines to save energy, time, and money. Racing news was likewise intercepted and flashed to bettors before the official result arrived.

The telephone brought on a new and more modern eavesdropper known as the "wiretapper." Interception was made by a connection with a telephone line. This activity has been with us for three-quarters of a century. Like its cousins, wiretapping proved to be a commercial as well as a police technique. Illinois outlawed it in 1895, and, in 1905, California extended its telegraph interception prohibition to the telephone. Some 50 years ago, a New York legislative committee found that police, in cooperation with the telephone company, had been tapping telephone lines in New York despite an Act passed in 1895 prohibiting it. During prohibition days, wiretaps were the principal source of information relied upon by the police as the basis for prosecutions. In 1934, the Congress outlawed the interception without authorization and the divulging or publishing of the contents of wiretaps by passing § 605 of the Communications Act of 1934. [Footnote 3] New York, in 1938, declared by constitutional amendment that "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated," but permitted by *ex parte* order of the Supreme Court of the State the interception of communications on a showing of "reasonable ground to believe that evidence of crime" might be obtained. N.Y.Const. Art. I, § 12.

Sophisticated electronic devices have now been developed (commonly known as "bugs") which are capable of eavesdropping on anyone in almost any given situation. They are to be distinguished from "wiretaps," which are confined to the interception of telegraphic and telephonic communications. Miniature in size (3/8″ x 3/8″ x 1/3″) — no larger than a postage stamp — these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the surfaces. Since 1940, eavesdropping has become a big business. Manufacturing concerns offer complete detection systems which automatically record voices under almost any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half mile. Receivers pick up the transmission with interference-free reception on a special wave frequency. And, of late, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed. *See* Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 Col.L.Rev. 1003, 1005-1010.

As science developed these detection techniques, lawmakers, sensing the resulting invasion of individual privacy, have provided some statutory protection for the public. Seven States, California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon, prohibit surreptitious eavesdropping by mechanical or electronic device. [Footnote 4] However, all save Illinois permit official court-ordered eavesdropping. Some 36 States prohibit wiretapping. [Footnote 5] But of these, 27 permit "authorized" interception of some type. Federal law, as we have seen, prohibits interception and divulging or publishing of the content of wiretaps without exception. [Footnote 6] In sum, it is fair to say that wiretapping, on the whole, is outlawed, except for permissive use by law enforcement officials in some States; while electronic eavesdropping is — save for seven States — permitted both officially and privately. And, in six of the seven States, electronic eavesdropping ("bugging") is permissible on court order.

III

The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge. This is not to say that individual privacy has been relegated to a second-class position, for it has been held since Lord Camden's day that intrusions into it are "subversive of all the comforts of society." *Entick v. Carrington*, 19 How.St.Tr. 1029, 1066 (1765). And the Founders so decided a quarter of a century later when they declared in the Fourth Amendment that the people had a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." Indeed, that right, they wrote,

"shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Almost a century thereafter, this Court took specific and lengthy notice of *Entick v. Carrington*, *supra*, finding that its holding was undoubtedly familiar to, and "in the minds of, those who framed the Fourth Amendment. . . ." *Boyd v. United States*, 116 U. S. 616, 116 U. S. 626-627 (1886). And after quoting from Lord Camden's opinion at some length, Mr. Justice Bradley characterized it thus:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case . . . ; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."

At 116 U. S. 630.

Boyd held unconstitutional an Act of the Congress authorizing a court of the United States to require a defendant in a revenue case to produce in court his private books, invoices, and papers or else the allegations of the Government were to be taken as confessed. The Court found that "the essence of the offense . . . [was] the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment." *Ibid.* The Act — the Court found — violated the Fourth Amendment in that it authorized a general search contrary to the Amendment's guarantee.

The Amendment, however, carried no criminal sanction, and, the federal statutes not affording one, the Court in 1914 formulated and pronounced the federal exclusionary rule in *Weeks v. United States*, 232 U. S. 383. Prohibiting the use in federal courts of any evidence seized in violation of the Amendment, the Court held:

"The effect of the Fourth Amendment is to put the courts of the United States . . . under limitations and restraints as to the exercise of such power . . . and to forever secure the people . . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all. . . .

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

At 116 U. S. 391-392.

IV

The Court was faced with its first wiretap case in 1928, *Olmstead v. United States*,277 U. S. 438. There.

the interception of Olmstead's telephone line was accomplished without entry upon his premises, and was, therefore, found not to be proscribed by the Fourth Amendment. The basis of the decision was that the Constitution did not forbid the obtaining of evidence by wiretapping unless it involved actual unlawful entry into the house. Statements in the opinion that a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of "persons, houses, papers, and effects" have been negated by our subsequent cases, as hereinafter noted. They found "conversation" was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a "search" within the meaning of the Amendment, and we so hold. In any event, Congress soon thereafter, and some say in answer to *Olmstead*, specifically prohibited the interception without authorization and the divulging or publishing of the contents of telephonic communications. And the *Nardone* cases, 302 U. S. 302 U.S. 379 (1937) and 308 U. S. 308 U.S. 338 (1939), extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

The first "bugging" case reached the Court in 1942 in *Goldman v. United States*, 316 U. S. 129. There, the Court found that the use of a detectaphone placed against an office wall in order to hear private conversations in the office next door did not violate the Fourth Amendment because there was no physical trespass in connection with the relevant interception. And in *On Lee v. United States*, 343 U. S. 747 (1952), we found that, since "no trespass was committed" a conversation between Lee and a federal agent, occurring in the former's laundry and electronically recorded, was not condemned by the Fourth Amendment. Thereafter in *Silverman v. United States*, 365 U. S. 505 (1961), the Court found "that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners." At 365 U. S. 509. A spike a foot long with a microphone attached to it was inserted under a baseboard into a party wall until it made contact with the heating duct that ran through the entire house occupied by Silverman, making a perfect sounding board through which the conversations in question were overheard. Significantly, the Court held that its decision did

"not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area."

At 365 U. S. 512.

In *Wong Sun v. United States*, 371 U. S. 471 (1963), the Court for the first time specifically held that verbal evidence may be the fruit of official illegality under the Fourth Amendment along with the more common tangible fruits of unwarranted intrusion. It used these words:

"The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U. S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'"

At 371 U. S. 485. And in *Lopez v. United States*, 373 U. S. 427 (1963), the Court confirmed that it had

"in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. . . . It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area."

At 373 U. S. 438-439. In this case, a recording of a conversation between a federal agent and the petitioner in which the latter offered the agent a bribe was admitted in evidence. Rather than constituting "eavesdropping," the Court found that the recording

"was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose."

At 373 U. S. 439.

V

It is now well settled that "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth" Amendment. *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 655 (1961).

"The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society."

Wolf v. Colorado, 338 U. S. 25, 338 U. S. 27 (1949). And its "fundamental protections . . . are guaranteed . . . against invasion by the States." *Stanford v. Texas*, 379 U. S. 476, 379 U. S. 481 (1965). This right has most recently received enunciation in *Camara v. Municipal Court*, 387 U. S. 523.

"The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."

At 387 U. S. 528. Likewise the Court has decided that, while the "standards of reasonableness" required under the Fourth Amendment are the same under the Fourteenth, they "are not susceptible of Procrustean application. . . ." *Ker v. California*, 374 U. S. 23, 374 U. S. 33 (1963). We said there that

"the reasonableness of a search is . . . [to be determined] by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment."

Ibid.

We, therefore, turn to New York's statute to determine the basis of the search and seizure authorized by it upon the order of a state supreme court justice, a county judge or general sessions judge of New York County. Section 813-a authorizes the issuance of an "*ex parte* order for eavesdropping" upon

"oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof. . . ."

The oath must state

"that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and . . . identifying the particular telephone number or telegraph line involved."

The judge

"may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application."

The order must specify the duration of the eavesdrop — not exceeding two months unless extended — and

"[a]ny such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein."

While New York's statute satisfies the Fourth Amendment's requirement that a neutral and detached authority be interposed between the police and the public, *Johnson v. United States*, 333 U. S. 10, 333 U. S. 14 (1948), the broad sweep of the statute is immediately observable. It permits the issuance of the order, or warrant for eavesdropping, upon the oath of the attorney general, the district attorney or any police officer above the rank of sergeant stating that "there is reasonable ground to believe that evidence of crime may be thus obtained. . . ." Such a requirement raises a serious probable cause question under the Fourth Amendment. Under it, warrants may only issue

"but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.*Carroll v. United States*, 267 U. S. 132, 267 U. S. 162 (1925); *Husty v. United States*, 282 U. S. 694, 282 U. S. 700-701 (1931); *Brinegar v. United States*, 338 U. S. 160, 338 U. S. 175-176 (1949).

It is said, however, by the petitioner, and the State agrees, that the "reasonable ground" requirement of § 813-a "is undisputedly equivalent to the probable cause requirement of the Fourth Amendment." This is indicated by *People v. Grossman*,45 Misc.2d 557, 257 N.Y.S.2d 266, *reversed on other grounds*, 27 App.Div.2d 572, 276 N.Y.S.2d 168. *Also see People v. Beshany*, 43 Misc.2d 521, 252 N.Y.S.2d 110. While we have found no case on the point by New York's highest court, we need not pursue the question further, because we have concluded that the statute is deficient on its face in other respects. Since petitioner clearly has standing to challenge the statute, being indisputably affected by it, we need not consider either the sufficiency of the affidavits upon which the eavesdrop orders were based or the standing of petitioner to attack the search and seizure made thereunder.

The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also "particularly describing the place to be searched, and the persons or things to be seized." New York's statute lacks this particularization. It merely says that a warrant may issue on reasonable ground to believe that evidence of crime may be obtained by the eavesdrop. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized," as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature, eavesdropping involves an intrusion on privacy that is broad in scope. As was said in *Osborn v. United States*, 385 U. S. 323 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures. . . ." At385 U. S. 329, n. 7. There, two judges acting jointly authorized the installation of a device on the person of a prospective witness to record conversations between him and an attorney for a defendant then on trial in the United States District Court. The judicial authorization was based on an affidavit of the witness setting out in detail previous conversations between the witness and the attorney concerning the bribery of jurors in the case. The recording device was, as the Court said, authorized "under the most precise and discriminate circumstances, circumstances which fully met the *requirement of particularity'" of the Fourth Amendment. The Court was asked to exclude the evidence of the recording of the conversations seized pursuant to the order on constitutional grounds, Weeks v. United States, supra, or in the exercise of supervisory power, McNabb v. United States, 318 U. S. 332 (1943). The Court refused to do so, finding that the recording, although an invasion of the privacy protected by the Fourth Amendment, was admissible because of the authorization of the judges, based upon*

"a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice . . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations."

At 318 U. S. 330. The invasion was lawful because there was sufficient proof to obtain a search warrant to make the search for the limited purpose outlined in the order of the judges. Through these "precise and discriminate" procedures, the order authorizing the use of the electronic device afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence. Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant. Under it, the officer could not search unauthorized areas; likewise, once the property sought, and for which the order was issued, was found, the officer could not use the order as a passkey to further search. In addition, the order authorized one limited intrusion, rather than a series or a continuous surveillance. And we note that a new order was issued when the officer sought to resume the search, and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. In this manner, no greater invasion of privacy was permitted than was necessary under the circumstances. Finally the officer was required to and did make a return on the order showing how it was executed and what was seized. Through these strict precautions, the danger of an unlawful search and seizure was minimized.

By contrast, New York's statute lays down no such "precise and discriminate" requirements. Indeed, it authorizes the "indiscriminate use" of electronic devices as specifically condemned in *Osborn*. "The proceeding by search warrant is a drastic one," *Sgro v. United States*, 287 U. S. 206, 287 U. S. 210 (1932), and must be carefully circumscribed so as to prevent unauthorized invasions of "the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U. S. 616, 116 U. S. 630. New York's broadside authorization, rather than being "carefully circumscribed" so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick v. Carrington*, 19 How.St.Tr. 1029 and which were then known as "general warrants." The use of the latter was a motivating factor behind the Declaration of Independence. In view of the many cases commenting on the practice, it is sufficient here to point out

that, under these "general warrants," customs officials were given blanket authority to conduct general searches for goods imported to the Colonies in violation of the tax laws of the Crown. The Fourth Amendment's requirement that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized," repudiated these general warrants and

"makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

Marron v. United States, 275 U. S. 192, 275 U. S. 196 (1927); *Stanford v. Texas, supra.*

We believe the statute here is equally offensive. First, as we have mentioned, eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the "property" sought, the conversations, be particularly described. The purpose of the probable cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted. Likewise, the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations. It is true that the statute requires the naming of "the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . ." But this does no more than identify the person whose constitutionally protected area is to be invaded, rather than "particularly describing" the communications, conversations, or discussions to be seized. As with general warrants, this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period, the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits, and there were authorized here, extensions of the original two-month period — presumably for two months each — on a mere showing that such extension is "in the public interest." Apparently the original grounds on which the eavesdrop order was initially issued also form the basis of the renewal. This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant, thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.

VI

It is said with fervor that electronic eavesdropping is a most important technique of law enforcement, and that outlawing it will severely cripple crime detection. The monumental report of the President's Commission on Law Enforcement and Administration of Justice entitled "The Challenge of Crime in a Free Society" informs us that the majority of law enforcement officials say that this is especially true in the detection of organized crime. As the Commission reports, there can be no question about the serious proportions of professional criminal activity in this country. However, we have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime. Indeed, there are even figures available in the wiretap category which indicate to the contrary. *See* District Attorney Silver's Poll of New York Prosecutors, in Dash Schwartz & Knowlton, The Eavesdroppers 105, 117-119 (1959). *Also see* Semerjian, Proposals on Wiretapping in Light of Recent Senate Hearings, 45 B.U.L.Rev. 217, 229. As the Commission points out,

"[w]iretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently, chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools, and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men,"

rather than electronic devices. At 201-202. Moreover, Brooklyn's District Attorney Silver's poll of the State of New York indicates that, during the 12-year period (1942-1954), duly authorized wiretaps in bribery and corruption cases constituted only a small

percentage of the whole. It indicates that this category involved only 10% of the total wiretaps. The overwhelming majority were in the categories of larceny, extortion, coercion, and blackmail, accounting for almost 50%. Organized gambling was about 11,%. Statistics are not available on subsequent years. Dash, Schwartz & Knowlton, *supra*, at 40.

An often repeated statement of District Attorney Hogan of New York County was made at a hearing before the Senate Judiciary Committee at which he advocated the amendment of the Communications Act of 1934, *supra*, so as to permit "telephonic interception" of conversations. As he testified,

"Federal statutory law [the 1934 Act] has been interpreted in such a way as to bar us from divulging wiretap evidence, even in the courtroom in the course of criminal prosecution."

Mr. Hogan then said that "[w]ithout it [wiretaps], my own office could not have convicted" "top figures in the underworld." He then named nine persons his office had convicted and one on whom he had furnished "leads" secured from wiretaps to the authorities of New Jersey. Evidence secured from wiretaps, as Mr. Hogan said, was not admissible in "criminal prosecutions." He was advocating that the Congress adopt a measure that would make it admissible; Hearings on S. 2813 and S. 1495, before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., pp. 173, 174 (1962). The President's Commission also emphasizes in its report the need for wiretapping in the investigation of organized crime because of the telephone's "relatively free use" by those engaged in the business and the difficulty of infiltrating their organizations. P. 201. The Congress, though long importuned, has not amended the 1934 Act to permit it.

We are also advised by the Solicitor General of the United States that the Federal Government has abandoned the use of electronic eavesdropping for "prosecutorial purposes." *See* Supplemental Memorandum, *Schipani v. United States*, No. 504, October Term, 1966, 385 U. S. 372. *See also Black v. United States*,385 U. S. 26 (1966); *O'Brien v. United States*, 386 U. S. 345 (1967); *Hoffa v. United States*, 387 U. S. 231 (1967); *Markis v. United States*, 387 U. S. 425; *Moretti v. United States*, 387 U. S. 425. Despite these actions of the Federal Government, there has been no failure of law enforcement in that field.

As THE CHIEF JUSTICE said in concurring in the result in *Lopez v. United States*, 373 U. S. 427,

"the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; . . . indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments. . . ."

At 373 U. S. 441.

In any event, we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today, but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While "[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement," *Lopez v. United States*, *supra*, at 373 U. S. 464 (dissenting opinion of BRENNAN, J.), it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that, without the use of such devices, crime detection in certain areas may suffer some delays, since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and — what is more important — without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true, then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand, this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. *See Goldman v. United States*, 316 U. S. 129; *On Lee v. United States*, 343 U. S. 747; *Lopez v. United States*, *supra*, and *Osborn v. United States*, *supra*. In the latter case, the eavesdropping device was permitted where the "commission of a specific offense" was charged, its use was "under the most precise and discriminate circumstances," and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the "precincts of the home or the office . . . sanctuaries where the law can never reach," DOUGLAS, J., dissenting in *Warden, Maryland Penitentiary v. Hayden*, 387 U. S. 294, 387 U. S. 321, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does.

Reversed.

[Footnote 1]

"§ 813-a. Ex parte order for eavesdropping"

"An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order, the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958."

[Footnote 2]

This contention is disposed of in *Warden, Maryland Penitentiary v. Hayden*, 387 U. S. 294, adversely to petitioner's assertion here.

[Footnote 3]

48 Stat. 1103, 47 U.S.C. § 605.

[Footnote 4]

Cal.Pen.Code §§ 65311h-j; Ill.Rev.Stat., c. 38, §§ 14-1 to 14-7 (1965); Md.Ann.Code, Art. 27, § 125A (1957); Mass.Gen.Laws, c. 272, § 99 (Supp. 1966); Nev.Rev.Stat. § 200.650 (1963); N.Y.Pen.Law § 738 (Supp. 1966); Ore.Rev.Stat. § 165.540(1)(c) (Supp. 1965).

[Footnote 5]

Ala.Code, Tit. 48, § 414 (1958); Alaska Stat. § 42.20.100 (1962); Ark.Stat.Ann. § 73-1810 (1957); Cal.Pen.Code § 640; Colo.Rev.Stat.Ann. § 40-4-17 (1963); Conn.Gen.Stat.Rev. § 53-140 (1958): Del.Code Ann., Tit. 11, § 757 (Supp. 1966); Fla.Stat. § 822.10 (1965); Hawaii Rev.Laws § 309 A-1 (Supp. 1963); Idaho Code Ann. §§ 18-6704, 6705 (1947); Ill.Rev.Stat., c. 134, § 16 (19,65); Iowa Code § 716.8 (1962); Ky.Rev.Stat. § 433.430 (1962); La.Rev.Stat. § 14:322 (1950); Md.Ann.Code, Art. 35, §§ 92, 93 (1957); Mass.Gen.Laws, c. 272, § 99 (Supp. 1966); Mich.Stat.Ann. § 28.808 (1954); Mont.Rev.Codes Ann. § 94-3203 (Supp. 1965); Neb.Rev.Stat. § 86-328 (1966); Nev.Rev.Stat. §§ 200.620, 200.630 (1963); N.J.Rev.Stat. § 2A:146-1 (1953); N.M.Stat.Ann. § 40A-12-1 (1964); N.Y.Pen.Law § 738 (Supp. 1966); N.C.Gen.Stat. § 14-155 (1953); N.D.Cent.Code § 8-10-07 (1959); Ohio Rev.Code Ann. § 4931.28 (1954); Okla.Stat., Tit. 21, § 1757 (1961); Ore.Rev.Stat. § 165.540(1) (Supp. 1965); Pa.Stat.Ann., Tit. 15, § 2443 (1958); R.I.Gen.Laws Ann. § 11-35-12 (1956); S.D.Code § 13.4519 (1939); Tenn.Code Ann. § 65-2117 (1955); Utah Code Ann. § 76-48-11 (1953); Va.Code Ann. § 18.1-156 (1960 Repl. Vol.); Wis.Stat. § 134.39 (1963); Wyo.Stat.Ann. § 37-259 (1957).

[Footnote 6]

A recent Federal Communications Commission Regulation, 31 Fed.Reg. 3400, 47 CFR § 2.701, prohibits the use of "a device required to be licensed by section 301 of the Communications Act" for the purpose of eavesdropping. This regulation, however, exempts use under "lawful authority" by police officers, and the sanctions are limited to loss of license and the imposition of a fine. The memorandum accompanying the regulation stated: "What constitutes a crime under State law reflecting State policy applicable to radio eavesdropping is, of course, unaffected by our rules." *Id.* at 3399.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court because, at long last, it overrules *sub silentio Olmstead v. United States*, 277 U. S. 438, and its offspring, and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment. I also join the opinion because it condemns electronic surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of "probable cause." These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance.

Yet there persists my overriding objection to electronic surveillance *viz.*, that it is a search for "mere evidence" which, as I have maintained on other occasions (*Osborn v. United States*, 385 U. S. 323, 385 U. S. 349-354), is a violation of the Fourth and Fifth Amendments, no matter with what nicety and precision a warrant may be drawn, a proposition that I developed in detail in my dissent in *Warden v. Hayden*, 387 U. S. 294, 387 U. S. 312, decided only the other day.

A discreet selective wiretap or electronic "bugging" is, of course, not rummaging around, collecting everything in the particular time and space zone. But even though it is limited in time, it is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer's office — everywhere and anywhere a "bug" can be placed.

If a statute were to authorize placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained, there is little doubt that it would be struck down as a bald invasion of privacy, far worse than the general warrants prohibited by the Fourth Amendment. I can see no difference between such a statute and one authorizing electronic surveillance, which, in effect, places an invisible policeman in the home. If anything, the latter is more offensive because the homeowner is completely unaware of the invasion of privacy.

The traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope — without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime, and intercepts the most intimate of conversations. Thus, in the *Coplon* case (*United States v. Coplon*, 91 F.Supp. 867, *rev'd*, 191 F.2d 749) wiretaps of the defendant's home and office telephones recorded conversations between the defendant and her mother, a quarrel between a husband and wife who had no connection with the case, and conferences between the defendant and her attorney concerning the preparation of briefs, testimony of government witnesses, selection of jurors and trial strategy. Westin, The Wire-Tapping Problem: An Analysis and a Legislative Proposal, 52 Col.L.Rev. 165, 170-171 (1952); Barth, The Loyalty of Free Men 173 (1951). It is also reported that the FBI incidentally learned about an affair, totally unrelated to espionage, between the defendant and a Justice Department attorney. Barth, *supra* at 173. While tapping one telephone, police recorded conversations involving, at the other end, The Juilliard School of Music, Brooklyn Law School, Consolidated Radio Artists, Western Union, Mercantile Commercial Bank, several restaurants, a real estate company, a drug store, many attorneys, an importer, a dry cleaning establishment, a number of taverns, a garage, and the Prudential Insurance Company. Westin, *supra*, at 188, n. 112. These cases are but a few of many demonstrating the sweeping nature of electronic total surveillance as we know it today.

It is, of course, possible for a statute to provide that wiretap or electronic eavesdrop evidence is admissible only in a prosecution for the crime to which the showing of probable cause related. *See* Nev.Rev.Stat. § 200.680 (1963). But such a limitation would not alter the fact that the order authorizes a general search. Whether or not the evidence obtained is used at a trial for another crime, the privacy of the individual has been infringed by the interception of all of his conversations. And even though the information is not introduced as evidence, it can and probably will be used as leads and background information. Again, a statute could provide that evidence developed from eavesdrop information could not be used at trial. *Cf. Silverthorne Lumber Co., Inc. v. United States*, 251 U. S. 385,251 U. S. 392; *Nardone v. United States*, 308 U. S. 338; *Silverman v. United States*, 365 U. S. 505. But, under a regime of total surveillance, where a multitude of conversations are recorded, it would be very difficult to show which aspects of the information had been used as investigative information.

As my Brother WHITE says in his dissent, this same vice inheres in any search for tangible evidence such as invoices, letters, diaries, and the like.

"In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search."

That is precisely why the Fourth Amendment made any such rummaging around unconstitutional,even though supported by a formally adequate warrant. That underwrites my dissent in *Hayden.*

With all respect, my Brother BLACK misses the point of the Fourth Amendment. It does not make every search constitutional provided there is a warrant that is technically adequate. The history of the Fourth Amendment, as I have shown in my dissent in the *Hayden* case, makes it plain that any search in the precincts of the home for personal items that are lawfully possessed and not articles of a crime is "unreasonable." That is the essence of the "mere evidence" rule that long obtained until overruled by *Hayden.*

The words that a man says consciously on a radio are public property. But I do not see how government, using surreptitious methods, can put a person on the radio and use his words to convict him. Under our regime, a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the "mere evidence" rule. For the Fourth Amendment and the Fifth come into play when the accused is "the unwilling source of the evidence" (*Gouled v. United States*, 255 U. S. 298, 255 U. S. 306), there being no difference

"whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers."

Ibid.

That is the essence of my dissent in *Hayden.* In short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence is or can be constitutional under the Fourth and Fifth Amendments. We could amend the Constitution and so provide — a step that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth Amendment, fashioned in Congress and submitted to the people, was designed to afford the individual. And unlike my Brother BLACK, I would adhere to *Mapp v. Ohio*, 367 U. S. 643, and apply the exclusionary rule in state as well as federal trials — a rule fashioned out of the Fourth Amendment and constituting a high constitutional barricade against the intrusion of Big Brother into the lives of all of us.

MR. JUSTICE STEWART, concurring in the result.

I fully agree with MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE that this New York law is entirely constitutional. In short, I think that "electronic eavesdropping, *as such* or as it is permitted by this statute, is not an unreasonable search and seizure." [Footnote 2/1] The statute contains many provisions more stringent than the Fourth Amendment generally requires, as MR. JUSTICE BLACK has so forcefully pointed out. And the petitioner himself has told us that the law's "reasonable grounds" requirement "is undisputedly equivalent to the probable cause requirement of the Fourth Amendment." This is confirmed by decisions of the New York courts. *People v. Cohen*, 42 Misc.2d 403, 248 N.Y.S.2d 339; *People v. Beshany*, 43 Misc.2d 521, 252 N.Y.S.2d 110; *People v. Grossman*, 45 Misc.2d 557, 257 N.Y.S.2d 266. Of course, a state court's construction of a state statute is binding upon us.

In order to hold this statute unconstitutional, therefore, we would have to either rewrite the statute or rewrite the Constitution. I can only conclude that the Court today seems to have rewritten both.

The issue before us, as MR. JUSTICE WHITE says, is "whether *this* search complied with Fourth Amendment standards." For me, that issue is an extremely close one in the circumstances of this case. It certainly cannot be resolved by incantation of ritual phrases like "general warrant." Its resolution involves "the unavoidable task in any search and seizure case: was the particular search and seizure reasonable or not?" [Footnote 2/2]

I would hold that the affidavits on which the judicial order issued in this case did not constitute a showing of probable cause adequate to justify the authorizing order. The need for particularity and evidence of reliability in the showing required when judicial authorization is sought for the kind of electronic eavesdropping involved in this case is especially great. The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature, electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort. I think the affidavits presented to the judge who authorized the electronic surveillance of the Steinman office failed to meet such a standard.

So far as the record shows, the only basis for the Steinman order consisted of two affidavits. One of them contained factual allegations supported only by bare, unexplained references to "evidence" in the district attorney's office and "evidence" obtained by the Neyer eavesdrop. No underlying facts were presented on the basis of which the judge could evaluate these general allegations. The second affidavit was no more than a statement of another assistant district attorney that he had read his associate's affidavit and was satisfied on that basis alone that proper grounds were presented for the issuance of an authorizing order.

This might be enough to satisfy the standards of the Fourth Amendment for a conventional search or arrest. *Cf. Aguilar v. Texas*, 378 U. S. 108, 378 U. S. 116(dissenting opinion). But I think it was constitutionally insufficient to constitute probable cause to justify an intrusion of the scope and duration that was permitted in this case. Accordingly, I would reverse the judgment.

[Footnote 2/1]

Dissenting opinion of MR. JUSTICE HARLAN, *post*, p. 388 U. S. 89, at 388 U. S. 94.

[Footnote 2/2]

See dissenting opinion of MR. JUSTICE BLACK, *post*, p. 388 U. S. 70, at 388 U. S. 83.

MR. JUSTICE BLACK, dissenting.

New York has an eavesdropping statute which permits its judges to authorize state officers to place on other people's premises electronic devices that will overhear and record telephonic and other conversations for the purpose of detecting secret crimes and conspiracies and obtaining evidence to convict criminals in court. Judges cannot issue such eavesdropping permits except upon oath or affirmation of certain state officers that

"there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded, and the purpose thereof. . . ."

N.Y.Code Crim.Proc. § 813-a. Evidence obtained by such electronic eavesdropping was used to convict the petitioner here of conspiracy to bribe the chairman of the State Liquor Authority, which controls the issuance of liquor licenses in New York. It is stipulated that, without this evidence, a conviction could not have been obtained, and it seems apparent that use of that evidence showed petitioner to be a briber beyond all reasonable doubt. Notwithstanding petitioner's obvious guilt, however, the Court now strikes down his conviction in a way that plainly makes it impossible ever to convict him again. This is true because the Court not only holds that the judicial orders which were the basis of the authority to eavesdrop were insufficient, but also holds that the New York eavesdropping statute is, *on its face*, violative of the Fourth Amendment. And while the Court faintly intimates to the contrary, it seem obvious to me that its holding, by creating obstacles that cannot be overcome, makes it completely impossible for the State or the Federal Government ever to have a valid eavesdropping statute. All of this is done, it seems to me, in part because of the Court's hostility to eavesdropping as "ignoble" and "dirty business" [Footnote 3/1] and in part because of fear that rapidly advancing science and technology is making eavesdropping more and more effective. *Cf. Lopez v. United States*, 373 U. S. 427, 373 U. S. 446 (dissenting opinion of BRENNAN, J.). Neither these nor any other grounds that I can think of are sufficient, in my judgment, to justify a holding that the use of evidence secured by eavesdropping is barred by the Constitution.

I

Perhaps as good a definition of eavesdropping as another is that it is listening secretly and sometimes "snoopily" to conversations and discussions believed to be private by those who engage in them. Needless to say, eavesdropping is not ranked as one of the most learned or most polite professions, nor perhaps would an eavesdropper be selected by many people as the most desirable and attractive associate. But the practice has undoubtedly gone on since the beginning of human society, and, during that time, it has developed a usefulness of its own, particularly in the detection and prosecution of crime.

Eavesdroppers have always been deemed competent witnesses in English and American courts. The main test of admissibility has been relevance and first-hand knowledge, not by whom or by what method proffered evidence was obtained. It is true that, in England, people who obtained evidence by unlawful means were held liable in damages, as in *Entick v. Carrington*, 19 How.St.Tr. 1029. But even that famous civil liberties case made no departure from the traditional common law rule that relevant evidence is admissible even though obtained contrary to ethics, morals, or law. And, for reasons that follow, this evidentiary rule is well adapted to our Government, set up as it was to "insure domestic tranquility" under a system of laws.

Today this country is painfully realizing that evidence of crime is difficult for governments to secure. Criminals are shrewd and constantly seek, too often successfully, to conceal their tracks and their outlawry from law officers. But, in carrying on their nefarious practices, professional criminals usually talk considerably. Naturally, this talk is done, they hope, in a secret way that will keep it from being heard by law enforcement authorities or by others who might report to the authorities. In this situation, "eavesdroppers," "informers," and "squealers," as they are variously called, are helpful, even though unpopular, agents of law enforcement. And it needs no empirical studies or statistics to establish that eavesdropping testimony plays an important role in

exposing criminals and bands of criminals who, but for such evidence, would go along their criminal way with little possibility of exposure, prosecution, or punishment. Such, of course, is this particular case before us.

The eavesdrop evidence here shows this petitioner to be a briber, a corrupter of trusted public officials, a poisoner of the honest administration of government, upon which good people must depend to obtain the blessings of a decent orderly society. No man's privacy, property, liberty, or life is secure if organized or even unorganized criminals can go their way unmolested, ever and ever further in their unbounded lawlessness. However obnoxious eavesdroppers may be, they are assuredly not engaged in a more "ignoble" or "dirty business" than are bribers, thieves, burglars, robbers, rapists, kidnapers, and murderers, not to speak of others. And it cannot be denied that, to deal with such specimens of our society, eavesdroppers are not merely useful, they are frequently a necessity. I realize that some may say, "Well, let the prosecuting officers use more scientific measures than eavesdropping." It is always easy to hint at mysterious means available just around the corner to catch outlaws. But crimes, unspeakably horrid crimes, are with us in this country, and we cannot afford to dispense with any known method of detecting and correcting them unless it is forbidden by the Constitution or deemed inadvisable by legislative policy — neither of which I believe to be true about eavesdropping.

II

Since eavesdrop evidence obtained by individuals is admissible and helpful, I can perceive no permissible reason for courts to reject it, even when obtained surreptitiously by machines, electronic or otherwise. Certainly evidence picked up and recorded on a machine is not less trustworthy. In both perception and retention, a machine is more accurate than a human listener. The machine does not have to depend on a defective memory to repeat what was said in its presence, for it repeats the very words uttered. I realize that there is complaint that sometimes the words are jumbled or indistinct. But machine evidence need not be done away with to correct such occasional defective recording. The trial judge has ample power to refuse to admit indistinct or garbled recordings.

The plain facts are, however, that there is no inherent danger to a defendant in using these electronic recordings except that which results from the use of testimony that is so unerringly accurate that it is practically bound to bring about a conviction. In other words, this kind of transcribed eavesdropping evidence is far more likely to lead a judge or jury to reach a correct judgment or verdict — the basic and always-present objective of a trial.

III

The superior quality of evidence recorded and transcribed on an electronic device is, of course, no excuse for using it against a defendant if, as the Court holds, its use violates the Fourth Amendment. If that is true, no amount of common law tradition or anything else can justify admitting such evidence. But I do not believe the Fourth Amendment, or any other, bans the use of evidence obtained by eavesdropping.

There are constitutional amendments that speak in clear unambiguous prohibitions or commands. The First, for illustration, declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." The Fifth declares that a person shall not be held to answer for a capital or otherwise infamous crime except on a grand jury indictment; shall not twice be put in jeopardy of life or limb for the same offense; nor be compelled in any criminal case to be a witness against himself. These provisions of the First and Fifth Amendments, as well as others I need not mention at this time, are clear unconditional commands that something shall not be done. Particularly of interest in comparison with the Fourth Amendment is the Fifth Amendment's prohibition against compelling a person to be a witness against himself. The Fifth Amendment's language forbids a court to hear evidence against a person that he has been compelled to give, without regard to reasonableness or anything else. Unlike all of these just-named Fifth Amendment provisions, the Fourth Amendment relating to searches and seizures contains no such unequivocal commands. It provides:

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

Obviously, those who wrote this Fourth Amendment knew from experience that searches and seizures were too valuable to law enforcement to prohibit them entirely, but also knew at the same time that, while searches or seizures must not be stopped, they should be slowed down, and warrants should be issued only after studied caution. This accounts for use of the imprecise and

flexible term, “unreasonable,” the key word permeating this whole Amendment. Also it is noticeable that this Amendment contains no appropriate language, as does the Fifth, to forbid the use and introduction of search and seizure evidence even though secured “unreasonably.” Nor does this Fourth Amendment attempt to describe with precision what was meant by its words, “probable cause”; nor by whom the “Oath or affirmation” should be taken; nor what it need contain. Although the Amendment does specifically say that the warrant should particularly describe “the place to be searched, and the persons or things to be seized,” it does not impose any precise limits on the spatial or temporal extent of the search or the quantitative extent of the seizure. Thus, this Amendment, aimed against only “unreasonable” searches and seizures, seeks to guard against them by providing, as the Court says, that a

“neutral and detached authority be interposed between the police and the public, *Johnson v. United States*, 333 U. S. 10, 333 U. S. 14.”

And, as the Court admits, the Amendment itself provides no sanctions to enforce its standards of searches, seizures, and warrants. This was left for Congress to carry out if it chose to do so.

Had the framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminatory evidence in the Fifth Amendment. Since the Fourth Amendment contains no language forbidding the use of such evidence, I think there is no such constitutional rule. So I continue to believe that the exclusionary rule formulated to bar such evidence in the *Weeks* [Footnote 3/2] case is not rooted in the Fourth Amendment, but rests on the “supervisory power” of this Court over the other federal courts — the same judicial power invoked in *McNabb v. United States*, 318 U. S. 332. *See* my concurring opinions in *Wolf v. Colorado*, 338 U. S. 25,338 U. S. 39, and *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 661. [Footnote 3/3] For these reasons and others to be stated, I do not believe the Fourth Amendment, standing alone, even if applicable to electronic eavesdropping, commands exclusion of the overheard evidence in this case.

In reaching my conclusion that the Fourth Amendment itself does not bar the use of eavesdropping evidence in courts, I do not overlook the fact that the Court, at present, is reading the Amendment as expressly and unqualifiedly barring invasions of “privacy”, rather than merely forbidding “unreasonable searches and seizures.”

On this premise of the changed command of the Amendment, the Court’s task in passing on the use of eavesdropping evidence becomes a simple one. Its syllogism is this:

“The Fourth Amendment forbids invasion of privacy, and excludes evidence obtained by such invasion;”

“To listen secretly to a man’s conversations or to tap his telephone conversations invades his privacy;”

“Therefore, the Fourth Amendment bars use of evidence obtained by eavesdropping or by tapping telephone wires.”

The foregoing syllogism is faulty for at least two reasons: (1) the Fourth Amendment itself contains no provision from which can be implied a purpose to bar evidence or anything else secured by an “unreasonable search or seizure”; (2) the Fourth Amendment’s language, fairly construed, refers specifically to “unreasonable searches and seizures,” and not to a broad undefined right to “privacy” in general. To attempt to transform the meaning of the Amendment, as the Court does here, is to play sleight-of-hand tricks with it. It is impossible for me to think that the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to protect the “right of privacy.” That expression, like a chameleon, has a different color for every turning. In fact, use of “privacy” as the keyword in the Fourth Amendment simply gives this Court a useful new tool, as I see it, both to usurp the policymaking power of the Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them. I therefore cannot agree to hold New York’s law unconstitutional on the premise that all laws that unreasonably invade privacy violate the Fourth Amendment.

IV

While the electronic eavesdropping ere bears some analogy to the problems with which the Fourth Amendment is concerned, I am by no means satisfied that the Amendment controls the constitutionality of such eavesdropping. As pointed out, the Amendment only bans searches and seizures of “persons, houses, papers, and effects.” This literal language imports tangible things, and it would require an expansion of the language used by the framers, in the interest of “privacy” or some equally vague judge-made goal, to hold that it applies to the spoken word. It simply requires an imaginative transformation of the English language to say that

conversations can be searched and words seized. Referring to wiretapping, this Court, in *Olmstead v. United States*, 277 U. S. 438, 277 U. S. 465, refused to make that transformation:

"Justice Bradley in the *Boyd* case, and Justice Clark[e] in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed. . . . But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."

Though *Olmstead* has been severely criticized by various individual members of this Court, and though the Court stated an alternative ground for holding the Amendment inapplicable in that case, the *Olmstead* holding that the Fourth Amendment does not apply to efforts to hear and obtain oral conversations has never been overruled by this Court. The Court today, however, suggests that this holding has been "negated" by subsequent congressional action and by four decisions of this Court. First, the Court intimates, though it does not exactly state, that Congress, "in answer to *Olmstead*," passed an Act to prohibit "the interception without authorization and the divulging or publishing of the contents of telephonic communications." The Court cites no authority for this strange surmise, and I assert with confidence that none can be recited. And even if it could, Congress' action would not have the slightest relevance to the scope of the Fourth Amendment. Second, the Court cites *Goldman v. United States*, 316 U. S. 129, and *On Lee v. United States*, 343 U. S. 747, in an effort to explain away *Olmstead.* But neither of those cases purported to repudiate the *Olmstead* case or any part of it. In fact, in both of those cases, the Court refused to exclude the challenged eavesdrop evidence. Finally, the Court relies on *Silverman v. United States*, 365 U. S. 505, and *Wong Sun v. United States*, 371 U. S. 471. In both of these cases, the Court did imply that the

"Fourth Amendment *may* protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects,'"

371 U.S. at 371 U. S. 485 (emphasis added), but in neither did the Court find it necessary to overrule *Olmstead*, an action that would have been required had the Court based its exclusion of the oral conversations solely on the ground of the Fourth Amendment. The fact is that both *Silverman* and *Wong Sun* were federal cases dealing with the use of verbal evidence in federal courts, and the Court held the evidence should be excluded by virtue of the exclusionary rule of the *Weeks*case. As I have previously pointed out, that rule rested on the Court's supervisory power over federal courts, not on the Fourth Amendment: it is not required by the Amendment, nor is a violation of the Amendment a prerequisite to its application. I would not have agreed with the Court's opinion in *Silverman*, which, by the way, cited *Olmstead* with approval, had I thought that the result depended on finding a violation of the Fourth Amendment, or had I any inkling that the Court's general statements about the scope of the Amendment were intended to negate the clear holding of *Olmstead.* And again, in *Wong Sun*, which did not even mention *Olmstead*, let alone overrule it, the Court clearly based its exclusion of oral statements made to federal agents during an illegal arrest on its supervisory power to deter lawless conduct by federal officers, and on the alternative ground that the incriminating statements were made under compulsive circumstances and were not the product of a free will. It is impossible for me to read into that non-eavesdropping federal case an intent to overrule *Olmstead* implicitly. In short, the only way this Court can escape *Olmstead* here is to overrule it. Without expressly saying so, the Court's opinion, as my Brother DOUGLAS acknowledges, does just that. And that overruling is accomplished by the simple expedient of substituting for the Amendment's words, "The right of the people to be secure in their persons, houses, papers, and effects" the words "The right of the people to be secure in their privacy," words the Court believes the Framers should have used, but did not. I have frequently stated my opposition to such judicial substitution. Although here the Court uses it to expand the scope of the Fourth Amendment to include words, the Court has been applying the same process to contract the Fifth Amendment's privilege against self-incrimination so as to exclude all types of incriminating evidence but words, or what the Court prefers to call "testimonial evidence." *See United States v. Wade*, *post*, p. 388 U. S. 218; *Gilbert v. California*, *post*, p. 388 U. S. 263.

There is yet another reason why I would adhere to the holding of *Olmstead* that the Fourth Amendment does not apply to eavesdropping. Since the Framers in the first clause of the Amendment specified that only persons, houses, and things were to be protected, they obviously wrote the second clause, regulating search warrants, in reference only to such tangible things. To hold, as the Court does, that the first clause protects words necessitates either a virtual rewriting of the particularity requirements of the Warrant Clause or a literal application of that clause's requirements and our cases construing them to situations they were never designed to cover. I am convinced that the Framers of the Amendment never intended this Court to do either, and yet it seems to me clear that the Court here does a little of both.

V

Assuming. as the Court holds, that the Fourth Amendment applies to eavesdropping and that the evidence obtained by an eavesdrop which violates the Fourth Amendment must be excluded in state courts, I disagree with the Court's holding that the New York statute, on its face, fails to comport with the Amendment. I also agree with my Brother WHITE that the statute, as here applied, did not violate any of petitioner's Fourth Amendment rights — assuming again that he has some — and that he is not entitled to a reversal of his conviction merely because the statute might have been applied in some way that would not have accorded with the Amendment.

This case deals only with a trespassory eavesdrop, an eavesdrop accomplished by placing "bugging" devices in certain offices. Significantly, the Court does not purport to disturb the *Olmstead-Silverman-Goldman* distinction between eavesdrops which are accompanied by a physical invasion and those that are not. Neither does the Court purport to overrule the holdings of *On Lee v. United States*,343 U. S. 747, and *Lopez v. United States*, 373 U. S. 427, which exempt from the Amendment's requirements the use of an electronic device to record, and perhaps even transmit, a conversation to which the user is a party. It is thus clear that at least certain types of electronic eavesdropping, until today, were completely outside the scope of the Fourth Amendment. Nevertheless, New York has made it a crime to engage in almost any kind of electronic eavesdropping, N.Y.Pen.Law § 738, and the only way eavesdropping, even the kind this Court has held constitutional, can be accomplished with immunity from criminal punishment is pursuant to § 813-a of the Code of Criminal Procedure, N.Y.Pen.Law § 739. The Court now strikes down § 813-a in its entirety, and that may well have the result of making it impossible for state law enforcement officers merely to listen through a closed door by means of an inverted cone or some other crude amplifying device, eavesdropping which this Court has to date refused to hold violative of the Fourth Amendment. Certainly there is no justification for striking down completely New York's statute, covering all kinds of eavesdropping, merely because it fails to contain the "strict precautions" which the Court derives — or, more accurately, fabricates — as conditions to eavesdrops covered by the Fourth Amendment. In failing to distinguish between types of eavesdropping and in failing to make clear that the New York statute is invalid only as applied to certain kinds of eavesdropping, the Court's opinion leaves the definite impression that all eavesdropping is governed by the Fourth Amendment. Such a step would require overruling of almost every opinion this Court has ever written on the subject. Indeed, from the Court's eavesdropping catalogue of horrors — electronic rays beamed at walls, lapel and cuff-link microphones, and off-premise parabolic microphones — it does not take too much insight to see that the Court is about ready to do, if it has not today done, just that.

I agree with my Brother WHITE that, instead of looking for technical defects in the language of the New York statute, the Court should examine the actual circumstances of its application in this case to determine whether petitioner's rights have here been violated. That to me seems to be the unavoidable task in any search and seizure case: was the particular search and seizure reasonable or not? We have just this Term held that a search and seizure without a warrant, and even without authorization of state law, can nevertheless, under all the circumstances, be "reasonable" for Fourth Amendment purposes. *Cooper v. California*, 386 U. S. 58. I do not see why that could not be equally true in the case of a search and seizure with a warrant and pursuant to a state law, even though the state law is itself too broad to be valid. Certainly a search and seizure may comply with the Fourth Amendment even in the absence of an authorizing statute which embodies the Amendment's requirements. *Osborn v. United States*, 385 U. S. 323, upon which the Court so heavily relies, is a good example of a case where the Court sustained the tape recording of a conversation by examining the particular circumstances surrounding it, even though no federal statute prescribed the precautions taken by the district judges there. Here, New York has gone much further than the Federal Government and most of the States to outlaw all eavesdropping except under the limited circumstances of § 813-a, a statute which, as I shall demonstrate, contains many more safeguards than the Fourth Amendment itself. But today New York fares far worse than those States which have done nothing to implement and supplement the Fourth Amendment: it must release a convicted criminal not because it has deprived him of constitutional rights, but because it has inartfully (according to the Court) tried to guarantee him those rights. The New York statute aside, the affidavits in this case were sufficient to justify a finding of probable cause, and the *ex parte* eavesdrop orders identified the person whose conversations were to be overheard, the place where the eavesdropping was to take place, and, when read in reference to the supporting affidavits, the type of conversations sought, *i.e.*, those relating to extortion and bribery.

The Court concludes its analysis of § 813-a by asserting that "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." Even if the Court's fear that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices" justifies it in rewriting the Fourth Amendment to impose on eavesdroppers "strict precautions" which are not imposed on other searchers, it is an undeserved criticism of New York to characterize its studied

efforts to regulate eavesdropping as resulting in a statute "without adequate judicial supervision or protective procedures." Let us look at the New York statute. It provides:

"(1) New York judges are to issue authorizations. (The Fourth Amendment does not command any such desirable judicial participation.)"

"(2) The judge must have an 'oath' from New York officials. (The Fourth Amendment does not specify who must execute the oath it requires.)"

"(3) The oath must state 'reasonable ground to believe that evidence of crime may be thus obtained,' and the judge may examine the affiant and any other witnesses to make certain that this is the case. (The Fourth Amendment requires a showing of 'probable cause,' but the Court does not dispute New York's assertion that 'reasonable ground' and 'probable cause' are the same. The Amendment does not specify, as the New York statute does, a procedure by which the judge may 'satisfy himself' of the existence of probable cause.) "

"(4) The 'person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof' must be particularly described. (In the case of conversation, it would seem impossible to require a more particular description than this. Tangible things in existence at the time a warrant for their seizure is issued could be more particularly described, but the only way to describe future conversations is by a description of the anticipated subject matter of the conversation. When the 'purpose' of the eavesdropping is stated, the subject of the conversation sought to be seized is readily recognizable. Nothing more was required in *Osborn;* nothing more should be required here.)"

"(5) The eavesdrop order must be limited in time to no more than two months. (The Fourth Amendment merely requires that the place to be searched be described. It does not require the warrant to limit the time of a search, and it imposes no limit, other than that of reasonableness, on the dimensions of the place to be searched.)"

Thus, it seems impossible for the Court to condemn this statute on the ground that it lacks "adequate judicial supervision or protective procedures." Rather, the only way the Court can invalidate it is to find it lacking in some of the safeguards which the Court today fashions without any reference to the language of the Fourth Amendment whatsoever. In fact, from the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself. First, the Court thinks the affidavits or the orders must particularize the crime being committed. The Fourth Amendment's particularity requirement relates to the place searched and the thing seized, not to the crime being committed. Second, the Court holds that two months for an eavesdrop order to be outstanding is too long. There are, however, no time limits of any kind in the Fourth Amendment other than the notion that a search should not last longer than reasonably necessary to search the place described in the warrant, and the extent of that place may also be limited by the concept of reasonableness. The Court does not explain why two months, regardless of the circumstances, is *per se* an unreasonable length of time to accomplish a verbal search. Third, the Court finds the statute deficient in not providing for a termination of the eavesdrop once the object is obtained and in not providing for a return of the warrant at that time. Where in the Fourth Amendment does the Court think it possible to find these requirements? Finally, the Court makes the fantastic suggestion that the eavesdropper must give notice to the person whose conversation is to be overheard or that the eavesdropper must show "exigent circumstances" before he can perform his eavesdrop without consent. Now, if never before, the Court's purpose is clear: it is determined to ban all eavesdropping. As the Court recognizes, eavesdropping "necessarily . . . depends on secrecy." Since secrecy is an essential, indeed a definitional, element of eavesdropping, when the Court says there shall be no eavesdropping without notice, the Court means to inform the Nation there shall be no eavesdropping — period.

It should now be clear that, in order to strike down the New York law, the Court has been compelled to rewrite completely the Fourth Amendment. By substituting the word "privacy" for the language of the first clause of the Amendment, the Court expands the scope of the Amendment to include oral conversations; then, by applying the literal particularity requirements of the second clause without adjustment for the Court's expansion of the Amendment's scope, the Court makes constitutional eavesdropping improbable; and finally, by inventing requirements found in neither clause — requirements with which neither New York nor any other State can possibly comply — the Court makes such eavesdropping impossible. If the Fourth Amendment does not ban all searches and seizures, I do not see how it can possibly ban all eavesdrops.

VI

As I see it, the differences between the Court and me in this case rest on different basic beliefs as to our duty in interpreting the Constitution. This basic charter of our Government was written in few words to define governmental powers generally, on the one hand, and to define governmental limitations, on the other. I believe it is the Court's duty to interpret these grants and limitations so as to carry out as nearly as possible the original intent of the Framers. But I do not believe that it is our duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution "up to date." Of course, where the Constitution has stated a broad purpose to be accomplished under any circumstances, we must consider that modern science has made it necessary to use new means in accomplishing the Framers' goal. A good illustration of this is the Commerce Clause, which gives Congress power to regulate commerce between the States however it may be carried on, whether by ox wagons or jet planes. But the Fourth Amendment gives no hint that it was designed to put an end to the age-old practice of using eavesdropping to combat crime. If changes in that Amendment are necessary, due to contemporary human reaction to technological advances, I think those changes should be accomplished by amendments, as the Constitution itself provides.

Then again, a constitution like ours is not designed to be a full code of laws, as some of our States and some foreign countries have made theirs. And if constitutional provisions require new rules and sanctions to make them as fully effective as might be desired, my belief is that calls for action not by us, but by Congress or state legislatures, vested with powers to choose between conflicting policies. Here, for illustration, there are widely diverging views about eavesdropping. Some would make it a crime, barring it absolutely and in all events; others would bar it except in searching for evidence in the field of "national security," whatever that means; still others would pass no law either authorizing or forbidding it, leaving it to follow its natural course. This is plainly the type of question that can and should be decided by legislative bodies, unless some constitutional provision expressly governs the matter, just as the Fifth Amendment expressly forbids enforced self-incrimination. There is no such express prohibition in the Fourth Amendment, nor can one be implied. The Fourth Amendment can only be made to prohibit or to regulate eavesdropping by taking away some of its words and by adding others.

Both the States and the National Government are at present confronted with a crime problem that threatens the peace, order, and tranquility of the people. There are, as I have pointed out, some constitutional commands that leave no room for doubt — certain procedures must be followed by courts regardless of how much more difficult they make it to convict and punish for crime. These commands we should enforce firmly and to the letter. But my objection to what the Court does today is the picking out of a broad general provision against unreasonable searches and seizures and the erecting out of it a constitutional obstacle against electronic eavesdropping that makes it impossible for lawmakers to overcome. Honest men may rightly differ on the potential dangers or benefits inherent in electronic eavesdropping and wiretapping. *See Lopez v. United States*, *supra*. But that is the very reason that legislatures, like New York's, should be left free to pass laws about the subject, rather than be told that the Constitution forbids it on grounds no more forceful than the Court has been able to muster in this case.

Home

[Footnote 3/1]

Mr. Justice Holmes dissenting in *Olmstead v. United States*, 277 U. S. 438, 277 U. S. 470.

[Footnote 3/2]

Weeks v. United States, 232 U. S. 383. *Compare Adams v. New York*, 192 U. S. 585.

[Footnote 3/3]

I concurred in *Mapp* because "[t]he close interrelationship between the Fourth and Fifth Amendments," 367 U.S. at 367 U. S. 662, as they applied to the facts of that case, required the exclusion there of the unconstitutionally seized evidence.

MR. JUSTICE HARLAN, dissenting.

The Court in recent years has more and more taken to itself sole responsibility for setting the pattern of criminal law enforcement throughout the country. Time-honored distinctions between the constitutional protections afforded against federal authority by the Bill of Rights and those provided against state action by the Fourteenth Amendment have been obliterated, thus increasingly subjecting state criminal law enforcement policies to oversight by this Court. *See, e.g., Mapp v. Ohio*, 367 U. S. 643; *Ker v. California*, 374 U. S. 23; *Malloy v. Hogan*, 378 U. S. 1; *Murphy v. Waterfront Commission*, 378 U. S. 52. Newly contrived

constitutional rights have been established without any apparent concern for the empirical process that goes with legislative reform. *See, e.g., Miranda v. Arizona*, 384 U. S. 436. And overlying the particular decisions to which this course has given rise is the fact that, short of future action by this Court, their impact can only be undone or modified by the slow and uncertain process of constitutional amendment.

Today's decision is in this mold. Despite the fact that the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country, the Court has chosen, quite unnecessarily, to decide this case in a manner which will seriously restrict, if not entirely thwart, such efforts, and will freeze further progress in this field, except as the Court may itself act or a constitutional amendment may set things right.

In my opinion, what the Court is doing is very wrong, and I must respectfully dissent.

I

I am, at the outset, divided from the majority by the way in which it has determined to approach the case. Without pausing to explain or to justify its reasoning, it has undertaken both to circumvent rules which have hitherto governed the presentation of constitutional issues to this Court, and to disregard the construction consistently attributed to a state statute by the State's own courts. Each of these omissions is, in my opinion, most unfortunate.

The Court declares, without further explanation, that, since petitioner was "affected" by § 813-a, he may challenge its validity on its face. Nothing in the cases of this Court supports this wholly ambiguous standard; the Court until now, has, in recognition of the intense difficulties so wide a rule might create for the orderly adjudication of constitutional issues, limited the situations in which state statutes may be challenged on their face. There is no reason here, apart from the momentary conveniences of this case, to abandon those limitations: none of the circumstances which have before properly been thought to warrant challenges of statutes on their face is present, *cf. Thornhill v. Alabama*, 310 U. S. 88, 310 U. S. 98, and no justification for additional exceptions has been offered. *See generally United States v. National Dairy Products Corp.*, 372 U. S. 29, 372 U. S. 36; *Aptheker v. Secretary of State*, 378 U. S. 500, 378 U. S. 521 (dissenting opinion). Petitioner's rights, and those of others similarly situated, can be fully vindicated through the adjudication of the consistency with the Fourteenth Amendment of each eavesdropping order.

If the statute is to be assessed on its face, the Court should at least adhere to the principle that, for purposes of assessing the validity under the Constitution of a state statute, the construction given the statute by the State's courts is conclusive of its scope and meaning. *Fox v. Washington*, 236 U. S. 273; *Winters v. New York*, 333 U. S. 507; *Poulos v. New Hampshire*, 345 U. S. 395. This principle is ultimately a consequence of the differences in function of the state and federal judicial systems. The strength with which it has hitherto been held may be estimated in part by the frequency with which the Court has in the past declined to adjudicate issues, often of great practical and constitutional importance, until the state courts "have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U. S. 167, 360 U. S. 176. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U. S. 496; *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101; *Shipman v. DuPre*, 339 U. S. 321; *Albertson v. Millard*, 345 U. S. 242; *Government Employees v. Windsor*, 353 U. S. 364.

The Court today entirely disregards this principle. In its haste to give force to its distaste for eavesdropping, it has apparently resolved that no attention need be given to the construction of § 813-a, adopted by the state courts. Apart from a brief and partial acknowledgment, spurred by petitioner's concession that the state cases might warrant exploration, the Court has been content simply to compare the terms of the statute with the provisions of the Fourth Amendment; upon discovery that their words differ, it has concluded that the statute is constitutionally impermissible. In sharp contrast, when confronted by Fourth Amendment issues under a federal statute which did not, and does not now, reproduce *ipsissimis verbis* the Fourth Amendment, 26 U.S.C. § 7607(2), the Court readily concluded, upon the authority of cases in the courts of appeals, that the statute effectively embodied the Amendment's requirements. *Draper v. United States*, 358 U. S. 307, 358 U. S. 310 n. And the Court, without the assistance even of state authorities, reached an identical conclusion as to a similar state statute in *Ker v. California*, 374 U. S. 23, 374 U. S. 36 n. The circumstances of the present case do not come even within the narrow exceptions to the rule that the Court ordinarily awaits a state court's construction before adjudicating the validity of a state statute. *Cf. Dombrowski v. Pfister*, 380 U. S. 479; *Baggett v. Bullitt*, 377 U. S. 360. The Court has shown no justification for its disregard of existing and pertinent state authorities.

II

The Court's precipitate neglect of the New York cases is the more obviously regrettable when their terms are examined, for they make quite plain that the state courts have fully recognized the applicability of the relevant federal constitutional requirements, and that they have construed § 813-a in conformity with those requirements. Opinions of the state courts repeatedly suggest that the "reasonable grounds" prescribed by the section are understood to be synonymous with the "probable cause" demanded by the Fourth and Fourteenth Amendments.*People v. Cohen*, 42 Misc.2d 403, 404, 248 N.Y.S.2d 339, 341; *People v. Grossman*, 45 Misc.2d 557, 568, 257 N.Y.S.2d 266, 277; *People v. Beshany*, 43 Misc.2d 521, 525, 252 N.Y.S.2d 110, 115. The terms are frequently employed interchangeably, without the least suggestion of any shadings of meaning. *See, e.g., People v. Rogers*, 46 Misc.2d 860, 863, 261 N.Y.S.2d 152, 155; *People v. McDonough*, 51 Misc.2d 1065, 1069, 275 N.Y.S.2d 8, 12. Further, a lower state court has stated quite specifically that "the same standards, at the least, must be applied" to orders under § 813-a as to warrants for the search and seizure of tangible objects. *People v. Cohen*, *supra*, at 407-408, 248 N.Y.S.2d at 344. Indeed, the court went on to say that the standards "should be much more stringent than those applied to search warrants." *Id.* at 408, 248 N.Y.S.2d at 344. *Compare Siegel v. People*, 16 N.Y.2d 330, 332, 213 N.E.2d 682, 683. The court in *Cohen* was concerned with a wiretap order, but the order had been issued under § 813-a, and there was no suggestion there or elsewhere that eavesdropping orders should be differently treated. New York's statutory requirements for search warrants, it must be emphasized, are virtually a literal reiteration of the terms of the Fourth Amendment. N.Y.Code Crim.Proc. § 793. If the Court wished a precise invocation of the terms of the Fourth Amendment, it had only to examine the pertinent state authorities.

There is still additional evidence that the State fully recognizes the applicability to eavesdropping orders of the Fourth Amendment's constraints. The Legislature of New York adopted in 1962 comprehensive restrictions upon the use of eavesdropped information obtained without a prior § 813-a order. N.Y.Civ.Prac. § 4506. The restrictions were expected and intended to give full force to the mandate of the opinion for this Court in *Mapp v. Ohio*, 367 U. S. 643. *See* 2 McKinney's Session Laws of New York 3677 (1962); New York State Legislative Annual 16 (1962). If it was then supposed that information obtained without a prior § 813-a order must, as a consequence of *Mapp*, be excluded from evidence, but that evidence obtained with a § 813-a order need not be excluded, it can only have been assumed that the requirements applicable to the issuance of § 813-a orders were entirely consistent with the demands of the Fourth and Fourteenth Amendments. The legislature recognized the "hiatus" in its law created by *Mapp*, and wished to set its own "house . . . in order." New York State Legislative Annual, *supra*,at 18. It plainly understood that the Amendments were applicable, and intended to adhere fully to their requirements.

New York's permissive eavesdropping statute must, for purposes of assessing its constitutional validity on its face, be read "as though" this judicial gloss had been "written into" it. *Poulos v. New Hampshire*, *supra*, at 345 U. S. 402. I can only conclude that, so read, the statute incorporates as limitations upon its employment the requirements of the Fourth Amendment.

III

The Court has frequently observed that the Fourth Amendment's two clauses impose separate, although related, limitations upon searches and seizures; the first "is general, and forbids every search that is unreasonable," *Go-Bart Co. v. United States*, 282 U. S. 344, 282 U. S. 357; the second places a number of specific constraints upon the issuance and character of warrants. It would be inappropriate and fruitless to undertake now to set the perimeters of "reasonableness" with respect to eavesdropping orders in general; any limitations, for example, necessary upon the period over which eavesdropping may be conducted, or upon the use of intercepted information unconnected with the offenses for which the eavesdropping order was first issued, should properly be developed only through a case-by-case examination of the pertinent questions. It suffices here to emphasize that, in my view, electronic eavesdropping, as such or as it is permitted by this statute, is not an unreasonable search and seizure.

At the least, reasonableness surely implies that this Court must not constrain in any grudging fashion the development of procedures, consistent with the Amendment's essential purposes, by which methods of search and seizure unknown in 1789 may be appropriately controlled.

It is instead obliged to permit, and indeed even to encourage, serious efforts to approach constructively the difficult problems created by electronic eavesdropping. In this situation, the Court should recognize and give weight to the State's careful efforts to restrict the excessive or unauthorized employment of these devices. New York has provided that no use may be made of eavesdropping devices without a prior court order, and that such an order is obtainable only upon the application of state prosecutorial authorities or of policemen of suitable seniority. N.Y.Code Crim.Proc. § 813-a. Eavesdropping conducted without an

order is punishable by imprisonment for as much as two years. N.Y.Pen.Law §§ 738, 740. Information obtained through impermissible eavesdropping may not be employed for any purpose in any civil or criminal action, proceeding, or hearing, except in the criminal prosecution of the unauthorized eavesdropper himself. N.Y.Civ.Prac. § 4506. These restrictions are calculated to prevent the "unbridled," [Footnote 4/1] "unauthorized," [Footnote 4/2] and "indiscriminate" [Footnote 4/3] electronic searches and seizures which members of this Court have frequently condemned. Surely the State's efforts warrant at least a careful, and even sympathetic, examination of the fashion in which the state courts have construed these provisions, and in which they have applied them to the situation before us. I cannot, in any event, agree that the Fourth Amendment can properly be taken as a roadblock to the use, within appropriate limits, of law enforcement techniques necessary to keep abreast of modern-day criminal activity. The importance of these devices as a tool of effective law enforcement is impressively attested by the data marshalled in my Brother WHITE's dissenting opinion. *Post*, p. 388 U. S. 107.

IV

I turn to what properly is the central issue in this case: the validity under the Warrants Clause of the Fourth Amendment of the eavesdropping order under which the recordings employed at petitioner's trial were obtained. It is essential first to set out certain of the pertinent facts.

The disputed recordings were made under the authority of a § 813-a order, dated June 12, 1962, permitting the installation of an eavesdropping device in the business office of one Harry Steinman; the order, in turn, was, so far as this record shows, issued solely upon the basis of information contained in affidavits submitted to the issuing judge by two assistant district attorneys. The first affidavit, signed by Assistant District Attorney Goldstein, indicated that the Rackets Bureau of the District Attorney's Office of New York County was then conducting an investigation of alleged corruption in the State Liquor Authority, and that the Bureau had received information that persons desiring to obtain or retain liquor licenses were obliged to pay large sums to officials of the Authority. It described the methods by which the bribe money was transmitted through certain attorneys to the officials. The affidavit asserted that one Harry Neyer, a former employee of the Authority, served as a "conduit." It indicated that evidence had been obtained "over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Neyer," that conferences "relative to the payment of unlawful fees" occurred in Steinman's office. The number and street address of the office were provided. The affidavit specified that the "evidence indicates that the said Harry Steinman has agreed to pay, through the aforesaid Harry Neyer, $30,000" in order to secure a license for the Palladium Ballroom, an establishment within New York City. The Palladium, it was noted, had been the subject of hearings before the Authority "because of narcotic arrests therein." On the basis of this information, the affidavit sought an order to install a recording device in Steinman's business office.

The second affidavit, signed by Assistant District Attorney Scotti, averred that Scotti, as the Chief of the Bureau to which Goldstein was assigned, had read Goldstein's affidavit, and had concluded that the order might properly issue under § 81a.

The order as issued permitted the recording of "any and all conversations, communications and discussions" in Steinman's business office for a period of 60 days.

The central objections mounted to this order by petitioner, and repeated as to the statute itself by the Court, are three: first, that it fails to specify with adequate particularity the conversations to be seized; second, that it permits a general and indiscriminate search and seizure, and third, that the order was issued without a showing of probable cause. [Footnote 4/4]

Each of the first two objections depends principally upon a problem of definition: the meaning in this context of the constitutional distinction between "search" and "seizure." If listening alone completes a "seizure," it would be virtually impossible for state authorities at a probable cause hearing to describe with particularity the seizures which would later be made during extended eavesdropping; correspondingly, seizures would unavoidably be made which lacked any sufficient nexus with the offenses for which the order was first issued. *Cf. Kremen v. United States*, 353 U. S. 346; *Warden v. Hayden*, 387 U. S. 294. There is no need for present purposes to explore at length the question's subtleties; it suffices to indicate that, in my view, conversations are not "seized" either by eavesdropping alone or by their recording so that they may later be heard at the eavesdropper's convenience. Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversation beyond the initial listening process is required for the seizure of the spoken word. *Cf. Lopez v. United States*, 373 U. S. 427,373 U. S. 459 (dissenting opinion); *United States v. On Lee*, 193 F.2d 306, 313-314 (dissenting opinion); *District of Columbia v. Little*, 85 U.S.App. D C. 242, 247, 178 F.2d 13, 18, affirmed on other grounds, 339 U. S. 339 U.S. 1. With this premise, I turn to these three objections.

The "particularity" demanded by the Fourth Amendment has never been thought by this Court to be reducible "to formula"; *Oklahoma Press Pub. Co. v. Walling*, 327 U. S. 186, 327 U. S. 209; it has instead been made plain that its measurement must take fully into account the character both of the materials to be seized and of the purposes of the seizures. Accordingly, where the materials "are books, and the basis for their seizure is the ideas which they contain," the most "scrupulous exactitude" is demanded in the warrant's description; *Stanford v. Texas*, 379 U. S. 476, 379 U. S. 485; *see also Marcus v. Search Warrant*, 367 U. S. 717; but where the special problems associated with the First Amendment are not involved, as they are not here, a more "reasonable particularity," *Brown v. United States*, 276 U. S. 134, 276 U. S. 143; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 207 U. S. 554, is permissible. The degree of particularity necessary is best measured by that requirement's purposes. The central purpose of the particularity requirement is to leave "nothing . . . to the discretion of the officer executing the warrant," *Marron v. United States*, 275 U. S. 192, 275 U. S. 196, by describing the materials to be seized with precision sufficient to prevent "the seizure of one thing under a warrant describing another." *Ibid.* The state authorities are not compelled at the probable cause hearing to wager, upon penalty of a subsequent reversal, that they can successfully predict each of the characteristics of the materials which they will later seize, *cf. Consolidated Rendering Co. v. Vermont, supra*, at 207 U. S. 554; such a demand would, by discouraging the use of the judicial process, defeat the Amendment's central purpose. *United States v. Ventresca*, 380 U. S. 102, 380 U. S. 108.

The materials to be seized are instead described with sufficient particularity if the warrant readily permits their identification both by those entrusted with the warrant's execution and by the court in any subsequent judicial proceeding. "It is," the Court has said with reference to the particularity of the place to be searched, "enough if the description is such that the officer . . . can with reasonable effort ascertain and identify" the warrant's objects. *Steele v. United States No. 1*, 267 U. S. 498, 267 U. S. 503.

These standards must be equally applicable to the seizure of words, and, under them, this order did not lack the requisite particularity. The order here permitted the interception, or search, of any and all conversations occurring within the order's time limitations at the specified location; but this direction must be read in light of the terms of the affidavits, which, under § 813, form part of the authority for the eavesdropping. The affidavits make plain that, among the intercepted conversations, the police were authorized to seize only those "relative to the payment of unlawful fees necessary to obtain liquor licenses." These directions sufficed to provide a standard which left nothing in the choice of materials to be seized to the "whim," *Stanford v. Texas*, *supra*, at 379 U. S. 485, of the state authorities. There could be no difficulty, either in the course of the search or in any subsequent judicial proceeding, in determining whether specific conversations were among those authorized for seizure by the order. The Fourth and Fourteenth Amendments do not demand more. *Compare* Kamisar, The Wiretapping-Eavesdropping Problem: A Professor's View, 44 Minn.L.Rev. 891, 913.

Nor was the order invalid because it permitted the search of any and all conversations occurring at the specified location; if the requisite papers have identified the materials to be seized with sufficient particularity, as they did here, and if the search was confined to an appropriate area, the order is not invalidated by the examination of all within that area reasonably necessary for discovery of the materials to be seized. I do not doubt that searches by eavesdrop must be confined in time precisely as the search for tangibles is confined in space, but the actual duration of the intrusion here, or, for that matter, the total period authorized by the order, was not, given the character of the offenses involved, excessive. All the disputed evidence was obtained within 13 days, scarcely unreasonable in light of an alleged conspiracy involving many individuals and a lengthy series of transactions.

The question therefore remains only whether, as petitioner suggests, the order was issued without an adequate showing of probable cause. The standards for the measurement of probable cause have often been explicated in the opinions of this Court; see, e.g., United States v. Ventresca, 380 U. S. 102; its suffices now simply to emphasize that the information presented to the magistrate or commissioner must permit him to "judge for himself the persuasiveness of the facts relied on by a complaining officer." *Giordenello v. United States*, 357 U. S. 480, 357 U. S. 486. The magistrate must "assess independently the probability" that the facts are as the complainant has alleged; *id.* at 357 U. S. 487; he may not "accept without question the complainant's mere conclusion." *Id.* at 357 U. S. 486.

As measured by the terms of the affidavits here, the issuing judge could properly have concluded that probable cause existed for the order. Unlike the situations in *Nathanson v. United States*, 290 U. S. 41, and *Giordenello v. United States*, *supra*, the judge was provided the evidence which supported the affiants' conclusions; he was not compelled to rely merely on their "affirmation of suspicion and belief," *Nathanson v. United States*, *supra*, at 290 U. S. 46. *Compare Rugendorf v. United States*, 376 U. S. 528; *Aguilar v. Texas*, 378 U. S. 108. In my opinion, taking the Steinman affidavits on their face, the constitutional requirements of probable cause were fully satisfied.

V

It is, however, plain that the Steinman order was issued principally upon the basis of evidence obtained under the authority of the Neyer order; absent the Neyer eavesdropped evidence, the Steinman affidavits consist entirely of conclusory assertions, and they would, in my judgment, be insufficient. It is, therefore, also necessary to examine the Neyer order.

The threshold issue is whether petitioner has standing to challenge the validity under the Constitution of the Neyer order. Standing to challenge the constitutional validity of a search and seizure has been an issue of some difficulty and uncertainty; [Footnote 4/5] it has, nevertheless, hitherto been thought to hinge, not upon the use against the challenging party of evidence seized during the search, but instead upon whether the privacy of the challenging party's premises or person has been invaded. *Jones v. United States*, 362 U. S. 257; *Wong Sun v. United States*, 371 U. S. 471. These cases centered upon searches conducted by federal authorities and challenged under Fed.Rule Crim.Proc. 41(e), but there is no reason now to suppose that any different standard is required by the Fourteenth Amendment for searches conducted by state officials. *See generally* Maguire, Evidence of Guilt 215-216 (1959).

The record before us does not indicate with precision what information was obtained under the Neyer order, but it appears, and petitioner does not otherwise assert, that petitioner was never present in Neyer's office during the period in which eavesdropping was conducted. There is, moreover, no suggestion that petitioner had any property interest in the premises in which the eavesdropping device was installed. Apart from the use of evidence obtained under the Neyer order to justify issuance of the Steinman order, under which petitioner's privacy was assuredly invaded, petitioner is linked with activities under the Neyer order only by one fleeting and ambiguous reference in the record.

In a pretrial hearing conducted on a motion to suppress the Steinman recordings, counsel for the State briefly described the materials obtained under the Neyer order. Counsel indicated that

"Mr. Neyer then has conversations with Mr. Steinman and other persons. In the course of some of these conversations, we have one-half of a telephone call, of several telephone calls between Mr. Neyer and a person he refers to on the telephone as Mr. Berger, and in the conversation with Mr. Berger, Mr. Neyer discusses also the obtaining of a liquor license for the Palladium and mentions the fact that this is going to be a big one. "

Counsel for petitioner responded, shortly after, that "I take it . . . that none of the subject matter to which [counsel for the State] has just adverted is any part of this case. . . ." Counsel for the State responded:

"That's right, your Honor. I am not — I think evidence can be brought out during the trial that Berger, who Mr. Steinman, Mr. Neyer speaks to concerning the Palladium, is, in fact, the defendant Ralph Berger."

However oblique this invasion of petitioner's personal privacy might at first seem, it would entirely suffice, in my view, to afford petitioner standing to challenge the validity of the Neyer order. It is surely without significance in these circumstances that petitioner did not conduct the conversation from a position physically within the room in which the device was placed; the fortuitousness of his location can matter no more than if he had been present for a conference in Neyer's office, but had not spoken, or had been seated beyond the limits of the device's hearing. The central question should properly be whether his privacy has been violated by the search; it is enough for this purpose that he participated in a discussion into which the recording intruded. Standing should not, in any event, be made an insuperable barrier which unnecessarily deprives of an adequate remedy those whose rights have been abridged; to impose distinctions of excessive refinement upon the doctrine "would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones v. United States*, *supra*, at362 U. S. 267. It would instead "permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *United States v. Jeffers*, 342 U. S. 48, 342 U. S. 52. I would conclude that, under the circumstances here, the recording of a portion of a telephone conversation to which petitioner was party would suffice to give him standing to challenge the validity under the Constitution of the Neyer order. [Footnote 4/6]

Given petitioner's standing under federal law to challenge the validity of the Neyer order, I would conclude that such order was issued without an adequate showing of probable cause. It seems quite plain, from the facts described by the State, that, at the moment the Neyer order was sought, the Rackets Bureau indeed had ample information to justify the issuance of an eavesdropping order. Nonetheless, the affidavits presented at the Neyer hearing unaccountably contained only the most conclusory allegations of suspicion. The record before us is silent on whether additional information might have been orally presented to the issuing judge. [Footnote 4/7] Under these circumstances, I am impelled to the view that the judge lacked sufficient information to permit him to

assess the circumstances as a "neutral and detached magistrate," *Johnson v. United States*, 333 U. S. 10, 333 U. S. 14, and accordingly that the Neyer order was impermissible.

VI

It does not follow, however, that evidence obtained under the Neyer order could not properly have been employed to support issuance of the Steinman order. The basic question here is the scope of the exclusionary rule fashioned in *Weeks v. United States*, 232 U. S. 383, and made applicable to state proceedings in *Mapp v. Ohio*, 367 U. S. 643. The Court determined in *Weeks* that the purposes of the Fourth Amendment could be fully vindicated only if materials seized in violation of its requirements were excluded from subsequent use against parties aggrieved by the seizure. Despite broader statements in certain of the cases, *see*, *e.g.*, *Silverthorne Lumber Co. v. United States*,251 U. S. 385, 251 U. S. 392, the situations for which the *Weeks* rule was devised, and to which it has since been applied, have uniformly involved misconduct by police or prosecutorial authorities. The rule's purposes have thus been said to be both to discourage "disobedience to the Federal Constitution," *Mapp v. Ohio*, *supra*,at 367 U. S. 657, and to avoid any possibility that the courts themselves might be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U. S. 206, 364 U. S. 223. The Court has cautioned that the exclusionary rule was not intended to establish supervisory jurisdiction over the administration of state criminal justice, and that the States might still fashion "workable rules governing arrests, searches and seizures." *Ker v. California*, 374 U. S. 23, 374 U. S. 34.

I find nothing in the terms or purposes of the rule which demands the invalidation, under the circumstances at issue here, of the Steinman order. The state authorities appeared, as the statute requires, before a judicial official, and held themselves ready to provide information to justify the issuance of an eavesdropping order. The necessary evidence was at hand, and there was apparently no reason for the State to have preferred that it not be given to the issuing judge. The Neyer order is thus invalid simply as a consequence of the judge's willingness to act upon substantially less information than the Fourteenth Amendment obliged him to demand; correspondingly, the only "misconduct" that could be charged against the prosecution consists entirely of its failure to press additional evidence upon him. If the exclusionary rule were to be applied in this and similar situations, praiseworthy efforts of law enforcement authorities would be seriously, and quite unnecessarily, hampered; the evidence lawfully obtained under a lengthy series of valid warrants might, for example, be lost by the haste of a single magistrate. The rule applied in that manner would not encourage police officers to adhere to the requirements of the Constitution; it would simply deprive the State of evidence it has sought in accordance with those requirements.

I would hold that, where, as here, authorities have obtained a warrant in a judicial proceeding untainted by fraud, a second warrant issued on the authority of evidence gathered under the first is not invalidated by a subsequent finding that the first was issued without a showing of probable cause.

VII

It follows that the Steinman order was, as a matter of constitutional requirement, validly issued, that the recordings obtained under it were properly admitted at petitioner's trial, and, accordingly, that his conviction must be affirmed. [Footnote 4/8]

[Footnote 4/1]

Hoffa v. United States, 385 U. S. 293, 385 U. S. 317 (dissenting opinion).

[Footnote 4/2]

Silverman v. United States, 365 U. S. 505, 365 U. S. 510.

[Footnote 4/3]

Lopez v. United States, 373 U. S. 427, 373 U. S. 441 (opinion concurring in result).

[Footnote 4/4]

Two of petitioner's other contentions are plainly foreclosed by recent opinions of this Court. His contention that eavesdropping unavoidably infringes the rule forbidding the seizure of "mere evidence" is precluded by *Warden v. Hayden*, 387 U. S. 294. His contention that eavesdropping violates his constitutional privilege against self-incrimination is answered by *Osborn v. United States*, 385 U. S. 323, and *Hoffa v. United States*, 385 U. S. 293.

[Footnote 4/5]

See, e.g., Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw.U.L.Rev. 471; Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U.Chi.L.Rev. 342; Recent Development, Search and Seizure: Admissibility of Illegally Acquired Evidence Against Third Parties, 66 Col.L.Rev. 400.

[Footnote 4/6]

While, on this record, it cannot be said with entire assurance that the "Berger" mentioned in the Neyer eavesdropped conversation was this petitioner, I think it proper to proceed at this juncture on the basis that such is the case, leaving whatever questions of identity there may be to such state proceedings as, on the premises of this opinion, might subsequently eventuate in the state courts. *See* <l=|388 u.s.="" 41fn4="" 8|="">n. 8, *infra.*</l=|388>

[Footnote 4/7]

The only additional reference in the record possibly pertinent to the content of the Neyer hearing is a conclusory assertion by counsel for the State in argument on the motion to suppress that the State had shown its evidence to the issuing judge. The reference is obscure, but its context suggests strongly that counsel meant only that the Steinman affidavits were adequate for purposes of probable cause.

[Footnote 4/8]

Whether N.Y.Civ.Prac. § 4506, as amended to take effect July 1, 1962, some 18 days after the issuance of the Steinman order, would he deemed, under the premises of this opinion, to render inadmissible at Berger's trial the evidence procured under it, is a matter for the state courts to decide. *See People v. Cohen*, 42 Misc.2d 403, 408, 409, 248 N.Y.S.2d 339, 344, 345; *People v. Beshany*, 43 Misc.2d 521, 532, 252 N.Y.S.2d 110, 121. Further state proceedings on that core would, of course, not be foreclosed under a disposition in accordance with this opinion.

MR. JUSTICE WHITE, dissenting.

With all due respect, I dissent from the majority's decision which unjustifiably strikes down "on its face" a 1938 New York statute applied by state officials in securing petitioner's conviction. In addition, I find no violation of petitioner's constitutional rights, and I would affirm.

I

At petitioner's trial for conspiring to bribe the Chairman of the New York State Liquor Authority, the prosecution introduced tape recordings obtained through an eavesdrop of the office of Harry Steinman which had been authorized by court order pursuant to § 813-a, N.Y.Code Crim.Proc. Since Berger was rightfully in Steinman's office when his conversations were recorded through the Steinman eavesdrop, he is entitled to have those recordings excluded at his trial if they were unconstitutionally obtained. *Jones v. United States*, 362 U. S. 257; *Silverman v. United States*, 365 U. S. 505. Petitioner vigorously argues that all judicially authorized eavesdropping violates Fourth Amendment rights, but his position is unsound.

Two of petitioner's theories are easily answered. First, surreptitious electronic recording of conversations among private persons, and introduction of the recording during a criminal trial, do not violate the Fifth Amendment's ban against compulsory self-incrimination, because the conversations are not the product of any official compulsion. *Olmstead v. United States*, 277 U. S. 438; *Hoffa v. United States*, 385 U. S. 293; *Osborn v. United States*, 385 U. S. 323. Second, our decision in *Warden v. Hayden*, 387 U. S. 294, answers petitioner's contention that eavesdropping under § 813-a constitutes an unlawful search for "mere evidence"; whatever the limits of the search and seizure power may be under the Fourth Amendment, the oral evidence of a furtive bribery conspiracy sought in the application for the Steinman eavesdrop order was within the scope of proper police investigation into suspected criminal activity.

Petitioner primarily argues that eavesdropping is invalid, even pursuant to court order or search warrant, because it constitutes a "general search" barred by the Fourth Amendment. Petitioner suggests that the search is inherently overbroad because the eavesdropper will overhear conversations which do not relate to criminal activity. But the same is true of almost all searches of private property which the Fourth Amendment permits. In searching for seizable matters, the police must necessarily see or hear, and comprehend, items which do not relate to the purpose of the search. That this occurs, however, does not render the search invalid, so long as it is authorized by a suitable search warrant and so long as the police, in executing that warrant, limit themselves to searching for items which may constitutionally be seized. [Footnote 5/1] Thus, while I would agree with petitioner that

individual searches of private property through surreptitious eavesdropping with a warrant must be carefully circumscribed to avoid excessive invasion of privacy and security, I cannot agree that all such intrusions are constitutionally impermissible general searches.

This case boils down, therefore, to the question of whether § 813-a was constitutionally applied in this case. At the outset, it is essential to note that the recordings of the Neyer office eavesdrop were not introduced at petitioner's trial, nor was petitioner present during this electronic surveillance, nor were any of petitioner's words recorded by that eavesdrop. The only links between the Neyer eavesdrop and petitioner's conviction are (a) that evidence secured from the Neyer recordings was used in the Steinman affidavits, which in turn led to the Steinman eavesdrop where petitioner's incriminating conversations were overheard, and (b) that the Neyer eavesdrop recorded what may have been [Footnote 5/2] the Neyer end of a telephone conversation between Neyer and Berger. In my opinion, it is clear that neither of these circumstances is enough to establish that Berger's Fourth Amendment interests were invaded by the eavesdrop in Neyer's office. *Wong Sun v. United States*, 371 U. S. 471; *Jones v. United States*, 362 U. S. 257. Thus, petitioner cannot secure reversal on the basis of the allegedly unconstitutional Neyer eavesdrop.

I turn to the circumstances surrounding the issuance of the one eavesdrop order which petitioner has "standing" to challenge. On June 11, 1962, Assistant District Attorney David Goldstein filed an affidavit before Judge Joseph Sarafite of the New York County Court of General Sessions requesting a court order under § 813-a authorizing the Steinman eavesdrop. Goldstein averred that the District Attorney's office was investigating alleged corruption in the State Liquor Authority, that the office had obtained evidence of a conspiracy between Authority officials and private attorneys to extort large illegal payments from liquor license applicants, that a "duly authorized eavesdropping device" had previously been installed in the office of Neyer, who was suspected of acting as a conduit for the bribes, and that this device had obtained evidence

"that conferences relative to the payment of unlawful fees necessary to obtain liquor licenses occur in the office of one Harry Steinman, located in Room 801 at 15 East 48th Street, in the County, City and State of New York."

The affidavit went on to describe Steinman at length as a prospective liquor license applicant and to relate evidence of a specific payoff which Steinman was likely to make, through Neyer, in the immediate future. On the basis of these facts, the affidavit concluded that

"there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions that may take place in the office of Harry Steinman which is located in Room 801 at 15 East 48th Street,"

and requested an order authorizing an eavesdrop until August 11, 1962. An affidavit of Assistant District Attorney Alfred Scotti verified the information contained in the Goldstein affidavit. The record also indicates that the affidavits were supplemented by orally presenting to Judge Sarafite all of the evidence obtained from the Neyer eavesdrop. But assuming that the Steinman court order was issued on the affidavits alone, I am confident that those affidavits are sufficient under the Fourth Amendment.

Goldstein's affidavit described with "particularity" what crime Goldstein believed was being committed; it requested authority to search one specific room; it described the principal object of the search — Steinman and his coconspirators — and the specific conversations which the affiant hoped to seize; it gave a precise time limit to the search, and it told the judge the manner in which the affiant had acquired his information. Petitioner argues that the reliability of the Neyer eavesdrop information was not adequately verified in the Steinman affidavit. But the Neyer eavesdrop need not be explained in detail in an application to the very judge who had authorized it just two months previously. Judge Sarafite had every reason to conclude that the Neyer eavesdrop was a reliable basis for suspecting a criminal conspiracy (consisting, as the recording did, of admissions by Steinman and other coconspirators) and that it was the source of the specific evidence recited in the Steinman affidavits.

"[A]ffidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion,"

United States v. Ventresca, 380 U. S. 102, 380 U. S. 108. I conclude that the Steinman affidavits fully satisfied the Fourth Amendment requirements of probable cause and particularity in the issuance of search warrants.

The Court, however, seems irresistibly determined to strike down the New York statute. The majority criticizes the *ex parte* nature of § 813-a court orders, the lack of a requirement that "exigent circumstances" be shown, and the fact that one court order authorizes "a series or a continuous surveillance." But where are such search warrant requirements to be found in the Fourth

Amendment or in any prior case construing it? The Court appears intent upon creating out of whole cloth new constitutionally mandated warrant procedures carefully tailored to make eavesdrop warrants unobtainable. That is not a judicial function. The question here is whether this search complied with Fourth Amendment standards. There is no indication in this record that the District Attorney's office seized and used conversations not described in the Goldstein affidavit, nor that officials continued the search after the time when they had gathered the evidence which they sought. Given the constitutional adequacy of the Goldstein affidavit in terms of Fourth Amendment requirements of probable cause and particularity, I conclude that both the search and seizure in Steinman's office satisfied Fourth Amendment mandates. Regardless of how the Court would like eavesdropping legislation to read, our function ends in a state case with the determination of these questions.

II

Unregulated use of electronic surveillance devices by law enforcement officials and by private parties poses a grave threat to the privacy and security of our citizens. As the majority recognizes, New York is one of a handful of States that have reacted to this threat by enacting legislation that limits official use of all such devices to situations where designated officers obtain judicial authorization to eavesdrop. Except in these States, there is a serious lack of comprehensive and sensible legislation in this field, a need that has been noted by many, including the President's prestigious Commission on Law Enforcement and Administration of Justice (the "Crime Commission") in its just-published reports. [Footnote 5/3] Bills have been introduced at this session of Congress to fill this legislative gap, and extensive hearings are in progress before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, and before Subcommittee No. 5 of the House Committee on the Judiciary.

At least three positions have been presented at these hearings. Opponents of eavesdropping and wiretapping argue that they are so "odious" an invasion of privacy that they should never be tolerated. The Justice Department, in advocating the Administration's current position, asserts a more limited view; its bill would prohibit all wiretapping and eavesdropping by state and federal authorities except in cases involving the "national security," and in addition would ban judicial use of evidence gathered even in national security cases. S. 928 and H.R. 5386, 90th Cong., 1st Sess. Advocates of a third position, who include many New York law enforcement personnel and others, agree that official eavesdropping and wiretapping must be stringently controlled, but argue that such methods are irreplaceable investigative tools which are needed for the enforcement of criminal laws and which can be adequately regulated through legislation such as New York's § 813-a.

The grant of certiorari in this case has been widely noted, and our decision can be expected to have a substantial impact on the current legislative consideration of these issues. Today's majority does not, in so many words, hold that all wiretapping and eavesdropping are constitutionally impermissible. But, by transparent indirection, it achieves practically the same result by striking down the New York statute and imposing a series of requirements for legalized electronic surveillance that will be almost impossible to satisfy.

In so doing, the Court ignores or discounts the need for wiretapping authority, and incredibly suggests that there has been no breakdown of federal law enforcement despite the unavailability of a federal statute legalizing electronic surveillance. The Court thereby impliedly disagrees with the carefully documented reports of the Crime Commission which, contrary to the Court's intimations, underline the serious proportions of professional criminal activity in this country, the failure of current national and state efforts to eliminate it, and the need for a statute permitting carefully controlled official use of electronic surveillance, particularly in dealing with organized crime and official corruption. *See* Appendix A, *infra;* Report of the Crime Commission's Task Force on Organized Crime 17-19, 80, 91-113 (1967). How the Court can feel itself so much better qualified than the Commission, which spent months on its study, to assess the needs of law enforcement is beyond my comprehension. We have only just decided that reasonableness of a search under the Fourth Amendment must be determined by weighing the invasions of Fourth Amendment interests which wiretapping and eavesdropping entail against the public need justifying such invasions. *Camara v. Municipal Court*, 387 U. S. 523; *See v. City of Seattle*, 387 U. S. 541. In these terms, it would seem imperative that the Court at least deal with facts of the real world. This the Court utterly fails to do. In my view, its opinion is wholly unresponsive to the test of reasonableness under the Fourth Amendment.

The Court also seeks support in the fact that the Federal Government does not now condone electronic eavesdropping. But here the Court is treading on treacherous ground. [Footnote 5/4] It is true that the Department of Justice has now disowned the relevant findings and recommendations of the Crime Commission, *see* Hearings on H.R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., ser. 3, at 308 (1967) (hereafter cited as "House Hearings"), and that it has

recommended to the Congress a bill which would impose broad prohibitions on wiretapping and eavesdropping. But although the Department's communication to the Congress speaks of "exercis[ing] the full reach of our constitutional powers to outlaw electronic eavesdropping on private conversations," [Footnote 5/5] the fact is, as I have already indicated, that the bill does nothing of the kind. Both H.R. 5386 and its counterpart in the Senate, S. 928, provide that the prohibitions in the bill shall not be deemed to apply to interceptions in national security cases. Apparently, under this legislation, the President, without court order, would be permitted to authorize wiretapping or eavesdropping

"to protect the Nation against actual or potential attack or other hostile acts of a foreign power or any other serious threat to the security of the United States, or to protect national security information against foreign intelligence activities."

H.R. 5386 and S. 928, § 3.

There are several interesting aspects to this proposed national security exemption in light of the Court's opinion. First, there is no limitation on the President's power to delegate his authority, and it seems likely that at least the Attorney General would exercise it. House Hearings at 302. Second, the national security exception would reach cases like sabotage and investigations of organizations controlled by a foreign government. For example, wiretapping to prove an individual is a member of the Communist Party, it is said, would be permissible under the statute. House Hearings at 292. Third, information from authorized surveillance in the national security area would not be admissible in evidence; to the contrary, the surveillance would apparently be for investigative and informational use only, not for use in a criminal prosecution and not authorized because of any belief or suspicion that a crime is being committed or is about to be committed. House Hearings at 289. Fourth, the Department of Justice has recommended that the Congress not await this Court's decision in the case now before us because, whether or not the Court upholds the New York statute, the power of Congress to enact the proposed legislation would not be affected. House Hearings at 308. But if electronic surveillance is a "general search," or if it must be circumscribed in the manner the Court now suggests, how can surreptitious electronic surveillance of a suspected Communist or a suspected saboteur escape the strictures of the Fourth Amendment? It seems obvious from the Department of Justice bill that the present Administration believes that there are some purposes and uses of electronic surveillance which do not involve violations of the Fourth Amendment by the Executive Branch. Such being the case, even if the views of the Executive were to be the final answer in this case, the requirements imposed by the Court to constitutionalize wiretapping and eavesdropping are a far cry from the practice anticipated under the proposed federal legislation now before the Congress.

But I do not think the views of the Executive should be dispositive of the broader Fourth Amendment issues raised in this case. If the security of the National Government is a sufficient interest to render eavesdropping reasonable, on what tenable basis can a contrary conclusion be reached when a State asserts a purpose to prevent the corruption of its major officials, to protect the integrity of its fundamental processes, and to maintain itself as a viable institution? The serious threat which organized crime poses to our society has been frequently documented. The interrelation between organized crime and corruption of governmental officials is likewise well established, [Footnote 5/6] and the enormous difficulty of eradicating both forms of social cancer is proved by the persistence of the problems, if by nothing else. The Crime Commission has concluded that

"only in New York have law enforcement officials been able to mount a relatively continuous and relatively successful attack on an organized crime problem,"

that "electronic surveillance techniques . . . have been the tools" making possible such an attack, and that practice under New York's § 813-a has achieved a proper balance between the interests of "privacy and justice." Task Force Report at 95. And New York County District Attorney Frank S. Hogan, who has been on the job almost as long as any member of this Court, has said of the need for legislation similar to § 813-a:

"The judicially supervised system under which we operate has worked. It has served efficiently to protect the rights liberties, property, and general welfare of the law-abiding members of our community. It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles 'Lucky' Luciano, Jimmy Hines, Louis 'Lepke' Buchalter, Jacob 'Gurrah' Shapiro, Joseph 'Socks' Lanza, George Scalise, Frank Erickson, John 'Dio' Dioguardi, and Frank Carbo. Joseph 'Adonis' Doto, who was tried in New Jersey, was convicted and deported on evidence supplied by our office and obtained by assiduously following leads secured through wiretapping."

Hearings on S. 2813 before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., at 173 (1962). To rebut such evidence of the reasonableness of regulated use of official eavesdropping, the Court presents only outdated statistics on the use of § 813-a in the organized crime and corruption arenas, the failure of the Congress thus far to enact similar legislation for federal law enforcement officials, and the blind hope that other "techniques and practices may well be developed that will operate just as speedily and certainly." None of this is even remotely responsive to the question whether the use of eavesdropping techniques to unveil the debilitating corruption involved in this case was reasonable under the Fourth Amendment. At best, the Court puts forth an apologetic and grossly inadequate justification for frustrating New York law enforcement by invalidating § 813-a.

In any event, I do not consider this case a proper vehicle for resolving all of these broad constitutional and legislative issues raised by the problem of official use of wiretapping and eavesdropping. I would hold only that electronic surveillance was a reasonable investigative tool to apply in uncovering corruption among high state officials, *compare Osborn v. United States*, 385 U. S. 323, that the § 813-a court procedure as used in this case satisfied the Fourth Amendment's search warrant requirements, and that New York officials limited themselves to a constitutionally permissible search and seizure of petitioner's private conversations in executing that court order. Therefore, I would affirm.

|388 U.S. 41appa|

APPENDIX TO OPINION OF MR. JUSTICE WHITE.

Excerpt from "The Challenge of Crime in a Free Society," A Report by the President's Commission on Law Enforcement and Administration of Justice, at 200-203 (1967).

A NATIONAL STRATEGY AGAINST

ORGANIZED CRIME

Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups. The Commission's program indicates ways to implement that commitment.

PROOF OF CRIMINAL VIOLATION

The previous section has described the difficulties that law enforcement agencies meet in trying to prove the participation of organized crime family members in criminal acts. Although earlier studies indicated a need for new substantive criminal laws, the Commission believes that, on the Federal level and in most State jurisdictions where organized crime exists, the major problem relates to matters of proof, rather than inadequacy of substantive criminal laws, as the latter — for the most part — are reasonably adequate to deal with organized crime activity. The laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups. From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process. Under present procedures, too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor.

Home*Grand Juries.* A compulsory process is necessary to obtain essential testimony or material. This is most readily accomplished by an investigative grand jury or an alternate mechanism through which the attendance of witnesses and production of books and records can be ordered. Such grand juries must stay in session long enough to allow for the unusually long time required to build an organized crime case. The possibility of arbitrary termination of a grand jury by supervisory judges constitutes a danger to successful completion of an investigation.

The Commission recommends:

At least one investigative grand jury should be impaneled annually in each jurisdiction that has major organized crime activity.

If a grand jury shows the court that its business is unfinished at the end of a normal term, the court should extend that term a reasonable time in order to allow the grand jury to complete pending investigations. Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provision made for suspension of such dismissal orders during the appeal.

The automatic convening of these grand juries would force less than diligent investigators and prosecutors to explain their inaction. The grand jury should also have recourse when not satisfied with such explanations.

The Commission recommends:

The grand jury should have the statutory right of appeal to an appropriate executive official, such as an attorney general or governor, to replace local prosecutors or investigators with special counsel or special investigators appointed only in relation to matters that they or the grand jury deem appropriate for investigation.

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

Immunity. A general immunity statute as proposed in chapter 5 on the courts is essential in organized crime investigations and prosecutions. There is evidence to indicate that the availability of immunity can overcome the wall of silence that so often defeats the efforts of law enforcement to obtain live witnesses in organized crime cases. Since the activities of criminal groups involve such a broad scope of criminal violations, immunity provisions covering this breadth of illicit actions are necessary to secure the testimony of uncooperative or criminally involved witnesses. Once granted immunity from prosecution based upon their testimony, such witnesses must testify before the grand jury and at trial, or face jail for contempt of court.

Federal, State, and local coordination of immunity grants, and approval by the jurisdiction's chief law enforcement officer before immunity is granted, are crucial in organized crime investigations. Otherwise, without such coordination and approval, or through corruption of officials, one jurisdiction might grant immunity to someone about to be arrested or indicted in another jurisdiction.

The Commission recommends:

A general witness immunity statute should be enacted at Federal and State levels, providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with existing investigations.

Perjury. Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine criminal matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof requirements in perjury cases, detailed in chapter 5, inhibit prosecutors from seeking perjury indictments and lead to much lower conviction rates for perjury than for other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.

The Commission recommends:

Congress and the States should abolish the rigid two-witness and direct-evidence rules in perjury prosecutions, but retain the requirement of proving an intentional false statement.

WIRETAPPING AND EAVESDROPPING

In connection with the problems of securing evidence against organized crime, the Commission considered issues relating to electronic surveillance, including wiretapping and "bugging" — the secret installation of mechanical devices at specific locations to receive and transmit conversations.

Significance to Law Enforcement. The great majority of law enforcement officials believe that the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them — each a necessary step in the evidence-gathering process in organized crime investigations and prosecutions.

As previously noted, the organizational structure and operational methods employed by organized crime have created unique problems for law enforcement. High-ranking organized crime figures are protected by layers of insulation from direct participation in criminal acts, and a rigid code of discipline inhibits the development of informants against them. A soldier in a family can complete his entire crime career without ever associating directly with his boss. Thus, he is unable, even if willing, to link the boss directly to any criminal activity in which he may have engaged for their mutual benefit. Agents and employees of an organized crime family, even when granted immunity from prosecution, cannot implicate the highest level figures, since frequently they have neither spoken to nor even seen them.

Members of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephones tapped, have continued to meet and to make relatively free use of the telephone — for communication is essential to the operation of any

business enterprise. In legitimate business this is accomplished with written and oral exchanges. In organized crime enterprises, however, the possibility of loss or seizure of an incriminating document demands a minimum of written communication. Because of the varied character of organized criminal enterprises, the large numbers of persons employed in them, and frequently the distances separating elements of the organization, the telephone remains an essential vehicle for communication. While discussions of business matters are held on a face-to-face basis whenever possible, they are never conducted in the presence of strangers. Thus, the content of these conversations, including the planning of new illegal activity, and transmission of policy decisions or operating instructions for existing enterprises, cannot be detected. The extreme scrutiny to which potential members are subjected and the necessity for them to engage in criminal activity have precluded law enforcement infiltration of organized crime groups.

District Attorney Frank S. Hogan, whose New York County office has been acknowledged for over 27 years as one of the country's most outstanding, has testified that electronic surveillance is:

"*the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles 'Lucky' Luciano, Jimmy Hines, Louis 'Lepke' Buchalter, Jacob 'Gurrah' Shapiro, Joseph 'Socks' Lanza, George Scalise, Frank Erickson, John 'Dio' Dioguardi, and Frank Carbo. . . .*"

Over the years, New York has faced one of the Nation's most aggravated organized crime problems. Only in New York have law enforcement officials achieved some level of continuous success in bringing prosecutions against organized crime. For over 20 years, New York has authorized wiretapping on court order. Since 1957, bugging has been similarly authorized. Wiretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened. Recently, chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools, and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men. The debilitating effect of corruption, political influence, and incompetence, underscored by the New York State Commission of Investigation, must also be noted.

In New York at one time, Court supervision of law enforcement's use of electronic surveillance was sometimes perfunctory, but the picture has changed substantially under the impact of pretrial adversary hearings on motions to suppress electronically seized evidence. Fifteen years ago, there was evidence of abuse by low-rank policemen. Legislative and administrative controls, however, have apparently been successful in curtailing its incidence.

The Threat to Privacy. In a democratic society, privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society.

Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques. They are employed to acquire evidence for domestic relations cases, to carry on industrial espionage and counterespionage, to assist in preparing for civil litigation, and for personnel investigations, among others. Technological advances have produced remarkably sophisticated devices, of which the electronic cocktail olive is illustrative, and continuing price reductions have expanded their markets. Nor has man's ingenuity in the development of surveillance equipment been exhausted with the design and manufacture of electronic devices for wiretapping or for eavesdropping within buildings or vehicles. Parabolic microphones that pick up conversations held in the open at distances of hundreds of feet are available commercially, and some progress has been made toward utilizing the laser beam to pick up conversations within a room by focusing upon the glass of a convenient window. Progress in microminiaturizing electronic components has resulted in the production of equipment of extremely small size. Because it can detect what is said anywhere — not just on the telephone — bugging presents especially serious threats to privacy.

Detection of surveillance devices is difficult, particularly where an installation is accomplished by a skilled agent. Isolated instances where equipment is discovered in operation therefore do not adequately reflect the volume of such activity; the effectiveness of electronic surveillance depends in part upon investigators who do not discuss their activities. The current confusion over the legality of electronic surveillance compounds the assessment problem, since many agents feel their conduct may be held

unlawful, and are unwilling to report their activities. It is presently impossible to estimate with any accuracy the volume of electronic surveillance conducted today. The Commission is impressed, however, with the opinions of knowledgeable persons that the incidence of electronic surveillance is already substantial, and increasing at a rapid rate.

Present Law and Practice. In 1928, the U.S. Supreme Court decided that evidence obtained by wiretapping a defendant's telephone at a point outside the defendant's premises was admissible in a Federal criminal prosecution. The Court found no unconstitutional search and seizure under the Fourth Amendment. Enactment of Section 605 of the Federal Communications Act in 1934 precluded interception and disclosure of wire communications. The Department of Justice has interpreted this section to permit interception so long as no disclosure of the content outside the Department is made. Thus, wiretapping may presently be conducted by a Federal agent, but the results may not be used in court. When police officers wiretap and disclose the information obtained, in accordance with State procedure, they are in violation of Federal law.

Law enforcement experience with bugging has been much more recent and more limited than the use of the traditional wiretap. The legal situation with respect to bugging is also different. The regulation of the national telephone communication network falls within recognized national powers, while legislation attempting to authorize the placing of electronic equipment even under a warrant system would break new and uncharted ground. At the present time, there is no Federal legislation explicitly dealing with bugging. Since the decision of the Supreme Court in *Silverman v. United States*, 365 U. S. 505 (1961), use of bugging equipment that involves an unauthorized physical entry into a constitutionally protected private area violates the Fourth Amendment, and evidence thus obtained is inadmissible. If eavesdropping is unaccompanied by such a trespass, or if the communication is recorded with the consent of one of the parties, no such prohibition applies.

The confusion that has arisen inhibits cooperation between State and Federal law enforcement agencies because of the fear that information secured in one investigation will legally pollute another. For example, in New York City prosecutors refuse to divulge the contents of wire communications intercepted pursuant to State court orders because of the Federal proscription, but do utilize evidence obtained by bugging pursuant to court order. In other sections of New York State, however, prosecutors continue to introduce both wiretapping and eavesdropping evidence at trial.

Despite the clear Federal prohibition against disclosure of wiretap information, no Federal prosecutions of State officers have been undertaken, although prosecutions of State officers under State laws have occurred.

One of the most serious consequences of the present state of the law is that private parties and some law enforcement officers are invading the privacy of many citizens without control from the courts and reasonable legislative standards. While the Federal prohibition is a partial deterrent against divulgence, it has no effect on interception, and the lack of prosecutive action against violators has substantially reduced respect for the law.

The present status of the law with respect to wiretapping and bugging is intolerable. It serves the interests neither of privacy nor of law enforcement. One way or the other, the present controversy with respect to electronic surveillance must be resolved.

The Commission recommends:

Congress should enact legislation dealing specifically with wiretapping and bugging.

All members of the Commission agree on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail. Further, striking this balance presents important constitutional questions now pending before the U.S. Supreme Court in *People v. Berger*, and any congressional action should await the outcome of that case.

All members of the Commission believe that, if authority to employ these techniques is granted, it must be granted only with stringent limitations. One form of detailed regulatory statute that has been suggested to the Commission is outlined in the appendix to the Commission's organized crime task force volume. All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People v. Berger*, and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority, and believe that, without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interests of privacy.

Matters affecting the national security not involving criminal prosecution are outside the Commission's mandate, and nothing in this discussion is intended to affect the existing powers to protect that interest.

[Footnote 5/1]

Recording an innocent conversation is no more a "seizure" than occurs when the policeman personally overhears conversation while conducting a search with a warrant.

[Footnote 5/2]

Petitioner has not included a transcript of the Neyer recording in the record before this Court. In an oral statement during the hearing on petitioner's motion to suppress eavesdrop evidence, the prosecutor stated:

"In the course of some of these conversations [recorded by the Neyer eavesdrop], we have one-half of a telephone call, of several telephone calls between Mr. Neyer and a person he refers to on the telephone as Mr. Berger, and in the conversation with Mr. Berger, Mr. Neyer discusses also the obtaining of a liquor license for the Palladium and mentions the fact that this is going to be a big one."

R. at 27. Petitioner made no argument, and offered no evidence, at the suppression hearing that the alleged Neyer-Berger phone conversation provided the State with evidence that was used to secure the Steinman eavesdrop order.

[Footnote 5/3]

The portion of the Crime Commission's report dealing with wiretapping and eavesdropping is reproduced in Appendix A to this opinion. A more detailed explanation of why most Commission members favored legislation permitting controlled use of electronic surveillance for law enforcement purposes can be found in the Commission's Task Force Report on Organized Crime, cited *infra*.

[Footnote 5/4]

The Court should draw no support from the Solicitor General's confession of error in recent cases, for they involved surreptitious eavesdropping by federal officers without judicial authorization. Such searches are clearly invalid because they violate the Fourth Amendment's warrant requirements. *Silverman v. United States*, *supra*.

[Footnote 5/5]

Letter from the Acting Attorney General to the Speaker of the House of Representatives submitting the Administration's "Right of Privacy Act of 1967" (H.R. 5386), Feb. 8, 1967.

[Footnote 5/6]

"All available data indicate that organized crime flourishes only where it has corrupted local officials. As the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of local government has grown. And as government regulation expands into more and more areas of private and business activity, the power to corrupt likewise affords the corrupter more control over matters affecting the everyday life of each citizen."

Task Force Report, at 6.

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6.3: Katz v. United states 389 US 347 (1967)

U.S. Supreme Court

Katz v. United States, 389 U.S. 347 (1967)

Katz v. United States

No. 35

Argued October 17, 1967

Decided December 18, 1967

389 U.S. 347

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of 18 U.S.C. § 1084. Evidence of petitioner's end of the conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the telephone booth from which the calls were made, was introduced at the trial. The Court of Appeals affirmed the conviction, finding that there was no Fourth Amendment violation, since there was "no physical entrance into the area occupied by" petitioner.

Held:

1. The Government's eavesdropping activities violated the privacy upon which petitioner justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. Pp. 389 U. S. 350-353.

(a) The Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements. *Silverman v. United States*, 365 U. S. 505, 365 U. S. 511. P. 389 U. S. 353.

(b) Because the Fourth Amendment protects people, rather than places, its reach cannot turn on the presence or absence of a physical intrusion into any given enclosure. The "trespass" doctrine of *Olmstead v. United States*, 277 U. S. 438, and *Goldman v. United States*, 316 U. S. 129, is no longer controlling. Pp. 389 U. S. 351,389 U. S. 353.

2. Although the surveillance in this case may have been so narrowly circumscribed that it could constitutionally have been authorized in advance, it was not in fact conducted pursuant to the warrant procedure which is a constitutional precondition of such electronic surveillance. Pp. 389 U. S. 354-359.

369 F.2d 130, reversed.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. [Footnote 1] At trial, the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because "[t]here was no physical entrance into the area occupied by [the petitioner]." [Footnote 2] We granted certiorari in order to consider the constitutional questions thus presented. [Footnote 3]

The petitioner has phrased those questions as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth. "

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. [Footnote 4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. [Footnote 5] But the protection of a person's *general* right to privacy — his right to be let alone by other people [Footnote 6] — is, like the protection of his property and of his very life, left largely to the law of the individual States. [Footnote 7]

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. [Footnote 8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. [Footnote 9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See Lewis v. United States*, 385 U. S. 206, 385 U. S. 210; *United States v. Lee*, 274 U. S. 559, 274 U. S. 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

See Rios v. United States, 364 U. S. 253; *Ex parte Jackson*, 96 U. S. 727, 96 U. S. 733.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, [Footnote 10] in a friend's apartment, [Footnote 11] or in a taxicab, [Footnote 12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead v. United States*, 277 U. S. 438, 277 U. S. 457, 277 U. S. 464, 277 U. S. 466; *Goldman v. United States*, 316 U. S. 129, 316 U. S. 134-136, for that Amendment was thought to limit only searches and seizures of tangible property. [Footnote 13] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden*,387 U. S. 294, 387 U. S. 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." *Silverman v. United States*, 365 U. S. 505, 365 U. S. 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply "areas" — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance. The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: they did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic

communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, [Footnote 14] and they took great care to overhear only the conversations of the petitioner himself. [Footnote 15]

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts, in fact, took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." *Osborn v. United States*, 385 U. S. 323, 385 U. S. 329-330. Discussing that holding, the Court in *Berger v. New York*, 388 U. S. 41, said that "the order authorizing the use of the electronic device" in *Osborn* "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." *Id.* at 388 U. S. 57. [Footnote 16] Here, too, a similar judicial order could have accommodated "the legitimate needs of law enforcement" [Footnote 17] by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman*, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello v. United States*, 269 U. S. 20, 269 U. S. 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." *Wong Sun v. United States*, 371 U. S. 471, 371 U. S. 481-482. "Over and again, this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U. S. 48, 342 U. S. 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment [Footnote 18] — subject only to a few specifically established and well delineated exceptions. [Footnote 19]

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. [Footnote 20]

Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." [Footnote 21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent. [Footnote 22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. [Footnote 23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

"bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

Beck v. Ohio, 379 U. S. 89, 379 U. S. 96. And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations "only in the discretion of the police." *Id.* at 379 U. S. 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth

Amendment," [Footnote 24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

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

[Footnote 1]

18 U.S.C. § 1084. That statute provides in pertinent part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

[Footnote 2]

369 F.2d 130, 134

[Footnote 3]

386 U. S. 954. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, we do not reach that issue.

We find no merit in the petitioner's further suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, he testified before a federal grand jury concerning the charges involved here. Because he was compelled to testify pursuant to a grant of immunity, 48 Stat. 1096, as amended, 47 U.S.C. § 409(*l*), it is clear that the fruit of his testimony cannot be used against him in any future trial. But the petitioner asks for more. He contends that. his conviction must be vacated and the charges against him dismissed lest he be "subjected to [a] penalty . . . on account of [a] . . . matter . . . concerning which he [was] compelled . . . to testify. . . ." 47 U.S.C. § 409(*l*). *Frank v. United States*, 347 F.2d 486. We disagree. In relevant part, § 409(*l*) substantially repeats the language of the Compulsory Testimony Act of 1893, 27 Stat. 443, 49 U.S.C. § 46, which was Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. *Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 585-586. The statutory provision here involved was designed to provide such protection, *see Brown v. United States*, 359 U. S. 41,359 U. S. 45-46, not to confer immunity from punishment pursuant to a *prior*prosecution and adjudication of guilt. *Cf. Regina v. United States*, 364 U. S. 507, 364 U. S. 513-514.

[Footnote 4]

"The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home."

Griswold v. Connecticut, 381 U. S. 479, 381 U. S. 509 (dissenting opinion of MR. JUSTICE BLACK).

[Footnote 5]

The First Amendment, for example, imposes limitations upon governmental abridgment of "freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U. S. 449, 357 U. S. 462. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too "reflects the Constitution's concern for . . . . . *the right of each individual "to a private enclave where he may lead a private life."'" Tehan v. Shott*, *382 U. S. 406*, *382 U. S. 416*. *Virtually every governmental action interferes with*

personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

[Footnote 6]

See Warren & Brandeis, The Right to Privacy, 4 Harv.L.Rev.193 (1890).

[Footnote 7]

See, e.g., Time, Inc. v. Hill, 385 U. S. 374. *Cf. Breard v. Alexandria,* 341 U. S. 622; *Kovacs v. Cooper,* 336 U. S. 77.

[Footnote 8]

In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, *Weeks v. United States,* 232 U. S. 383, but that an open field is not. *Hester v. United States,* 265 U. S. 57. Defending the inclusion of a telephone booth in his list the petitioner cites *United States v. Stone,* 232 F.Supp. 396, and *United States v. Madison,* 32 L.W. 2243 (D.C. Ct.Gen.Sess.). Urging that the telephone booth should be excluded, the Government finds support in *United States v. Borgese,* 235 F.Supp. 286.

[Footnote 9]

It is true that this Court has occasionally described its conclusions in terms of "constitutionally protected areas," *see, e.g., Silverman v. United States,* 365 U. S. 505,365 U. S. 510, 365 U. S. 512; *Lopez v. United States,* 373 U. S. 427, 373 U. S. 438-439; *Berger v. New York,* 388 U. S. 41, 388 U. S. 57, 388 U. S. 59, but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

[Footnote 10]

Silverthorne Lumber Co. v. United States, 251 U. S. 385.

[Footnote 11]

Jones v. United States, 362 U. S. 257.

[Footnote 12]

Rios v United States, 364 U. S. 253.

[Footnote 13]

See Olmstead v. United States, 277 U. S. 438, 277 U. S. 464-466. We do not deal in this case with the law of detention or arrest under the Fourth Amendment.

[Footnote 14]

Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioners end of conversations concerning the placing of bets and the receipt of wagering information.

[Footnote 15]

On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.

[Footnote 16]

Although the protections afforded the petitioner in *Osborn* were "*similar* . . . to those . . . of conventional warrants," they were not identical. A conventional warrant ordinarily serves to notify the suspect of an intended search. But if Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. *See Ker v. California,* 374 U. S. 23, 374 U. S. 37-41.

Although some have thought that this "exception to the notice requirement where exigent circumstances are present," *id.* at 374 U. S. 39, should be deemed inapplicable where police enter a home before its occupants are aware that officers are present, *id.* at 374 U. S. 55-58 (opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation have no bearing here. However true it may be that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," *id.* at 374 U. S. 57, and that "the requirement of awareness . . . serves to minimize the hazards of the officers' dangerous calling," *id.* at 374 U. S. 57-58, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

Nor do the Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice.Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place.*Nordelli v. United States,* 24 F.2d 665, 666-667.

Thus, the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful. 388 U. S. 41, 388 U. S. 57.

[Footnote 17]

Lopez v. United States, 373 U. S. 427, 373 U. S. 464 (dissenting opinion of MR. JUSTICE BRENNAN).

[Footnote 18]

See, e.g., Jones v. United States, 357 U. S. 493, 357 U. S. 497-499; *Rios v. United States*,364 U. S. 253, 364 U. S. 261; *Chapman v. United States*, 365 U. S. 610, 365 U. S. 613-615; *Stoner v. California*, 376 U. S. 483, 376 U. S. 486-487.

[Footnote 19]

See, e.g., Carroll v. United States, 267 U. S. 132, 267 U. S. 153, 156; *McDonald v. United States*, 335 U. S. 451, 335 U. S. 454-456; *Brinegar v. United States*, 338 U. S. 160, 338 U. S. 174-177; *Cooper v. California*, 386 U. S. 58; *Warden v. Hayden*, 387 U. S. 294, 387 U. S. 298-300.

[Footnote 20]

In *Agnello v. United States*, 269 U. S. 20, 269 U. S. 30, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest," *United States v. Rabinowitz*, 339 U. S. 56, 339 U. S. 61; *cf. id.* at 339 U. S. 71-79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

[Footnote 21]

Although

"[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others,"

Warden v. Hayden, 387 U. S. 294, 387 U. S. 298-299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[Footnote 22]

A search to which an individual consents meets Fourth Amendment requirements, *Zap v. United States*, 328 U. S. 624, but, of course, "the usefulness of electronic surveillance depends on lack of notice to the suspect." *Lopez v. United States*, 373 U. S. 427, 373 U. S. 463 (dissenting opinion of MR. JUSTICE BRENNAN).

[Footnote 23]

Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

[Footnote 24]

See Osborn v. United States, 385 U. S. 323, 385 U. S. 330.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels "national security" matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved, they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, I cannot agree that, where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of "adversary and prosecutor" and disinterested, neutral magistrate.

There is, so far as I understand constitutional history, no distinction under the Fourth Amendment between types of crimes. Article III, § 3, gives "treason" a very narrow definition, and puts restrictions on its proof. But the Fourth Amendment draws no lines between various substantive offenses. The arrests in cases of "hot pursuit" and the arrests on visible or other evidence of probable cause cut across the board, and are not peculiar to any kind of crime.

I would respect the present lines of distinction, and not improvise because a particular crime seems particularly heinous. When the Framers took that step, as they did with treason, the worst crime of all, they made their purpose manifest.

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, 232 U. S. 383, and unlike a field, *Hester v. United States*, 265 U. S. 57, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment, and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected," because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. *Cf. Hester v. United States*, *supra*.

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. *Ante* at389 U. S. 352. The point is not that the booth is "accessible to the public" at other times, *ante* at 389 U. S. 351, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. *Cf. Rios v. United States*, 364 U. S. 253.

In *Silverman v. United States*, 365 U. S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment.

That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure." and that the examination or taking of physical property was not required. This view of the Fourth Amendment was followed in *Wong Sun v. United States*, 371 U. S. 471, at 371 U. S. 485, and *Berger v. New York*, 388 U. S. 41, at 51. *Also compare Osborn v. United States*, 385 U. S. 323, at385 U. S. 327. In *Silverman*, we found it unnecessary to reexamine *Goldman v. United States*, 316 U. S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider *Goldman*, and I agree that it should now be overruled. * Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.

Finally, I do not read the Court's opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.

* I also think that the course of development evinced by *Silverman. supra, Wong Sun., supra, Berger, supra,* and today's decision must be recognized as overruling *Olmstead v. United States*, 277 U. S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.

MR. JUSTICE WHITE, concurring.

I agree that the official surveillance of petitioner's telephone conversations in a public booth must be subjected to the test of reasonableness under the Fourth Amendment and that, on the record now before us, the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.*

In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. *See Berger v. New York*, 388 U. S. 41, 388 U. S. 112-118 (1967) (WHITE, J., dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

* In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, *Hoffa v. United States*, 385 U. S. 293 (1966); (2) by a recording device hidden on the person of such an informant, *Lopez v. United States*, 373 U. S. 427 (1963); *Osborn v. United States*, 385 U. S. 323 (1966), and (3) by a policeman listening to the secret microwave transmissions of an agent conversing with the defendant in another location, *On Lee v. United States*, 343 U. S. 747 (1952). When one man speaks to another, he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa v. United States, supra.* It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

MR. JUSTICE BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion For on that premise, my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect, today's opinion differs sharply from *Berger v. New York*, 388 U. S. 41, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The

Berger case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the *Berger* holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is two-fold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times," and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me, the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

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

The first clause protects "persons, houses, papers, and effects against unreasonable searches and seizures. . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized, but to something already in existence, so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations, which, by their very nature, are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment, which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger*, *supra*, recognized,

"an ancient practice which, at common law, was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those days, the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse."

388 U.S. at 388 U. S. 45. There can be no doubt that the Framers were aware of this practice, and, if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances, it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires, and that this Court often has said, that the Bill of Rights' safeguards should be given a liberal construction. This principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But, until today, this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. *See, e.g., Olmstead v. United States*, 277 U. S. 438 (1928), and *Goldman v. United States*, 316 U. S. 129 (1942).

So far, I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption, and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, *Olmstead*, *supra.* In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

"The Amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or things to be seized. . . ."

"* * * *"

"Justice Bradley in the *Boyd* case [*Boyd v. United States*, 116 U. S. 616], and Justice Clark[e] in the *Gouled* case [*Gouled v. United States*, 255 U. S. 298], said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."

277 U.S. at 277 U. S. 464-465.

Goldman v. United States, 316 U. S. 129, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There, federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead*, found no Fourth Amendment violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown *supra* in the cited quotation from the case, the Court went to great pains to examine the actual language of the Amendment, and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court, in citing *Hester v. United States*, 265 U. S. 57, indicated that, even where there was a trespass, the Fourth Amendment does not automatically apply to evidence obtained by "hearing or sight." The *Olmstead* majority characterized *Hester* as holding

"that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house, and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects."

277 U.S. at 277 U. S. 465. Thus, the clear holding of the *Olmstead* and *Goldman*cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in *Berger v. New York*, 388 U. S. 41, 388 U. S. 76, I continue to believe that this exclusionary rule formulated in *Weeks v. United States*, 232 U. S. 383, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the Fourth Amendment. *See Wolf v. Colorado*, concurring opinion, 338 U. S. 338 U.S. 25, 338 U. S. 39, at 40. *See also Mapp v. Ohio*, concurring opinion, 367 U. S. 367 U.S. 643, 367 U. S. 661-666. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in *Lopez v. United States*, 373 U. S. 427, 373 U. S. 438-439

"The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear

[citing*Olmstead* and *Goldman*]. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area.*Silverman v. United States.*"

To support its new interpretation of the Fourth Amendment, which, in effect, amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* and *Goldman* have been . . . eroded by our subsequent decisions. . . ." But the only cases cited as accomplishing this "eroding" are *Silverman v. United States*, 365 U. S. 505, and *Warden v. Hayden*, 387 U. S. 294. Neither of these cases "eroded" *Olmstead* or *Goldman. Silverman* is an interesting choice, since there the Court expressly refused to reexamine the rationale of *Olmstead* or *Goldman* although such a reexamination was strenuously urged upon the Court by the petitioners' counsel. Also, it is significant that, in *Silverman*, as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," 365 U.S. at 365 U. S. 509, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." (At 365 U. S. 511.) Yet this statement should not becloud the fact that, time and again, the opinion emphasizes that there has been an unauthorized intrusion:

"For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners."

(At 365 U. S. 509, emphasis added.) "Eavesdropping accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions. . . ." (At 365 U. S. 509, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office. . . ." (At 365 U. S. 511, emphasis added.) "[D]ecision here . . . is based upon the reality of an *actual intrusion.* . . ." (At 365 U. S. 512, emphasis added.) "We find no occasion to reexamine *Goldman* here, but we decline to go beyond it, *by even a fraction of an inch.*" (At 365 U. S. 512, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement:

"In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion."

(At 365 U. S. 513, emphasis added.) As I made clear in my dissent in *Berger,* the Court in *Silverman* held the evidence should be excluded by virtue of the exclusionary rule, and "I would not have agreed with the Court's opinion in Silverman . . . had I thought that the result depended on finding a violation of the Fourth Amendment. . . ." 388 U.S. at 388 U. S. 79-80. In light of this and the fact that the Court expressly refused to reexamine *Olmstead* and *Goldman*, I cannot read *Silverman* as overturning the interpretation stated very plainly in *Olmstead* and followed in *Goldman* that eavesdropping is not covered by the Fourth Amendment.

The other "eroding" case cited in the Court's opinion is *Warden v. Hayden*, 387 U. S. 294. It appears that this case is cited for the proposition that the Fourth Amendment applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the Government to search and seize has been discredited." 387 U.S. at 387 U. S. 304. But far from being concerned with eavesdropping, *Warden v. Hayden* upholds the seizure of clothes, certainly tangibles by any definition. The discussion of property interests was involved only with the common law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that, although the Court attempts to convey the impression that, for some reason, today *Olmstead* and *Goldman* are no longer good law, it must face up to the fact that these cases have never been overruled, or even "eroded." It is the Court's opinions in this case and *Berger* which, for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversations can be "seized."* I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment.

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which, in effect, would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable*searches and seizures as one to protect an individual's privacy. By clever word juggling, the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. As I said in *Griswold v. Connecticut*, 381 U. S. 479,

"The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."

(Dissenting opinion, at 381 U. S. 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against *unreasonable searches and seizures.'" (See generally dissenting opinion at 381 U. S. 507-527.)*

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons, I respectfully dissent.

* The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the Fourth Amendment and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a citation to *Silverman*, and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read *Silverman* as holding any such thing, and, in the second place, *Silverman* was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule *Olmstead* and *Goldman.* In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother HARLAN's claim that it is "bad physics" to adhere to *Goldman.* Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.

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6.4: Clapper v. Amnesty Int'l USA 568 US ___ (2013)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES

Syllabus

CLAPPER, DIRECTOR OF NATIONAL INTELLIGENCE, et al. v. AMNESTY INTERNATIONAL USA et al.

certiorari to the united states court of appeals for the second circuit

No. 11–1025. Argued October 29, 2012—Decided February 26, 2013

Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U. S. C. §1881a, added by the FISA Amendments Act of 2008, permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court's (FISC) approval. Surveillance under §1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Respondents—attorneys and human rights, labor, legal, and media organizations—are United States persons who claim that they engage in sensitive international communications with individuals who they believe are likely targets of §1881a surveillance. On the day that the FISA Amendments Act was enacted, they filed suit, seeking a declaration that §1881a is facially unconstitutional and a permanent injunction against §1881a-authorized surveillance. The District Court found that respondents lacked standing, but the Second Circuit reversed, holding that respondents showed (1) an "objectively reasonable likelihood" that their communications will be intercepted at some time in the future, and (2) that they are suffering present injuries resulting from costly and burdensome measures they take to protect the confidentiality of their international communications from possible §1881a surveillance.

Held: Respondents do not have Article III standing. Pp. 8–24.

(a) To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, 561 U. S. ___, ___. "[T]hreatened injury must be ' "certainly impending" ' to constitute injury in fact," and "[a]llegations of possible future injury" are not sufficient. Whitmore v. Arkansas, 495 U. S. 149 . Pp. 8–10.

(b) Respondents assert that they have suffered injury in fact that is fairly traceable to §1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under §1881a at some point. This argument fails. Initially, the Second Circuit's "objectively reasonable likelihood" standard is inconsistent with this Court's "threatened injury" requirement. Respondents' standing theory also rests on a speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to §1881a. First, it is highly speculative whether the Government will imminently target communications to which respondents are parties. Since respondents, as U. S. persons, cannot be targeted under §1881a, their theory necessarily rests on their assertion that their foreign contacts will be targeted. Yet they have no actual knowledge of the Government's §1881a targeting practices. Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, they can only speculate as to whether the Government will seek to use §1881aauthorized surveillance instead of one of the Government's numerous other surveillance methods, which are not challenged here. Third, even if respondents could show that the Government will seek FISC authorization to target respondents' foreign contacts under §1881a, they can only speculate as to whether the FISC will authorize the surveillance. This Court is reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment. See, e.g., Whitmore, supra, at 159–160. Fourth, even if the Government were to obtain the FISC's approval to target respondents' foreign contacts under §1881a, it is unclear whether the Government would succeed in acquiring those contacts' communications. And fifth, even if the Government were to target respondents' foreign contacts, respondents can only speculate as to whether their own communications with those contacts would be incidentally acquired. Pp. 10–15.

(c) Respondents' alternative argument is also unpersuasive. They claim that they suffer ongoing injuries that are fairly traceable to §1881a because the risk of §1881a surveillance requires them to take costly and burdensome measures to protect the confidentiality of their communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. Because they do not face a threat of certainly impending interception under §1881a, their costs are simply the product of their fear of surveillance, which is insufficient to create standing. See Laird v. Tatum, 408 U. S. 1 –15. Accordingly, any ongoing injuries that respondents are suffering are not fairly traceable to §1881a. Pp. 16–20.

(d) Respondents' remaining arguments are likewise unavailing. Contrary to their claim, their alleged injuries are not the same kinds of injuries that supported standing in cases such as Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U. S. 167 , Meese v. Keene, 481 U. S. 465 , and Monsanto, supra. And their suggestion that they should be held to have standing because otherwise the constitutionality of §1881a will never be adjudicated is both legally and factually incorrect. First, " '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' " Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U. S. 464 . Second, the holding in this case by no means insulates §1881a from judicial review. Pp. 20–23.

638 F. 3d 118, reversed and remanded.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

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CHAPTER OVERVIEW

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7.1: Bram v. US 168 US 532 (1897)

U.S. Supreme Court

Bram v. United States, 168 U.S. 532 (1897)

Bram v. United States

No. 340

Argued October 18, 19, 1897

Decided December 13, 1897

168 U.S. 532

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS

This was an indictment for murder alleged to have been committed on an American vessel on the high seas. After the crime was discovered, Brown, a sailor, was put in irons and the vessel was headed for Halifax. Before it reached there, Brown charged Bram with the commission of the crime, saying that he had seen him do it. Bram was then also put in irons. On the arrival at Halifax, Power, a policeman and detective in the government service at that place, had a conversation with Bram. Bram was indicted at Boston for the commission of the crime, and, on his trial, Power was offered as a witness for the Government. He testified that he made an examination of Bram, in his own office in the city hall at Halifax, when no one was present besides Bram and himself, and that no threats were made in any way to Bram, nor any inducements held out to him. The witness was then asked: "What did you say to him and he to you?" To this, defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that, up to that time, the defendant had been in the custody of the police authorities of Halifax; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that, at his office, he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody, and did everything the witness directed him to do; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, or that the defendant was held for the United States — for the consul general of the United States. The witness answered questions by the court as follows:

"You say there was no inducement to him in the way of promise or expectation of advantage?"

"A. Not any, your honor."

"Q. Held out?"

"A. Not any, your honor."

"Q. Nor anything said in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?"

"A. No, sir, not any."

"Q. So far as you were concerned, it was entirely voluntary?"

"A. Voluntary, indeed."

"Q. No influence on your part exerted to persuade him one way or the other?"

"A. None whatever, sir; none whatever."

The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: that, at the time, the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring defendant as a prisoner to his office, and there stripped him; that defendant understood that he was a prisoner, and obeyed every order and direction that the witness gave. Under these circumstances, the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent

described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent. The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed. The witness answered as follows:

"When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder. He said, 'He could not have seen me; where was he? I said, 'He state he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'How, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

"Q. Anything further said by either of you?"

"A. No, there was nothing further said on that occasion."

The direct examination of this witness was limited to the interview between the witness and the defendant Bram.

Held:

(1) That this statement made by the accused to a police officer was evidently not a voluntary confession, and was not admissible in evidence against him;

(2) That the objection to its admission having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness.

The objection that the indictment recited that it was presented upon the oath of the jurors when the fact was that it was presented upon the oath and affirmation of the jurors is without merit.

The objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was shown to have possessed conscientious scruples against taking an oath is also without merit.

As the evidence against Bram was purely circumstantial, it was clearly proper for the Government to endeavor to establish as a circumstance in the case the fact that another person who was present in the vicinity at the time of the killing could not have committed the crime.

The objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and fore head with an axe would necessarily be spattered with, or covered with, some of the blood was also properly overruled.

The case is stated in the opinion.

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon by which the plaintiff was found guilty of murder and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller while on the high seas, bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide, as follows:

"She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward; and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks."

"The vessel proceeded on her course towards her port of destination until the night between July 13th and July 14th. On that night, at 12 o'clock, the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate, all lived in the after-cabin, occupying separate rooms. . . . The crew and the steward slept forward in the forward house."

"When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty

to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight."

"The passenger, Monks, who occupied a room on the starboard side of the cabin between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock — the exact time is not known, as he says — by a scream, and by another sound, characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned, and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body, and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck, and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up, and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called, and told what had happened. Up to this time, no call had been made for the second mate, nor had anyone visited his room. Later, it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument, like an axe, penetrating the skull, and into the substance of the brain; and the second mate lying on his back, with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed; and Captain Nash in his room, as already stated."

"The whole crew was called at or about daylight, and were informed of the deaths."

"The bodies were removed from the cabin, and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax."

"At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion, she was headed to go to Cavenne, in French Guiana; but the plan was changed, and she steered for Halifax, Nova Scotia, where she arrived July 21st, and was taken possession of by the local authorities, at the instance of the consul general of the United States."

"At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate."

"No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to any one."

"In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while, the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax, on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the after-part and on the starboard side of the house, and saw Bram, the mate, kill the captain, in consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate, and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons."

The bill of exceptions further states that, when the ship arrived at Halifax, the accused and Brown were held in custody by the chief of police at that place, and that, while in such custody, the accused was taken from prison to the office of a detective, and there questioned, under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew, and the passenger were examined before the American consul, and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, of Mrs. Nash, and the second mate, Blomberg. The trial and the conviction now under review related to the first of these charges. The errors which are here assigned as grounds for reversal are more than 60 in number, and are classified by the counsel for the accused as follows: (a) questions raised preliminary to the trial; (b) questions raised during the trial; (c) questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial, a detective, by whom the accused was questioned while at Halifax, was placed upon the stand as a witness for the prosecution, for the purpose of

testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

"Nicholas Power, of Halifax, called by the government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that, after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness' office, in the city hall at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him."

"The witness was then asked: 'What did you say to him and he to you?'"

"To this, the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that, up to that time, the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that, at his office, he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody, and did everything the witness directed him to do; that the witness was then a police officer, acting in his official capacity; that all this took place before the defendant had been examined before the United States consul; and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States — for the consul general of the United States."

"The witness answered questions by the court as follows:"

"You say there was no inducement to him in the way of promise or expectation of advantage?"

"A. Not any, your honor."

"Q. Held out?"

"A. Not any, your honor."

"Q. Nor anything said in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?"

"A. No, sir; not any."

"Q. So far as you were concerned, it was entirely voluntary?"

"A. Voluntary, indeed. "

"Q. No influence on your part exerted to persuade him on way or the other?"

"A. None whatever, sir; none whatever."

"The defendant then renewed his objection to the question what conversation had taken place between Bram and the witness, for the following reasons: that, at the time, the defendant was in the custody of the chief of police at Halifax; that the witness, in an official capacity, directed the police authorities to bring the defendant as a prisoner to his private office, and there proceeded to take extraordinary liberties with him. He stripped him. The defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances, the counsel submitted that no statement made by the defendant while so held in custody, and his rights interfered with to the extent describe, was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent."

"The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed."

"The witness answered as follows:"

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of

us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

"Q. Anything further said by either of you?"

"A. No; there was nothing further said on that occasion. "

"The direct examination of this witness was limited to the interview between the witness and the defendant, Bram."

"On cross-examination of the witness Power, he testified that, at the time of the above-stated examination, he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston — the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston — when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant."

"Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: 'What other articles belonging to the defendant did you take possession of at that time?'"

"This line of inquiry was objected to by the district attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination, and did not tend to show interest, and the defendant duly excepted, and the exception was allowed."

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such; and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross-examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded, the accused renewed his objection, and his exception to the admissibility of the conversation was allowed, and regularly noted. The witness then proceeded to give the conversation. To say that, under these circumstances, the objection, which was twice presented and regularly allowed, should have been renewed at the termination of the testimony of the witness would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar, no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that, in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession, and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which, by the very offer, is vouched for as tending to that end, and, on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence:

"The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another or a refusal to confess. *Rex v. Tyler,* 1 Car. & P. 129; *Rex v. Enoch,* 5 Car. & P. 539. *See further,* as to the object of the rule, *Rex v. Court,* 7 Car. & P. 486, per Littledale, J.; *People v. Ward,* 15 Wend. 231."

Nor from the fact that, in *Wilson v. United States,* 162 U. S. 621,

mention was made of the circumstance that the statement of the accused was a mere denial of guilt, accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered was based not alone upon the nature of the statement, but upon

"the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert."

(P. 162 U. S. 624.)

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then, after procuring its admission, claiming that it did not tend to prove guilt, and could not therefore have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State v. Rorie,* (1876) 74 N.C. 148:

"But the State says this was a denial of guilt, and not a confession. It was a declaration which the State used to procure a to prove guilt, and therefore was admissible, say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precludes the State from saying that it was not used to his prejudice."

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the textbooks.

In 3 Russell on Crimes (6th Ed.) 478, it is stated as follows:

"But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Green.Ev. (15th Ed.) § 219; Wharton Crim.Ev. (9th Ed.) § 631; 2 Taylor Ev. (9th Ed.) § 872; 1 Bishop's New Crim.Proc. § 1217, par. 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes, following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this Court on the subject. *Hopt v. Utah,* (1883) 110 U. S. 574; *Sparf v. United States,*(1895) 156 U. S. 51, 156 U. S. 55; *Pierce v. United States,* (1896) 160 U. S. 355; and *Wilson v. United States,* (1896) 162 U. S. 613.

A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the Amendment itself. In *Boyd v. United States,* 116 U. S. 616, attention was called to the intimate relation existing between the provision of the Fifth Amendment securing one accused against being compelled to testify against himself, and those of the Fourth Amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject in *Brown v. Walker,* 161 U. S. 596, the Court, speaking through Mr. Justice Brown, said:

"The maxim '*nemo tenetur seipsum accusare*' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne, in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him

into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that, long prior to our independence, the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In *Burrowes v. High Commission Court*, (1616) Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor on Evidence § 886), certain it is that, without a statute so commanding, in *Felton's Case*, (1628) 3 How.St.Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

Lord Hale died December 25, 1676. In the first volume of his Pleas of the Crown, 1st Ed. 1736, treating of the subject of confessions in cases of treason, it is said, at page 304:

"That the confession before one of the privy council or a justice of the peace being *voluntarily made, without torture*, is sufficient as to the indictment on trial to satisfy the statute, and it is not necessary that it be a confession in court; but the confession is sufficient if made before him that hath power to take an examination."

In the second volume, at p. 225, it is said:

"When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer."

"The confession is either simple, or relative in order to the attainment of some other advantage."

"That which I call a simple confession is where the defendant, upon hearing of his indictment, without any other respect, confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40."

"If it be but an extrajudicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, tho upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony '*not guilty.*' 22 Assiz. 71, and Stamf.P.C. lib. 2, c. 51, fol. 142*b*."

In chapter 38 of volume 2, at p. 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip and Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said:

"But then, 1. Oath must be made either by the justice or coroner that took them, or the clerk that wrote them; that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination."

"2. As to the examination of the prisoner, it must be testified that he did it freely, without any menace or undue terror imposed upon him; for I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession. . . ."

Gilbert, in his treatise on Evidence (2d ed. — published in 1760), says, at p. 140:

". . . But then this confession must be voluntary, and without compulsion; for our law in this differs from the civil law; that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."

In Hawkins' Pleas of the Crown (6th ed., by Leach — published in 1787, book 2, chapter 31), it is said:

"Sec. 2. . . . And where a person upon his arraignment actually confesses he is guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead not guilty."

In section 3, chap. 46, it is stated that examinations by the common law before a secretary of state or other magistrate for treason or other crimes not within the statutes of Philip and Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor (*see* note to *Gilham's Case*, 2 Moody, pp. 194-195), reads as follows:

"The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted (*vide* O.B. 1786, page 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Although the English reports, prior to the separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins, and Gilbert, both the opinion of Lord Mansfield in *Rex v. Rudd*, (1775) Cowp. 333, and that of Mr. Justice Wilson, some years after the separation, in *Lambe's Case* (1791) 2 Leach (4th Ed.) 552, make it certain that the rule as stated by Hawkins, Gilbert, and Hale was considered in the English courts as no longer open to question, and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule not by the changing causes, but by their resultant effect upon the mind — that is, hope or fear — so that, however diverse might be the facts, the test of whether the confession as voluntary would be uniform — that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well settled nature of the rule in England at the time of the adoption of the Constitution and of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law, and imbedded in the Fifth Amendment, was noticed by this Court in *Wilson v. United States*, *supra*, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." 162 U. S. 162 U.S. 613, 162 U. S. 623.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different, although somewhat similar, condition of fact. Indeed, the embarrassment which comes from the varying state of fact considered in the decided cases has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Taylor on Evidence § 8722. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. *Green v. State*, 88 Georgia 516; *State v. Patterson*, 73 Missouri 695, 705; *State v. Matthews*, 66 N.C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for, however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the Constitution. Much of the confusion which has resulted from the effort to deduce

from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when, but for the improper influences, he would have remained silent. With this understanding of the rule, we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century (1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10), justices of the peace were directed, on accusations of felony, to "take the examination of the said prisoner and information of them that bring him." In 1655, the judges directed that the examination of prisoners should be without oath (J.Kel. 2), and the reason of this rule, Starkie on Evidence (2d ed. p. 29), says, was that an examination under oath "would be a species of duress, and a violation of the maxim that no one is bound to criminate himself." The ruling of the judges in this regard was recognized in the statute of 7 Geo. IV. chap. 64, which, although requiring "information of witnesses" to be "upon oath," simply directed an "examination" of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that, before such an examination could be received in evidence, it must appear that the accused was made to understand that it was optional with him to make a statement. *Rex v. Green*, (1833) 5 Car. & P. 322; *Reg. v. Arnold*, (1838) 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused:

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In *Reg. v. Drew*, (1837) 8 Car. & P. 140, and *Reg. v. Harris*, (1844) 1 Cox, C.C. 106, though the accused had been cautioned not to say anything to prejudice himself, the further statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and "would" be used for or against him at his trial was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and to be a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurances that the statement of the prisoner would be used were made to him by a police officer. *Reg. v. Morton*,(1843) 2 Moo. & Rob. 514, and *Reg. v. Furley*, (1844) 1 Cox C.C. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges as to whether a confession made to a person not in a position of authority over the accused was admissible in evidence after an inducement had been held out to the prisoner by such person. *Rex v. Spencer*, (1837) 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority, *Reg. v. Taylor*, (1839) 8 Car. & P. 734; *Reg. v. Moore*,(1852) 2 Den.C.C. 522, although, in the last cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction (2 Den.C.C. 527). There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule, and, as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in Russell on Crimes, third volume, at page 501.

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In *Rex v. Thompson*, (1783) 1 Leach (4th Ed.) 291, a declaration to a suspected person that, unless he gave a more satisfactory account of his connection with a stolen bank note, his interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a

magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance said that the prisoner was hardly a free agent at the time, as, though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in which it had been expressed rendering it more efficacious.

In *Cass' Case*, (1784) 1 Leach 293, a confession induced by the statement of the prosecutor to the accused, "I am in great distress about my irons. If you will tell me where they are, I will be favorable to you," was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible because induced by the language set out in each case: in *Rex v. Griffin*, (1809) Russ. & Ry. 151, telling the prisoner that it would be better for him to confess. In *Rex v. Jones*, (1809) Russ. & Ry. 152, the prosecutor saying to the accused that he only wanted his money, and, if the prisoner gave him that, he might go to the devil, if he pleased. In *Rex v. Kingston*, (1830) 4 Car. & P. 387, saying to the accused: "You are under suspicion of this, and you had better tell all you know." In *Rex. v. Enoch*,(1833) 5 Car. & P. 539, saying: "You had better tell the truth, or it will lie upon you, and the man go free." In *Rex v. Mills*, (1833) 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it." In *Sherrington's Case*, (1838) 2 Lewin C.C. 123, saying: "There is no doubt, thou wilt be found guilty: it will be better for you if you will confess." In *Rex v. Thomas*, (1833) 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them." In *Rex v. Simpson*, (1834) 1 Moody 410, and Ry. & Mood. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess. In *Rex v. Upchurch*, (1836) 1 Moody, 465, saying:

"If you are guilty, do confess. It will perhaps save your neck. You will have to go to prison. If William H. [another person suspected, and whom the prisoner had charged] is found clear, the guilt will fall on you. Pray, tell me if you did it."

In *Reg. v. Croydon*, (1846) 2 Cox C.C. 67, saying: "I dare say you had a hand in it. You may as well tell me all about it." In *Reg. v. Garner*, (1848) 1 Den.C.C. 329, saying: "It will be better for you to speak out."

In *Reg. v. Fleming*, (1842) Arm., M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said:

"The prisoner and witness being both in the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible."

In the leading case of *Reg. v. Baldry*, (1852) 2 Den.C.C. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely imported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of *Reg. v. Drew*, *Reg. v. Harris*, *Reg. v. Morton*, and *Reg. v. Farley*, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon *Cass' Case*, *Rex v. Thomas*, *Sherrington's Case* and *Rex v. Enoch*, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak, or other intimation given of possible benefit, would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C.B., said (page 432): "There is no doubt as to the application of the rule in those cases, which are all familiar to the judges and to the bar."

In the course of the opinion, subsequently delivered by him, Chief Baron Pollock said (p. 442):

"A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that, when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but, if he says anything, let it be true. It has been decided that that would not prevent the statement's being received in evidence, by Littledale, J., in the case of *Rex v. Court*, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester, *Reg. v. Holmes*, 1 Car. & K. 248; but, where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg. v.*

Garner, 1 Den.C.C. 329. The true distinction between the present case and a case of that kind is that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

In *Reg. v. Moore*, (1852) 2 Den.C.C. 523, also decided by the Court of Criminal Appeal, an admonition to a person suspected of crime that she "had better speak the truth," was held not to vitiate a subsequent confession, because not made by a person in authority. Parke, B., delivering the opinion of the judges, said, in substance (p. 526), that one element in the consideration of the question whether a confession ought to be excluded was "whether the threat or inducement was such as to be likely to influence the prisoner," and

"that if the threat or inducement was held out, *actually or constructively*, by a person in *authority*, it cannot be received, *however slight the threat or inducement.* "

In *Reg. v. Cheverton*, (1862) 2 F. & F. 833, a statement made by a policeman to a person in his custody that "you had better tell all about it; it will save you trouble," was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible.

In *Reg. v. Fennell* (1881) 7 Q.B.D. 147, the Court for Crown Cases reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, "upon all the decided cases," held inadmissible a statement made, induced by the prosecutor saying to the prisoner in the presence of an inspector of police: "The inspector tells me you are making housebreaking implements. If this is so, you had better tell the truth; it may be better for you."

The latest decision in England on the subject of inducement, made by the Court for Crown Cases Reserved, is *Reg. v. Thompson*, (1893) 2 Q.B. 12. At the trial, a confession was offered in evidence which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence on the ground that it had been made under the operation of an inducement held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that "it will be the right thing for Marcellus [the accused] to make a clean breast of it." The evidence having been admitted, and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day, and Wills, JJ. After stating and adopting the ruling of Baron Parke in *Reg. v. Warringham*, 2 Den.C.C. 447, note, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C.B., in *Reg. v. Baldry*,that the true ground of the exclusion of statements not voluntary was that "it would not be safe to receive a statement made under any influence or fear." The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the *Fennell* case, and added:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary? — that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

After reviewing the evidence, and holding that, under the ruling of Pollock, C.B., in the *Baldry* case, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that, "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," the confession ought not to have been received.

While, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority within the rule in England, and, therefore, that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would, *per se*, render the confession inadmissible because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russell on Crimes, p. 510, note *t*. In *Reg. v. Johnson*, (1864) 15 Ir.Com.Law 60, this subject was elaborately considered by the Irish Court of Criminal Appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render *per se* any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an

important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes, are later in date than *Reg. v. Johnson*, although they emanate from *nisi prius* courts, and not from appellate tribunals. Whatever be the rule in this regard in England, however, it is certain that, where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner, and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. *Berriman's Case*, (1854) 6 Cox C.C. 388; *Cheverton's Case*, (1862) 2 F. & F. 833; *Mick's Case*, (1863) 3 F. & F. 822; *Reagan's Case*, (1867) 17 L.T.(N. S.) 325; and *Reason's Case*, (1872) 12 Cox C.C. 228.

From this review, it clearly appears that the rule as to confessions by an accused (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority) is in England today what it was prior to and at the adoption of the Fifth Amendment, and that, while all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come, then, to the American authorities. In this Court, the general rule that the confession must be free and voluntary — that is, not produced by inducements engendering either hope or fear — is settled by the authorities referred to at the outset. The facts in the particular cases decided in this Court, and which have been referred to, manifested so clearly that the confessions were voluntary that no useful purpose can be subserved by analyzing them. In this Court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. *Hopt v. Utah*, 110 U. S. 574; *Sparf v. United States*, 156 U. S. 51, 156 U. S. 55. And this last rule thus by this Court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized, although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury, with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction cannot be had by proof of a confession made under inducement, "without corroborating testimony." Rev.Stat.Ind. 1881, § 1802. And, in the Texas Code of Procedure, article 750, it is provided that confessions shall not be used against a prisoner at his trial

"if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed. " The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. *Spears v. State*, 2 Ohio St. 583. Whether it is one which should be followed by this Court in view of the express terms of the Constitution need not be now considered, as it does not arise under the state of facts here presented. In some, it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will *per se* exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. *People v. McMahon*, (1857) 15 N.Y. 384, *followed* in *People v. Mondon*, (1886) 103 N.Y. 211, 218; *State v. Matthews*, (1872) 66 N.C. 106; *Jackson v. State*, (1879) 56 Mississippi 311, 312; *State v. Clifford*, (1892) 86 Iowa, 550. This doctrine as to examining magistrates is in some states enforced by statutes somewhat similar in character to the English statutes. (2 Taylor on Evidence § 888, note 2.)

In some of the States, it has been held that, where questions are propounded to a prisoner by one having a right to ask them, and he remains silent where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weighed by the jury. *See* authorities collected in Chamberlayne's note to 2 Taylor on Evidence p. 5884, *et seq.*

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several states treating of confessions in the divergent aspects in which that doctrine may have presented itself, but will content ourselves with a brief reference to a few leading and well considered cases treating of the subject of inducements, and which are therefore apposite to the issue now considered.

In the following cases, the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: in *Kelly v. State*, (1882) 72 Alabama 244, saying to the prisoner:

"You have got your foot in it, and somebody else was with you.

Now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth."

In *People v. Barrie*, 49 California 342, saying to the accused: "It will be better for you to make a full disclosure." In *People v. Thompson*, (1890) 84 California 598, 605, saying to the accused: "I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way." In *Berry v. United States*, (1893) 2 Colorado 186, 188, 203, advising the prisoner to make full restitution, and saying: "If you do so, it will go easy with you. It will be better for you to confess. The door of mercy is open, and that of justice closed;" and threatening to arrest the accused and expose his family if he did not confess. In *State v. Bostick*, (1845) 4 Harr. (Del.) 563, saying to one suspected of crime:

"The suspicion is general against you, and you had as well tell all about it. The prosecution will be no greater. I don't expect to do anything with you. I am going to send you home to your mother."

In *Green v. State*, (1891) 88 Georgia 516, saying to the accused: "Edmund, if you know anything, it may be best for you to tell it;" or, "Edmund, if you know anything, go and tell it, and it may be best for you." In *Rector v. Commonwealth*, (1882) 80 Kentucky 468, saying to the prisoner in a case of larceny: "It will go better with you to tell where the money is. All I want is my money, and, if you will tell me where it is, I will not prosecute you hard." In *Biscoe v. State*, (1887) 67 Maryland 6, saying to the accused: "It will be better for you to tell the truth, and have no more trouble about it." In *Commonwealth v. Nott*, (1883) 135 Massachusetts 269, saying to the accused:

"You had better own up. I was in the place when you took it. We have got you down fine. This is not the first you have taken. We have got other things against you nearly as good as this."

In *Commonwealth v. Myers*, (1894) 160 Massachusetts 530, saying to the accused: "You had better tell the truth." In *People v. Wolcott*, (1883) 51 Michigan 612, saying to the accused: "It will be better for you to confess." In *Territory v. Underwood*,(1888) 8 Montana 131, saying to the prisoner that it would be better to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution, or make it as light as possible. In *State v. York*, (1858) 37 N.H. 175, saying to one under arrest immediately before a confession: "If you are guilty, you had better own it." In *People v. Phillips*, (1870) 42 N.Y. 200, saying to the prisoner: "The best you can do is to own up. It will be better for you." In *State v. Whitfield*, (1874) 70 N.C. 356, saying to the accused: "I believe you are guilty. If you are, you had better say so. If you are not, you had better say that." In *State v. Drake*, (1893) 113 N.C. 624, saying to the prisoner: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." In *Vaughan v. Commonwealth*,(1867) 17 Gratt. 576, saying to the accused: "You had as well tell all about it."

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused, it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax, and were there held in confinement, awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place, the police detective caused Bram to be brought from jail to his private office; and, when there alone with the detective, *he was*

stripped of his clothing, and either while the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'"

The fact, then, is that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime; and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, Homecan it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. While it must not be considered that, by referring to these authorities, we approve them, it is yet manifest that, if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself commit the offense, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or in hope that, if he did reply, he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place where the statements were made, and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped, or had been stripped, of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted; yet, when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who, in law, could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary, within the rule laid down by the authorities. What further was said by the detective? "Now, look here, Bram, I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But," I said,

"some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."

But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language; that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty, and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that, by so doing, he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted:

"The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

In the case before us, we find that an influence was exerted, and, as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders to unnecessary to pass on the serious question arising from the ruling of the trial court by which, in cross-examination, the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out, by way of cross-examination, everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error except in so far as they present questions which are likely to arise on the new trial.

We will now briefly consider the alleged errors of this character.

By plea and supplemental plea in abatement, and by motion to quash, defendant, preliminary to the trial, attacked the sufficiency of the indictment because one of the grand jurors was permitted to affirm, and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when in fact it was presented upon the oath *and affirmation* of the jurors. At the hearing of the pleas in abatement, it appeared that, when the grand jurors were impaneled, one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and, after his fellows had been regularly sworn, he was formally affirmed to the same duties specified in the oath administered to the others. It is also stated in the record, following the recital of the issuance of venires for grand and petit jurors, that:

"In obedience to the said order of court, and to the venires issued thereunder, the following named grand jurors attended on the 15th day of October, A.D. 1896. On that day, the said grand jurors were duly impaneled as the grand jury for the October term of this Court, A.D. 1896. All of said grand jurors, being impaneled aforesaid, were duly sworn, except Grand Juror William Merrill, Junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance."

In section 1 of the Revised Statutes of the United States it is provided, among other things, that, in determining the meaning of the Revised Statutes, "a requirement of an *oath' shall be deemed complied with by making affirmation in judicial form." Section 800 also provides that:*

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state courts, so far as

such may be practicable by the courts of the United States or the officers thereof. And for this purpose, the said courts may, by rule or order, conform the designation and impaneling of juries in substance to the laws and usages relating to jurors in the state courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania."

The Public Statutes of Massachusetts, 1882, chap. 213, section 6, provides as follows:

"SECTION 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words 'this you do under the pains and penalties of perjury,' instead of the words 'so help you God.'"

And section 3 of chapter 30 of the same statutes provides as follows (p. 58):

"In the construction of statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute, that is to say: . . . Fourteenth. The word 'oath' shall include 'affirmation' in cases where, by law, an affirmation may be substituted for an oath."

The objection that the indictment recited that it was presented "upon the oath" of the jurors, when the fact was that it was presented upon the "oath and affirmation" of the jurors, is without merit. Waiving a consideration of the question whether, under the provisions of the statutes to which reference has been made, the word "oath" might not properly be construed as meaning either "oath" or "affirmation," the recital alluded to was purely formal, and, if defective, was open to amendment. The record disclosing the fact that all of the grand jurors were duly sworn except Grand Juror William Merrill, Jr., who was "duly affirmed," the defendant could not have been prejudiced by the form of the statement made in the indictment, and the defect, if any, was rendered harmless by the curative provisions of section 1025, Revised Statutes.

The further objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that Grand Juror Merrill, before being permitted to affirm, was proven to have possessed conscientious scruples against taking an oath, is practically concluded by the disposition made of the objection just passed upon, and is rendered nugatory by the terms of § 1025, Revised Statutes. Further, the mode of ascertaining the existence or nonexistence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. *Commonwealth v. Fisher,* 7 Gray 492; *State v. Adams,* 78 Maine 486.

The remaining assignments which we deem it proper to notice relate to the overruling of objections interposed to questions propounded to certain witnesses in the character of experts. Some of these objections were made to hypothetical questions asked a number of sailors, reciting the condition of things assumed to have been established by the evidence as existing about the time of the killing, *viz.*,the speed of the Herbert Fuller, the condition of her sails, direction of wind, etc., and inquiry as to the effect it would have on the vessel if the wheelman had taken his hands off the wheel, and what effect would be produced by lashing the wheel under similar conditions. These questions were evidently intended to supplement the testimony of Brown, who swore that he stood with both hands on the wheel during the time between twelve and two o'clock, and, consequently, when the murders were committed. The questions were competent, as the testimony sought to be elicited was relevant to the issue. Aside from the testimony of Brown, the evidence against Bram was purely circumstantial, and it was clearly proper for the government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing could not have committed the crime. The testimony sought to be adduced had this tendency, and the fact that it might operate indirectly to fortify the credit of such person as a witness in the cause could not affect its admissibility.

An objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with or covered with some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury, after all, being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt v. Utah,* 120 U. S. 430.

The judgment is reversed, and the cause remanded, with directions to set aside the verdict and to order a new trial.

MR. JUSTICE BREWER, dissenting.

I dissent from the opinion and judgment in this case —

First, because I think the testimony was not open to objection. “A confession, if freely and voluntarily made, is evidence of the most satisfactory character.” *Hopt v. Utah*, 110 U. S. 574, 110 U. S. 584, reaffirmed in *Sparf v. United States*, 156 U. S. 51,156 U. S. 55. The fact that the defendant was in custody and in irons does not destroy the competency of a confession.

“Confinement or imprisonment is not, in itself, sufficient to justify the exclusion of a confession if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises.”

Sparf v. United States, supra. See also Wilson v. United States, 162 U. S. 613, 162 U. S. 623.

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram, and this general declaration he affirmed and reaffirmed in response to inquiries made by the court and the defendant’s counsel. The court therefore properly overruled the objection at that time made to his testifying to the statements of defendant. It is not suggested that there was error in this ruling, and the fact that inducements were held out is deduced only from the testimony subsequently given by Power of the conversation between him and Bram. The first part of that conversation is as follows:

“When Mr. Bram came into my office, I said to him, ‘Bram, we are trying to unravel this horrible mystery.’ I said, ‘Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.’ He said, ‘He could not have seen me. Where was he?’ I said, ‘He states he was at the wheel.’ ‘Well,’ he said, ‘he could not see me from there.'”

In this, there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive.

It is strange to hear it even intimated that Bram, up to this time, was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows:

“I said, ‘Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,’ I said, ‘some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.’ He said, ‘Well, I think, and many others on board the ship think, that Brown is the murderer; but I don’t know anything about it.’ He was rather short in his replies.”

And here, it is argued, was a suggestion of a benefit — the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvelous metaphysical ability, is of little weight in practical affairs. But, even if it did carry any such improper suggestion, it was made at nearly the close of the conversation; and that this suggestion then made had a retroactive effect, and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to comprehend. The only reply which Bram made to the question containing this supposed improper suggestion was this: “Well, I think, and many others on board the ship think, that Brown is the murderer; but I don’t know anything about it.” Can it for a moment be thought that such a reply was so significant that permitting it to go to the jury compels the putting at naught this protracted trial, and overthrowing the deliberate verdict of the 12 men who heard the evidence and condemned the defendant? With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that, in all this conversation with Bram, there was nothing of sufficient importance to justify the reversal of the judgment.

Again, there is a lack of any proper objection or exception; and, if there is any one thing which may be considered as settled in all appellate courts, it is that an error in the admission of testimony will not be considered unless there was a specific objection and exception at the trial.

“To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this Court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon.”

Hutchins v. King, 1 Wall. 53, 68 U. S. 60; *United States v. McMasters,* 4 Wall. 680, 71 U. S. 682. “Our power is confined to exceptions actually taken at the trial.” *Railway Co. v. Heck*, 102 U. S. 120. *See also Moore v. Bank of Metropolis,* 13 Pet. 302; *Camden v. Doremus,* 3 How. 515; *Zeller’s Lessee v. Eckert,* 4 How. 289, 45 U. S. 297; *Phelps v. Mayer,* 15 How. 160; *Dredge v. Forsyth,* 2 Black 563; *Young v. Martin,* 8 Wall. 354; *Belk v. Meagher,* 104 U. S. 279; *Hanna v. Maas*, 122 U. S. 24; *White v. Barber,*

123 U. S. 392,123 U. S. 419; *Stewart v. Ranche Co.*, 128 U. S. 383; *Anthony v. Louisville & Nashville Railroad*, 132 U. S. 172; *Block v. Darling*, 140 U. S. 234; *Bogk v. Gassert*, 149 U. S. 17.

It is true these were civil cases, for it is only in the later history of this Court that we have had jurisdiction of writs of error in criminal cases; but the law is equally applicable to the latter.

"It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and, in case of an adverse ruling, to note an exception."

Alexander v. United States, 138 U. S. 353, 138 U. S. 355. "The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule." *Sparf v. United States*, 156 U. S. 51, 156 U. S. 56; *Holder v. United States*, 150 U. S. 91; *Tucker v. United States*, 151 U. S. 164.

It is true, the defendant objected to the admission of the conversation before it was given; but, upon the state of facts as then presented, unquestionably the trial court ruled properly in permitting the witness to testify, for he positively declared that there was neither threat nor promise, intimidation or inducement. If it be true, as the court now holds, that, in the progress of his testimony, it was developed that he did make a statement which carried an inducement — a suggestion of hope — it was then the duty of the defendant to call the attention of the court to the matter, either by objecting to any further disclosures of the conversation or else by a motion to strike out. Nothing of the kind took place. Defendant was apparently content to let all of the subsequent conversation come in. Can it be held that the court erred in not, of its own motion, stopping the witness, or striking out the testimony, or instructing the jury to disregard it, when defendant asked nothing of the kind? Surely, by this decision, we practically overrule the long line of authorities heretofore cited affirming the necessity of calling the attention of the trial court to the specific matter, obtaining its ruling thereon, and saving an exception thereto before there is any jurisdiction in this Court to review. Nor is this a mere technical and arbitrary rule which may be dispensed with whenever the exigencies of any case seem to demand, and in no other way a ground for reversal can be discovered. It may be, and undoubtedly often is, the case that, though incompetent testimony be given, the defendant prefers that it shall remain, in order,

for certain purposes, to take advantage of it in the argument before the jury. Can it be possible that he may obtain this advantage and, having obtained and used it, insist that, because of such incompetent testimony, he is entitled to a reversal of the judgment against him? *Wilson v. United States*, 162 U. S. 613, 162 U. S. 624. Who shall say that this defendant, though at first objecting to any testimony respecting his statements, yet, after hearing what the witness said, did not prefer that such testimony remain, as it disclosed that, at the very first moment he was informed that Brown charged him with the crime, he protested that Brown was not in a position where he could see who did the killing? Indeed, for anything in this record to the contrary, he, when a witness in his own behalf, may have given the same version of the conversation, and admitted that his statements were voluntarily made. Who shall say that he did not wish to argue before the jury that the claim made of Brown's inability to see what took place was not an excuse suggested only by the exigencies of the trial, but was presented at the very first moment of the charge; and if he was willing to let the testimony remain, and have all the advantage which he could take of it in argument before the jury, can it be that he can now come to this Court, and say, "True, I did not object to this specific testimony, nor ask to have it stricken out, but it was incompetent," and obtain a reversal on the ground of its admission?

I dissent, therefore, first, because I think the testimony was properly received, and, secondly, because no motion was made to strike it out, and no exception taken to its admission.

THE CHIEF JUSTICE and MR. JUSTICE BROWN concur in this dissent.

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7.2: Spano v. NY 360 US 315 (1959)

U.S. Supreme Court

Spano v New York, 360 U.S. 315 (1959)

Spano v New York

No. 582

Argued April 27, 1959

Decided June 22, 1959

360 U.S. 315

After petitioner, a foreign-born young man of 25 with a junior highschool education and no previous criminal record, had been indicted for first-degree murder, he retained counsel and surrendered to police at 7:10 p.m. He was then subjected to persistent and continuous questioning by an assistant prosecutor and numerous police officers for virtually eight hours until he confessed, after he had repeatedly requested, and had been denied, an opportunity to consult his counsel. At his trial in a state court, his confession was admitted in evidence over his objection, and he was convicted and sentenced to death.

Held: On the record in this case, petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused, his confession was not voluntary, and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment.

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7.3: Frazier v. Cupp 394 US 731 (1969)

U.S. Supreme Court

Frazier v. Cupp, 394 U.S. 731 (1969)

Frazier v. Cupp

No. 643

Argued February 26, 1969

Decided April 22, 1969

394 U.S. 731

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner in this habeas corpus proceeding claims that his constitutional rights were violated in three respects in his trial in 1965 for murder for which he had been indicted jointly with one Rawls, who pleaded guilty. (1) The prosecutor, on the basis of previous information he had received that Rawls would testify, included in his opening statement a brief summary of Rawls' expected testimony. When Rawls was called to the stand, he claimed his privilege against self-incrimination, and was dismissed. Petitioner's motions for a mistrial were overruled. The trial court instructed the jury that the opening statements of counsel should not be considered as evidence. (2) After preliminary questioning shortly after his arrest, petitioner was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Thereafter the interrogating officer falsely told petitioner, who was reluctant to talk, that Rawls had confessed. Petitioner later began to spill his story, but again showed signs of reluctance and said he thought he better get a lawyer before he talked any more. Following the officer's reply that petitioner could not be in any more trouble than he was in, petitioner fully confessed and, after further warnings, signed a written confession, which was later admitted into evidence over petitioner's objection. (3) Also admitted into evidence was some clothing which officers had seized from petitioner's duffel hag which he and Rawls had used jointly and which the officers had found during a search conducted with Rawls' consent. Petitioner was convicted, and the State Supreme Court affirmed. Petitioner thereafter filed a petition for a writ of habeas corpus in the District Court, which granted the writ. The Court of Appeals reversed. Petitioner claims that the prosecutor's use of the summarized Rawls statement denied him his constitutional rights of confrontation as guaranteed by the Sixth and Fourteenth Amendments; that his confession contravened the principles established by *Escobedo v. Illinois*, 378 U. S. 478 (1964), and *Miranda v. Arizona*, 384 U. S. 436 (1966), and was involuntary, and that the clothing had been illegally seized in violation of the Fourth and Fourteenth Amendments.

Held: 1. On the facts here, where the evidence which the prosecutor reasonably expected to produce was objectively and briefly summarized and was not touted to the jury as crucial to the prosecution's case, the court's limiting instructions were sufficient to protect petitioner's constitutional rights. *Douglas v. Alabama*, 380 U. S. 415 (1965), and *Bruton v. United States*, 391 U. S. 123 (1968), distinguished. Pp.394 U. S. 734-737.

2. In the context of this case, where it is possible that the questioning officer took petitioner's remark about seeing an attorney not as a request that the interrogation cease but as a passing comment, there was no denial of the right to counsel such as existed in *Escobedo*, and *Miranda*, which was decided after petitioner's trial, is inapplicable under *Johnson v. New Jersey*, 384 U. S. 719 (1966). Pp. 394 U. S. 738-739.

3. On the facts of this case and in view of the "totality of the circumstances," the trial court did not err in holding that petitioner's confession was voluntary. P. 394 U. S. 739.

4. The clothing from petitioner's duffel bag was found in the course of a lawful search since Rawls, a joint user of the bag, had authority to consent to its search. P. 394 U. S. 740.

388 F.2d 777, affirmed.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner was convicted in an Oregon state court of second-degree murder in connection with the September 22, 1964, slaying of one Russell Anton Marleau. After the Supreme Court of Oregon had affirmed his conviction, 245 Ore. 4, 418 P.2d 841 (1966), petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Oregon. The District Court granted the writ, but the Court of Appeals for the Ninth Circuit reversed, 388 F.2d 777 (1968). We

granted certiorari to consider three contentions of error raised by petitioner. 393 U. S. 821 (1968). Although petitioner's case has been ably briefed and argued by appointed counsel, we find none of these allegations sufficient to warrant reversal.

I

Petitioner's first argument centers on certain allegedly prejudicial remarks made during the prosecutor's opening statement. Petitioner had been indicted jointly with his cousin, Jerry Lee Rawls, who pleaded guilty to the same offense. Prior to petitioner's trial, petitioner's defense counsel told the prosecutor that Rawls would invoke his privilege against self-incrimination if he were called to the stand; defense counsel warned the prosecutor not to rely in his opening statement upon Rawls' expected testimony. The prosecutor replied that he would act on the basis of "all of the information I have concerning [Rawls'] testimony." Before trial, he consulted with a police officer who had spoken to Rawls and with Rawls' probation officer; each indicated his belief that Rawls would testify. Similar information came, through a sheriff's report, from some of Rawls' close relatives. Because of these reports, the prosecutor concluded that Rawls would testify if asked to do so. The court below felt that the prosecutor also relied on the fact that Rawls had pleaded guilty and was awaiting sentence. This would give him reason, the court felt, to cooperate with the prosecutor.

In any case, after the trial began, the prosecutor included in his opening statement a summary of the testimony he expected to receive from Rawls. The summary was not emphasized in any particular way; it took only a few minutes to recite, and was sandwiched between a summary of petitioner's own confession and a description of the circumstantial evidence the State would introduce.

At one point, the prosecutor referred to a paper he was holding in his hands to refresh his memory about something Rawls had said. Although the State admitted in argument here that the jury might fairly have believed that the prosecutor was referring to Rawls' statement, he did not explicitly tell the jury that this paper was Rawls' confession, nor did he purport to read directly from it. A motion for a mistrial was made at the close of the opening statement, but it was denied. Later, the prosecutor called Rawls to the stand. Rawls informed the court that he intended to assert his privilege against self-incrimination in regard to every question concerning his activities on the morning of September 22, 1964. The matter was not further pursued, and Rawls was dismissed from the stand. His appearance could not have lasted more than two or three minutes. The motion for mistrial was renewed and once again denied.

Petitioner argues that this series of events placed the substance of Rawls' statement before the jury in a way that "may well have been the equivalent in the jury's mind of testimony," *Douglas v. Alabama*, 380 U. S. 415, 380 U. S. 419 (1965), and that, as in *Bruton v. United States*, 391 U. S. 123, 391 U. S. 128 (1968), the statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination. . . ." In this way, petitioner claims he was denied his constitutional right of confrontation, guaranteed by the Sixth and Fourteenth Amendments to the Constitution. *See Pointer v. Texas*, 380 U. S. 400(1965). Although the judge did caution the jurors that they "must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence," petitioner contends that *Bruton v. United States*, *supra*, disposes of the contention that limiting instructions of this sort can be relied upon to cure the error which occurred. Although the question thus posed is not an easy one, we cannot agree with petitioner's conclusion. First of all, it is clear that this case is quite different from either *Douglas* or *Bruton*. In *Douglas*, the prosecutor called the defendant's coconspirator to the stand and read his alleged confession to him; the coconspirator was required to assert his privilege against self-incrimination repeatedly as the prosecutor asked him to confirm or deny each statement. The Court found that this procedure placed powerfully incriminating evidence before the jury in a manner which effectively denied the right of cross-examination. Here, Rawls was on the stand for a very short time and only a paraphrase of the statement was placed before the jury. This was done not during the trial, while the person making the statement was on the stand, but in an opening statement. In addition, the jury was told that the opening statement should not be considered as evidence. Certainly the impact of the procedure used here was much less damaging than was the case in *Douglas*. And unlike the situation in *Bruton*, the jury was not being asked to perform the mental gymnastics of considering an

incriminating statement against only one of two defendants in a joint trial. Moreover, unlike the situation in either *Douglas* or *Bruton*, Rawls' statement was not a vitally important part of the prosecution's case.

We believe that, in these circumstances the limiting instructions given were sufficient to protect petitioner's constitutional rights. * As the Court said in *Bruton*,391 U.S. at 391 U. S. 135,

"Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

See Hopt v. Utah, 120

U.S. 430, 120 U. S. 438 (1887). It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable. But here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that a jury can disregard a coconspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial. At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case,

"it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately."

United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 310 U. S. 239 (1940).

The Court of Appeals seemed to feel that this aspect of the case turned on whether or not the prosecutor acted "in a good faith expectation that Rawls would testify." 388 F.2d at 780-781. While we do not believe that the prosecutor's good faith, or lack of it, is controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments, we agree with the Court of Appeals' factual determination in this case. The evidence presented in the record is sufficient to support the Oregon Supreme Court's conclusion that "the state could reasonably expect [Rawls] to testify in line with his previous statements." 245 Ore. at 9, 418 P.2d at 843. Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error. *Cf. Miller v. Pate*, 386 U. S. 1 (1967). Therefore, because we find neither prosecutorial misconduct nor a deprivation of the right of confrontation, we agree with the Court of Appeals that nothing which occurred during the prosecution's opening statement would warrant federal habeas relief.

II

Petitioner's second argument concerns the admission into evidence of his own confession. The circumstances under which the confession was obtained can be summarized briefly. Petitioner was arrested about 4:15 p.m. on September 24, 1964. He was taken to headquarters, where questioning began at about 5 p.m. The interrogation, which was tape-recorded, ended slightly more than an hour later, and by 6:45 p.m. petitioner had signed a written version of his confession.

After the questioning had begun and after a few routine facts were ascertained, petitioner was questioned briefly about the location of his Marine uniform. He was not asked where he was on the night in question. Although he admitted that he was with his cousin Rawls, he denied being with any third person. Then petitioner was given a somewhat abbreviated description of his constitutional rights. He was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. Questioning thereafter became somewhat more vigorous, but petitioner continued to deny being with anyone but Rawls. At this point, the officer questioning petitioner told him, falsely, that Rawls had been brought in and that he had confessed. Petitioner still was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, petitioner began to spill out his story. Shortly after he began, he again showed signs of reluctance, and said, "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." The officer replied simply, "You can't be in any more trouble than you are in now," and the questioning session proceeded. A full confession was obtained and, after further warnings, a written version was signed.

Since petitioner was tried after this Court's decision in *Escobedo v. Illinois*, 378 U. S. 478 (1964), but before the decision in *Miranda v. Arizona*, 384 U. S. 436 (1966), only the rule of the former case is directly applicable. *Johnson v. New Jersey*, 384 U. S. 719 (1966). Petitioner argues that his statement about getting a lawyer was sufficient to bring *Escobedo* into play, and that the police should immediately have stopped the questioning and obtained counsel for him. We might agree were *Miranda* applicable to this case, for, in *Miranda*, this Court held that,

"[i]f . . . [a suspect] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning."

384 U.S. at 384 U. S. 444-445. But *Miranda* does not apply to this case. This Court, in *Johnson v. New Jersey*, pointedly rejected the contention that the specific commands of *Miranda* should apply to all post-*Escobedo* cases. The Court recognized "[t]he disagreements among other courts concerning the implications of *Escobedo*," *Johnson v. New Jersey*, *supra*, at 384 U. S. 734, and concluded that the States, although free to apply *Miranda* to post-*Escobedo* cases, *id.* at 384 U. S. 733, were not required to do so. The Oregon Supreme Court, in affirming petitioner's conviction, concluded that the confession was properly introduced into evidence. Under *Johnson*, we would be free to disagree with this conclusion only if we felt compelled to do so by the specific holding of *Escobedo.*

We do not believe that *Escobedo* covers this case. Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; in fact, Escobedo's attorney was present and repeatedly requested permission to see his client. Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease, but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. In this context, we cannot find the denial of the right to counsel which was found so crucial in *Escobedo.*

Petitioner also presses the alternative argument that his confession was involuntary, and that it should have been excluded for that reason. The trial judge, after an evidentiary hearing during which the tape recording was played, could not agree with this contention, and our reading of the record does not lead us to a contrary conclusion. Before petitioner made any incriminating statements, he received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness. *Davis v. North Carolina*,384 U. S. 737, 384 U. S. 740-741 (1966). The questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient, in our view, to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the "totality of the circumstances," *see, e.g., Clewis v. Texas*, 386 U. S. 707, 386 U. S. 708 (1967), and, on the facts of this case, we can find no error in the admission of petitioner's confession.

III

Petitioner's final contention can be dismissed rather quickly. He argues that the trial judge erred in permitting some clothing seized from petitioner's duffel bag to be introduced into evidence. This duffel bag was being used jointly by petitioner and his cousin Rawls, and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag, and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing, and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it. *Harris v. United States*, 390 U. S. 234 (1968); *Warden v. Hayden*,387 U. S. 294 (1967). Petitioner argues that Rawls only had actual permission to use one compartment of the bag, and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case.

Because we find none of petitioner's contentions meritorious, we affirm the judgment of the Court of Appeals.

Affirmed.

MR. CHIEF JUSTICE WARREN and MR. JUSTICE DOUGLAS concur in the result.

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

* A more specific limiting instruction might have been desirable, but none was requested.

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7.4: Arizona v. Fulminante 499 US 279 (1991)

U.S. Supreme Court

Arizona v. Fulminante, 499 U.S. 279 (1991)

Arizona v. Fulminante

No. 89-839

Argued Oct. 10, 1990

Decided March 26, 1991

499 U.S. 279

CERTIORARI TO THE SUPREME COURT OF ARIZONA

After respondent Fulminante's 11-year-old stepdaughter was murdered in Arizona, he left the State, was convicted of an unrelated federal crime, and was incarcerated in a federal prison in New York. There he was befriended by Anthony Sarivola, a fellow inmate who was a paid informant for the Federal Bureau of Investigation and was masquerading as an organized crime figure. When Sarivola told Fulminante that he knew Fulminante was getting tough treatment from other inmates because of a rumor that he was a child murderer, and offered him protection in exchange for the truth, Fulminante admitted that he had killed the girl and provided details about the crime. After Fulminante was released from prison, he also confessed to Sarivola's wife, whom he had never met before. Subsequently, he was indicted in Arizona for first-degree murder. The trial court denied his motion to suppress, *inter alia*, the confession to Sarivola, rejecting his contention that it was coerced, and thus barred by the Fifth and Fourteenth Amendments. He was convicted and sentenced to death. The State Supreme Court held that the confession was coerced and that this Court's precedent precluded the use of harmless error analysis in such a case. It remanded the case for a new trial without the use of the confession.

Held: The judgment is affirmed.

161 Ariz. 237, 778 P.2d 602, (1988), affirmed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. The State Supreme Court properly concluded that Fulminante's confession was coerced. The court applied the appropriate test, totality of the circumstances, *cf. Schneckloth v. Bustamonte*, 412 U. S. 218, 412 U. S. 226, to determine the confession's voluntariness, and plainly found that Fulminante was motivated to confess by a fear of physical violence, absent protection from his friend Sarivola. The court's finding, permissible on this record, that there was a credible threat of physical violence is sufficient to support a finding of coercion. *Blackburn v. Alabama*, 361 U. S. 199, 361 U. S. 206. Pp. 499 U. S. 285-288.

2. Under harmless error analysis, which the Court has determined applies to the admission of coerced confessions, *post* at 499 U. S. 306-312, the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Sarivola was harmless. Pp. 499 U. S. 295-302.

(a) A defendant's confession is like no other evidence. It is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession, a jury may be tempted to rely on it alone in reaching its decision. The risk that a coerced confession is unreliable, coupled with the profound impact that it has upon the jury, requires a reviewing court to exercise extreme caution before determining that the confession's admission was harmless. Pp. 499 U. S. 295-296.

(b) The evidence shows that the State has failed to meet its burden. First, the transcript reveals that both the trial court and the State recognized that a successful prosecution depended on the jury's believing both confessions, since it is unlikely that the physical and circumstantial evidence alone would have been sufficient to convict. Second, the jury's assessment of the second confession could easily have depended on the presence of the first. The jury might have believed that the two confessions reinforced and corroborated each other, since the only evidence corroborating some aspects of the second confession was in the first confession. Without that confession, the jurors might have found the wife's story unbelievable because the second confession was given under questionable circumstances, and they might have believed that she was motivated to lie in order to receive favorable treatment from federal authorities for herself and her husband. Third, the admission of the first confession led to the admission of evidence about

Sarivola's organized crime connections, which depicted Fulminante as someone who willingly sought out the company of criminals and, thus, was prejudicial to him. Finally, it is impossible to say beyond a reasonable doubt that the judge, who, during the sentencing phase, relied on evidence that could only be found in the two confessions, would have passed the same sentence without the confession. Pp. 499 U. S. 296-302.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part II, concluding that the harmless error rule adopted in *Chapman v. California*, 386 U. S. 18, is applicable to the admission of involuntary confessions. The admission of such a confession is a "trial error," which occurs during a case's presentation to the trier of fact, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt. *See, e.g., Clemons v. Mississippi*, 494 U. S. 738. A trial error differs markedly from violations that are structural defects in the constitution of the trial mechanism, and thus defy analysis by harmless error standards. *Gideon v. Wainwright*, 372 U. S. 335; *Tumey v. Ohio*, 273 U. S. 510, distinguished. It is also not the type of error that transcends the criminal process. In fact, it is impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment, whose admission is subject to harmless error analysis, *see, e.g., Milton v. Wainwright*, 407 U. S. 371, and those elicited in violation of the Fourteenth Amendment, since both confessions have the same evidentiary impact and may have been elicited by equally egregious conduct. Pp. 499 U. S. 306-312.

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III., *post*, p. 499 U. S. 302. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 499 U. S. 313.

JUSTICE WHITE delivered the opinion of the Court.

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced, and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. The court also held that the harmless error rule could not be used to save the conviction. We affirm the judgment of the Arizona court, although for different reasons than those upon which that court relied.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of the body, it was impossible to tell whether she had been sexually assaulted.

Fulminante's statements to police concerning Jeneane's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges of possession of a firearm by a felon.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime, but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any involvement in Jeneane's death. During one conversation, he told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

Sarivola learned more one evening in October, 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. App.

83. Sarivola offered to protect Fulminante from his fellow inmates, but told him, "*You have to tell me about it,' you know. I mean, in other words, `For me to give you any help.'" Ibid. Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head. Id. at 84-85.*

Sarivola was released from prison in November, 1983. Fulminante was released the following May, only to be arrested the next month for another weapons violation. On September 4, 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison, as well as a second confession he had given to Donna Sarivola, then Anthony Sarivola's fiancee and later his wife, following his May, 1984, release from prison. He asserted that the confession to Sarivola was coerced, and that the second confession was the "fruit" of the first. *Id.*at 6-8. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confessions were voluntary. *Id.* at 44, 63. The State introduced both confessions as evidence at trial, and on December 19, 1985, Fulminante was convicted of Jeneane's murder. He was subsequently sentenced to death.

Fulminante appealed, arguing, among other things, that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process, under the Fifth and Fourteenth Amendments of the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced, but initially determined that the admission of the confession at trial was harmless error, because of the overwhelming nature of the evidence against Fulminante. 161 Ariz. 237, 778 P.2d 602 (1988). Upon Fulminante's motion for reconsideration, however, the court ruled that this Court's precedent precluded the use of the harmless error analysis in the case of a coerced confession. *Id.* at 262, 778 P.2d at 627. The court therefore reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola. [Footnote 1] Because of differing views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless error analysis, we granted the State's petition for certiorari, 494 U.S. 1055 (1990). Although a majority of this Court finds that such a confession is subject to a harmless error analysis, for the reasons set forth below, we affirm the judgment of the Arizona court.

II

We deal first with the State's contention that the court below erred in holding Fulminante's confession to have been coerced. The State argues that it is the totality of the circumstances that determines whether Fulminante's confession was coerced, *cf. Schneckloth v. Bustamonte*, 412 U. S. 218, 412 U. S. 226 (1973), but contends that, rather than apply this standard, the Arizona court applied a "but for" test, under which the court found that but for the promise given by Sarivola, Fulminante would not have confessed. Brief for Petitioner 14-15. In support of this argument, the State points to the Arizona court's reference to *Bram v. United States*,168 U. S. 532 (1897). Although the Court noted in *Bram* that a confession cannot be obtained by "*any direct or implied promises, however slight, nor by the exertion of any improper influence,'" id. at 168 U. S. 542-543 (quoting 3 H. Smith & A. Keep, Russell on Crimes and Misdemeanors 478 (6th ed. 1896)), it is clear this passage from Bram, which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion. Rather, the court cited this language as part of a longer quotation from an Arizona case which accurately described the State's burden of proof for establishing voluntariness.See 161 Ariz. at 244, 778 P.2d at 609 (citing State v. Thomas, 148 Ariz. 225, 227, 714 P.2d 395, 397 (1986), Malloy v. Hogan, 378 U. S. 1, 378 U. S. 7, (1964), and Bram, 168 U.S. at 168 U. S. 542-543). Indeed, the Arizona Supreme Court stated that a "determination regarding the voluntariness of a confession . . . must be viewed in a totality of the circumstances," 161 Ariz. at 243, 778 P.2d at 608, and under that standard plainly found that Fulminante's statement to Sarivola had been coerced.*

In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that, "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates."*Ibid.* In addition, Sarivola was aware that Fulminante had been receiving "*rough treatment from the guys.'" Id. at 244, n. 1, 778 P.2d at 609, n. 1. Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to Jeneane's murder, id. at 243, 778 P.2d at 608, and "[i]n response to Sarivola's offer of protection, [Fulminante] confessed." Id. at 244, 778 P.2d at 609. Agreeing with Fulminante that "Sarivola's promise was `extremely coercive,'" id. at 243, 778 P.2d at 608, the Arizona Court declared:*

"[T]he confession was obtained as a direct result of extreme coercion, and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word."

Id. at 262, 778 P.2d at 627. [Footnote 2]

We normally give great deference to the factual findings of the state court. *Davis v. North Carolina*, 384 U. S. 737, 384 U. S. 741 (1966); *Haynes v. Washington*, 373 U. S. 503, 373 U. S. 515 (1963); *Culombe v. Connecticut*, 367 U. S. 568, 367 U. S. 603-604 (1961). Nevertheless, "the ultimate issue of *voluntariness' is a legal question requiring independent federal determination." Miller v. Fenton*, *474 U. S. 104*, *474 U. S. 110 (1985). See also Mincey v. Arizona*, *437 U. S. 385*, *437 U. S. 398 (1978); Davis*, *supra*,*384 U.S. at 384 U. S. 741-742; Haynes*, *supra*, *373 U.S. at 373 U. S. 515; Chambers v. Florida*, *309 U. S. 227*, *309 U. S. 228-229 (1940).*

Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced. [Footnote 3] The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; [Footnote 4] a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition."*Blackburn v. Alabama*, 361 U. S. 199, 361 U. S. 206 (1960). *See also Culombe*, *supra*,367 U.S. at 367 U. S. 584; *Reck v. Pate*, 367 U. S. 433, 367 U. S. 440-441 (1961); *Rogers v. Richmond*, 365 U. S. 534, 365 U. S. 540 (1961); *Payne v. Arkansas*, 356 U. S. 560, 356 U. S. 561

(1958); *Watts v. Indiana*, 338 U. S. 49, 338 U. S. 52 (1949). As in *Payne*, where the Court found that a confession was coerced because the interrogating police officer had promised that, if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S. at 356 U. S. 564-565, 356 U. S. 567, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

Four of us, JUSTICES MARSHALL, BLACKMUN, STEVENS and myself, would affirm the judgment of the Arizona Supreme Court on the ground that the harmless error rule is inapplicable to erroneously admitted coerced confessions. We thus disagree with the Justices who have a contrary views.

The majority today abandons what until now the Court has regarded as the

"axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers v. Richmond*, 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U. S. 401 (1945); *Stroble v. California*, 343 U. S. 181; *Payne v. Arkansas*, 356 U. S. 560."

Jackson v. Denno, 378 U. S. 368, 378 U. S. 376 (1964). The Court has repeatedly stressed that the view that the admission of a coerced confession can be harmless error because of the other evidence to support the verdict is "an impermissible doctrine," *Lynumn v. Illinois*, 372 U. S. 528, 372 U. S. 537 (1963); for "the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." *Payne*, *supra*, 356 U.S. at356 U. S. 568. *See also Rose v. Clark*, 478 U. S. 570, 478 U. S. 578, n. 6 (1986); *New Jersey v. Portash*, 440 U. S. 450, 440 U. S. 459 (1979); *Lego v. Twomey*, 404 U. S. 477,404 U. S. 483 (1972); *Chapman v. California*, 386 U. S. 18, 386 U. S. 23, and n. 8 (1967); *Haynes v. Washington*, *supra*, 373 U.S. at 373 U. S. 518; *Blackburn v. Alabama*, *supra*, 361 U.S. at 361 U. S. 206; *Spano v. New York*, 360 U. S. 315, 360 U. S. 324(1959); *Brown v. Allen*, 344 U. S. 443, 344 U. S. 475 (1953); *Stroble v. California*, 343 U. S. 181, 343 U. S. 190, (1952); *Gallegos v. Nebraska*, 342 U. S. 55, 342 U. S. 63 (1951); *Haley v. Ohio*, 332 U. S. 596, 332 U. S. 599, (1948); *Malinski v. New York*, 324 U. S. 401,324 U. S. 404 (1945); *Lyons v. Oklahoma*, 322 U. S. 596, 322 U. S. 597, n. 1 (1944). As the decisions in *Haynes* and *Payne*, *supra*, show, the rule was the same even when another confession of the defendant had been properly admitted into evidence. Today, a majority of the Court, without any justification, *cf. Arizona v. Rumsey*, 467 U. S. 203, 467 U. S. 212 (1984), overrules this vast body of precedent without a word, and, in so doing, dislodges one of the fundamental tenets of our criminal justice system.

In extending to coerced confessions the harmless error rule of *Chapman v. California*, 386 U. S. 18 (1967), the majority declares that, because the Court has applied that analysis to numerous other "trial errors," there is no reason that it should not apply to an error of this nature as well. The four of us remain convinced, however, that we should abide by our cases that have refused to apply the harmless error rule to coerced confessions, for a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the rule has been applied. Indeed, as the majority concedes, *Chapman* itself recognized that prior cases "have indicated that there are some constitutional rights so basic to a fair trial that their infraction can *never* be treated as harmless error," and it placed in that category the constitutional rule against using a defendant's coerced confession against him at his criminal trial. 386 U.S. at 386 U. S. 23, and n. 8 (emphasis added). Moreover, cases since *Chapman* have reiterated the rule that using a defendant's coerced confession against him is a denial of due process of law regardless of the other evidence in the record aside from the confession. *Lego v. Twomey*, *supra*, 404 U.S. at 404 U. S. 483; *Mincey v. Arizona*, 437 U.S. at 437 U. S. 398; *New Jersey v. Portash*, *supra*, 440 U.S. at 440 U. S. 459; *Rose v. Clark*, *supra*, 478 U.S. at 478 U. S. 577, 478 U. S. 578, and n. 6.

Chapman specifically noted three constitutional errors that could not be categorized as harmless error: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge. The majority attempts to distinguish the use of a coerced confession from the other two errors listed in *Chapman* first by distorting the decision in *Payne*, and then by drawing a meaningless dichotomy between "trial errors" and "structural defects" in the trial process. Viewing *Payne* as merely rejecting a test whereby the admission of a coerced confession could stand if there were "sufficient evidence," other than the confession, to support the conviction, the majority suggests that the Court in *Payne* might have reached a different result had it been considering a harmless error test. *Post* at 499 U. S. 309 (opinion of REHNQUIST, C.J.). It is clear, though, that in *Payne* the Court recognized that, *regardless* of the amount of other evidence, "the admission in evidence, over objection, of the coerced confession vitiates the judgment," because

"where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."

356 U.S. at 356 U. S. 568. The inability to assess its effect on a conviction causes the admission at trial of a coerced confession to "defy analysis by *harmless error' standards," cf. post at 499 U. S. 309 (opinion of REHNQUIST, C.J.), just as certainly as do deprivation of counsel and trial before a biased judge.*

The majority also attempts to distinguish "trial errors" which occur "during the presentation of the case to the jury," *post* at 499 U. S. 309, and which it deems susceptible to harmless error analysis, from "structural defects in the constitution of the trial mechanism," *post* at 499 U. S. 309, which the majority concedes cannot be so analyzed. This effort fails, for our jurisprudence on harmless error has not classified so neatly the errors at issue. For example, we have held susceptible to harmless error analysis the failure to instruct the jury on the presumption of innocence, *Kentucky v. Whorton*, 441 U. S. 786 (1979), while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable doubt standard, *Jackson v. Virginia*, 443 U. S. 307, 443 U. S. 320, n. 14 (1979). These cases cannot be reconciled by labeling the former "trial error" and the latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. *See Whorton*, *supra*, 441 U.S. at 441 U. S. 789; *Taylor v. Kentucky*, 436 U. S. 478, 436 U. S. 488-490 (1978). While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable doubt instruction, though a "trial error," distorts the very structure of the trial, because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof. *Cf. Cool v. United States*, 409 U. S. 100, 409 U. S. 104 (1972); *In re Winship*, 397 U. S. 358, 397 U. S. 364 (1970).

These same concerns counsel against applying harmless error analysis to the admission of a coerced confession. A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him," *Cruz v. New York*, 481 U. S. 186, 481 U. S. 195 (1987) (WHITE, J., dissenting), so damaging that a jury should not be expected to ignore it even if told to do so, *Bruton v. United States*,391 U. S. 123, 391 U. S. 140 (1968) (WHITE, J., dissenting), and because, in any event, it is impossible to know what credit and weight the jury gave to the confession. *Cf. Payne*, *supra*, 356 U.S. at 356 U. S. 568. Concededly, this reason is insufficient to justify a *per se* bar to the use of any confession. Thus, *Milton v. Wainwright*, 407 U. S. 371 (1972), applied

harmless error analysis to a confession obtained and introduced in circumstances that violated the defendant's Sixth Amendment right to counsel. [Footnote 5] Similarly, the Courts of Appeals have held that the introduction of incriminating statements taken from defendants in violation of *Miranda v. Arizona*, 384 U. S. 436 (1966), is subject to treatment as harmless error. [Footnote 6]

Nevertheless, in declaring that it is

"impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment,"

post at 499 U. S. 312 (opinion of REHNQUIST, C.J.), the majority overlooks the obvious. Neither *Milton v. Wainwright* nor any of the other cases upon which the majority relies involved a defendant's *coerced* confession, nor were there present in these cases the distinctive reasons underlying the exclusion of coerced incriminating statements of the defendant. [Footnote 7] First, some coerced confessions may be untrustworthy. *Jackson v. Denno*, 378 U.S. at 378 U. S. 385-386; *Spano v. New York*, 360 U.S. at 360 U. S. 320. Consequently, admission of coerced confessions may distort the truthseeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden

"because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial, and not an inquisitorial, system — a system in which the State must establish guilt by evidence independently and freely secured, and may not by coercion prove its charge against an accused out of his own mouth,"

Rogers v. Richmond, 365 U.S. at 365 U. S. 540-541; *see also Lego*, 404 U.S. at 404 U. S. 485. This reflects the

"strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,"

Blackburn v. Alabama, 361 U.S. at 361 U. S. 206-207, as well as

"the deep-rooted feeling that the police must obey the law while enforcing the law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves,"

Spano, *supra*, 360 U.S. at 360 U. S. 320-321. Thus, permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice. *Cf. Chambers v. Florida*, 309 U.S. at 309 U. S. 235-238.

As the majority concedes, there are other constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error. For example, a judge in a criminal trial

"is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, *see Sparf & Hansen v. United States*, 156 U. S. 51, 156 U. S. 105 (1895); *Carpenters v. United States*, 330 U. S. 395, 330 U. S. 408 (1947), regardless of how overwhelmingly the evidence may point in that direction."

United States v. Martin Linen Supply Co., 430 U. S. 564, 430 U. S. 572-573 (1977). A defendant is entitled to counsel at trial, *Gideon v. Wainwright*, 372 U. S. 335 (1963), and, as *Chapman* recognized, violating this right can never be harmless error. 386 U.S. at 386 U. S. 23, and n. 8. *See also White v. Maryland*, 373 U. S. 59 (1963), where a conviction was set aside because the defendant had not had counsel at a preliminary hearing without regard to the showing of prejudice. In *Vasquez v. Hillery*, 474 U. S. 254 (1986), a defendant was found guilty beyond reasonable doubt, but the conviction had been set aside because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. The error at the grand jury stage struck at fundamental values of our society, and "undermine[d] the structural integrity of the criminal tribunal itself, and [was] not amenable to harmless error review." *Id.* at474 U. S. 263-264. *Vasquez*, like *Chapman*, also noted that rule of automatic reversal when a defendant is tried before a judge with a financial interest in the outcome, *Tumey v. Ohio*, 273 U. S. 510, 273 U. S. 535 (1927), despite a lack of any indication that bias influenced the decision. *Waller v. Georgia*, 467 U. S. 39, 467 U. S. 49 (1984), recognized that violation of the guarantee of a public trial required reversal without any showing of prejudice and even though the values of a public trial may be intangible and unprovable in any particular case.

The search for truth is indeed central to our system of justice, but

"certain constitutional rights are not, and should not be, subject to harmless error analysis, because those rights protect important values that are unrelated to the truthseeking function of the trial."

Rose v. Clark, 478 U.S. at 478 U. S. 587 (STEVENS, J., concurring in judgment). The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair." *Id.* at 478 U. S. 577, 478 U. S. 578, n. 6.

For the foregoing reasons, the four of us would adhere to the consistent line of authority that has recognized as a basic tenet of our criminal justice system, before and after both *Miranda* and *Chapman*, the prohibition against using a defendant's coerced confession against him at his criminal trial. *Stare decisis* is "of fundamental importance to the rule of law," *Welch v. Texas Highways and Public Transp. Dept.*, 483 U. S. 468, 483 U. S. 494 (1987); the majority offers no convincing reason for overturning our long line of decisions requiring the exclusion of coerced confessions.

IV

Since five Justices have determined that harmless error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola. *Cf. Pennsylvania v. Union Gas Co.*, 491 U. S. 1,491 U. S. 45 (1989) (WHITE, J., concurring in judgment in part and dissenting in part); *id.* at 491 U. S. 57 (O'CONNOR, J., dissenting). *Chapman v. California*, 386 U.S. at 386 U. S. 24, made clear that,

"before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Court has the power to review the record *de novo* in order to determine an error's harmlessness. *See ibid.; Satterwhite v. Texas*, 486 U.S. at 486 U. S. 258. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction. *Chapman, supra*, 386 U.S. at386 U. S. 26. Five of us are of the view that the State has not carried its burden, and accordingly affirm the judgment of the court below reversing petitioner's conviction.

A confession is like no other evidence. Indeed,

"the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Bruton v. United States, 391 U.S. at 391 U. S. 139-140 (WHITE J., dissenting). *See also Cruz v. New York*, 481 U.S. at 481 U. S. 195 (WHITE, J., dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

In the Arizona Supreme Court's initial opinion, in which it determined that harmless error analysis could be applied to the confession, the court found that the admissible second confession to Donna Sarivola rendered the first confession to Anthony Sarivola cumulative. 161 Ariz. at 245-246, 778 P.2d at 610-611. The court also noted that circumstantial physical evidence concerning the wounds, the ligature around Jeneane's neck, the location of the body, and the presence of motorcycle tracks at the scene corroborated the second confession. *Ibid.* The court concluded that,

"due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict Fulminante."

Id. at 246, 778 P.2d at 611.

We have a quite different evaluation of the evidence. Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error. Three considerations compel this result.

First, the transcript discloses that both the trial court and the State recognized that a successful prosecution depended on the jury's believing the two confessions. Absent the confessions, it is unlikely that Fulminante would have been prosecuted at all, because the

physical evidence from the scene and other circumstantial evidence would have been insufficient to convict. Indeed, no indictment was filed until nearly two years after the murder. [Footnote 8] App. 2. Although the police had suspected Fulminante from the beginning, as the prosecutor acknowledged in his opening statement to the jury,

"[W]hat brings us to Court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife."

App. 65-66. After trial began, during a renewed hearing on Fulminante's motion to suppress, the trial court opined,

"You know, I think from what little I know about this trial, the character of this man [Sarivola] for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?,"

to which the prosecutor responded, "It's very important, there's no doubt." App. 62. Finally, in his closing argument, the prosecutor prefaced his discussion of the two confessions by conceding,

"[W]e have a lot of [circumstantial] evidence that indicates that this is our suspect, this is the fellow that did it, but it's a little short as far as saying that it's proof that he actually put the gun to the girl's head and killed her. So it's a little short of that. We recognize that."

10 Tr. 75 (Dec. 17, 1985).

Second, the jury's assessment of the confession to Donna Sarivola could easily have depended in large part on the presence of the confession to Anthony Sarivola. Absent the admission at trial of the first confession, the jurors might have found Donna Sarivola's story unbelievable. Fulminante's confession to Donna Sarivola allegedly occurred in May, 1984, on the day he was released from Ray Brook, as she and Anthony Sarivola drove Fulminante from New York to Pennsylvania. Donna Sarivola testified that Fulminante, whom she had never before met, confessed in detail about Jeneane's brutal murder in response to her casual question concerning why he was going to visit friends in Pennsylvania instead of returning to his family in Arizona. App. 167-168. Although she testified that she was "disgusted" by Fulminante's disclosures, *id.* at 169, she stated that she took no steps to notify authorities of what she had learned. *Id.* at 172-173. In fact, she claimed that she barely discussed the matter with Anthony Sarivola, who was in the car and overheard Fulminante's entire conversation with Donna. *Id.* at 174-175. Despite her disgust for Fulminante, Donna Sarivola later went on a second trip with him. *Id.* at 173-174. Although Sarivola informed authorities that he had driven Fulminante to Pennsylvania, he did not mention Donna's presence in the car or her conversation with Fulminante. *Id.* at 159-161. Only when questioned by authorities in June, 1985, did Anthony Sarivola belatedly recall the confession to Donna more than a year before, and only then did he ask if she would be willing to discuss the matter with authorities. *Id.* at 90-92.Home

Although some of the details in the confession to Donna Sarivola were corroborated by circumstantial evidence, many, including details that Jeneane was choked and sexually assaulted, were not. *Id.* at 186-188. As to other aspects of the second confession, including Fulminante's motive and state of mind, the *only*corroborating evidence was the first confession to Anthony Sarivola. [Footnote 9] No. CR 142821 (Super.Ct. Maricopa County, Ariz. Feb. 11, 1986), pp. 3-4. Thus, contrary to what the Arizona Supreme Court found, it is clear that the jury might have believed that the two confessions reinforced and corroborated each other. For this reason, one confession was not merely cumulative of the other. While in some cases two confessions, delivered on different occasions to different listeners, might be viewed as being independent of each other, *cf. Milton v. Wainwright*, 407 U. S. 371 (1972), it strains credulity to think that the jury so viewed the two confessions in this case, especially given the close relationship between Donna and Anthony Sarivola.

The jurors could also have believed that Donna Sarivola had a motive to lie about the confession in order to assist her husband. Anthony Sarivola received significant benefits from federal authorities, including payment for information, immunity from prosecution, and eventual placement in the federal Witness Protection Program. App. 79, 114, 129-131. In addition, the jury might have found Donna motivated by her own desire for favorable treatment, for she, too, was ultimately placed in the Witness Protection Program. *Id.* at 176, 179-180.

Third, the admission of the first confession led to the admission of other evidence prejudicial to Fulminante. For example, the State introduced evidence that Fulminante knew of Sarivola's connections with organized crime in an attempt to explain why Fulminante would have been motivated to confess to Sarivola in seeking protection. *Id.* at 45-48, 67. Absent the confession, this evidence would have had no relevance, and would have been inadmissible at trial. The Arizona Supreme Court found that the evidence of Sarivola's connections with organized crime reflected on Sarivola's character, not Fulminante's, and noted that the evidence could

have been used to impeach Sarivola. 161 Ariz. at 245-246, 778 P.2d at 610-611. This analysis overlooks the fact that, had the confession not been admitted, there would have been no reason for Sarivola to testify, and thus no need to impeach his testimony. Moreover, we cannot agree that the evidence did not reflect on Fulminante's character as well, for it depicted him as someone who willingly sought out the company of criminals. It is quite possible that this evidence led the jury to view Fulminante as capable of murder. [Footnote 10]

Finally, although our concern here is with the effect of the erroneous admission of the confession on Fulminante's conviction, it is clear that the presence of the confession also influenced the sentencing phase of the trial. Under Arizona law, the trial judge is the sentencer. Ariz.Rev.Stat. § 13-703(B) (1989). At the sentencing hearing, the admissibility of information regarding aggravating circumstances is governed by the rules of evidence applicable to criminal trials. § 13-703(C). In this case, "based upon admissible evidence produced at the trial," No. CR 14821, *supra*,at 2, the judge found that only one aggravating circumstance existed beyond a reasonable doubt, *i.e.*, that the murder was committed in "an *especially* heinous, cruel, and depraved manner." *Ibid.; see* Ariz.Rev.Stat. § 13-703(F)(6) (1989). In reaching this conclusion, the judge relied heavily on evidence concerning the manner of the killing and Fulminante's motives and state of mind which could only be found in the two confessions. For example, in labeling the murder "cruel," the judge focused in part on Fulminante's alleged statements that he choked Jeneane and made her get on her knees and beg before killing her. No. CR 142821, *supra*, at 3. Although the circumstantial evidence was not inconsistent with this determination, neither was it sufficient to make such a finding beyond a reasonable doubt. Indeed, the sentencing judge acknowledged that the confessions were only partly corroborated by other evidence. *Ibid.*

In declaring that Fulminante "acted with an especially heinous and depraved state of mind," the sentencing judge relied solely on the two confessions. *Id.* at 4. While the judge found that the statements in the confessions regarding the alleged sexual assault on Jeneane should not be considered on the issue of cruelty because they were not corroborated by other evidence, the judge determined that they were worthy of belief on the issue of Fulminante's state of mind. *Ibid.* The judge then focused on Anthony Sarivola's statement that Fulminante had made vulgar references to Jeneane during the first confession, and on Donna Sarivola's statement that Fulminante had made similar comments to her. *Ibid.* Finally, the judge stressed that Fulminante's alleged comments to the Sarivolas concerning torture, choking, and sexual assault, "whether they all occurred or not," *ibid.*, depicted "a man who was bragging, and relished the crime he committed." *Id.* at 5.

Although the sentencing judge might have reached the same conclusions even without the confession to Anthony Sarivola, it is impossible to say so beyond a reasonable doubt. Furthermore, the judge's assessment of Donna Sarivola's credibility, and hence the reliability of the second confession, might well have been influenced by the corroborative effect of the erroneously admitted first confession. Indeed, the fact that the sentencing judge focused on the similarities between the two confessions in determining that they were reliable suggests that either of the confessions alone, even when considered with all the other evidence, would have been insufficient to permit the judge to find an aggravating circumstance beyond a reasonable doubt as a requisite prelude to imposing the death penalty.

Because a majority of the Court has determined that Fulminante's confession to Anthony Sarivola was coerced, and because a majority has determined that admitting this confession was not harmless beyond a reasonable doubt, we agree with the Arizona Supreme Court's conclusion that Fulminante is entitled to a new trial at which the confession is not admitted. Accordingly the judgment of the Arizona Supreme Court is

Affirmed.

[Footnote 1]

In its initial opinion, the Arizona Supreme Court had determined that the second confession, to Donna Sarivola was not the "fruit of the poisonous tree," because it was made six months after the confession to Sarivola; it occurred after Fulminante's need for protection from Sarivola presumably had ended; and it took place in the course of a casual conversation with someone who was not an agent of the State. 161 Ariz. 237, 246, 778 P.2d 602, 611 (1988). The court adhered to this determination in its supplemental opinion. *Id.* at 262, 778 P.2d at 627. This aspect of the Arizona Supreme Court's decision is not challenged here.

[Footnote 2]

There are additional facts in the record, not relied upon by the Arizona Supreme Court, which also support a finding of coercion. Fulminante possesses low average to average intelligence; he dropped out of school in the fourth grade. Record 88i, 88*0*. He is

short in stature and slight in build. *Id.* at 88. Although he had been in prison before, *ibid.* he had not always adapted well to the stress of prison life. While incarcerated at the age of 26, he had "felt threatened by the [prison] population," *id.* at 88x, and he therefore requested that he be placed in protective custody. Once there, however, he was unable to cope with the isolation, and was admitted to a psychiatric hospital. *Id.* at 88t-88bl. The Court has previously recognized that factors such as these are relevant in determining whether a defendant's will has been overborne. *See, e.g., Payne v. Arkansas*, 356 U. S. 560, 356 U. S. 567 (1958) (lack of education); *Reck v. Pate*, 367 U. S. 433, 367 U. S. 441 (1961) (low intelligence). *Cf. Schneckloth v. Bustamonte*, 412 U. S. 218, 412 U. S. 226 (1973) (listing potential factors); *Culombe v. Connecticut*, 367 U. S. 568, 367 U. S. 602 (1961) (same). In addition, we note that Sarivola's position as Fulminante's friend might well have made the latter particularly susceptible to the former's entreaties. *See Spano v. New York*, 360 U. S. 315, 360 U. S. 323 (1959).

[Footnote 3]

Our prior cases have used the terms "coerced confession" and "involuntary confession" interchangeably "by way of convenient shorthand." *Blackburn v. Alabama*, 361 U. S. 199, 361 U. S. 207 (1960). We use the former term throughout this opinion, as that is the term used by the Arizona Supreme Court.

[Footnote 4]

The parties agree that Sarivola acted as an agent of the Government when he questioned Fulminante about the murder and elicited the confession. Brief for Petitioner 19, Brief for Respondent 2.

[Footnote 5]

In *Satterwhite v. Texas*, 486 U. S. 249 (1988), and *Moore v. Illinois*, 434 U. S. 220(1977), the harmless error rule was applied to the admission of evidence in violation of the Sixth Amendment Counsel Clause, but in neither case did the error involve admitting a confession or an incriminating statement of the defendant, which was the case in *Milton v. Wainwright*.

[Footnote 6]

Howard v. Pung, 862 F.2d 1348, 1351 (CA8), *cert. denied*, 492 U.S. 920 (1989); *United States v. Johnson*, 816 F.2d 918, 923 (CA3 1987); *Bryant v. Vose*, 785 F.2d 364, 367 (CA1), *cert. denied*, 477 U.S. 907 (1986); *Martin v. Wainwright*, 770 F.2d 918, 932 (CA11 1985), *modified*, 781 F.2d 185, *cert. denied*, 479 U.S. 909 (1986); *United States v. Ramirez*, 710 F.2d 535, 542-543 (CA9 1983); *Harryman v. Estelle*, 616 F.2d 870, 875 (CA5) (en banc), *cert. denied*, 449 U.S. 860 (1980).

[Footnote 7]

The same can be said of the *Miranda* cases. As the Court has recognized, a *Miranda*violation

"does not mean that the statements received have actually been coerced, but only that the courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised."

Oregon v. Elstad, 470 U. S. 298, 470 U. S. 310 (1985). *See also New York v. Quarles*,467 U. S. 649, 467 U. S. 654 (1984).

[Footnote 8]

Although Fulminante had allegedly confessed to Donna Sarivola several months previously, police did not yet know of this confession, which Anthony Sarivola did not mention to them until June, 1985. App. 992. They did, however, know of the first confession, which Fulminante had given to Anthony Sarivola nearly a year before.

[Footnote 9]

The inadmissible confession to Anthony Sarivola was itself subject to serious challenge. Sarivola's lack of moral integrity was demonstrated by his testimony that he had worked for organized crime during the time he was a uniformed police officer. App. 74-75, 104-105. His overzealous approach to gathering information for which he would be paid by authorities, *id.* at 79, was revealed by his admission that he had fabricated a tape recording in connection with an earlier, unrelated FBI investigation. *Id.* at 998. He received immunity in connection with the information he provided. *Id.* at 129. His eagerness to get in and stay in the federal Witness Protection Program provided a motive for giving detailed information to authorities. *Id.* at 114, 129-131. During his first report of the confession, Sarivola failed to hint at numerous details concerning an alleged sexual assault on Jeneane, he mentioned them for the first time more than a year later during further interrogation, at which he also recalled, for the first time, the confession to Donna Sarivola. *Id.* at 90-92, 148-149. The impeaching affect of each of these factors was undoubtedly undercut by the presence

of the second confession, which, not surprisingly, recounted a quite similar story, and thus corroborated the first confession. Thus, each confession, though easily impeachable if viewed in isolation, became difficult to discount when viewed in conjunction with the other.

[Footnote 10]

Fulminante asserts that other prejudicial evidence, including his prior felony convictions and incarcerations, and his prison reputation for untruthfulness, likewise would not have been admitted that the confession to Sarivola been excluded. Brief for Respondent 31-32. Because we find that the admission of the confession was not harmless in any event, we express no opinion as to the effect any of this evidence might have had on Fulminante's conviction.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, JUSTICE KENNEDY and JUSTICE SOUTER join as to Parts I and II, and JUSTICE SCALIA joins as to Parts II and III, delivering the opinion of the Court as to Part II, and dissenting as to Parts I and III.

The Court today properly concludes that the admission of an "involuntary" confession at trial is subject to harmless error analysis. Nonetheless, the independent review of the record which we are required to make shows that respondent Fulminante's confession was not, in fact, involuntary. And even if the confession were deemed to be involuntary, the evidence offered at trial, including a second, untainted confession by Fulminante, supports the conclusion that any error here was certainly harmless.

I

The question of whether respondent Fulminante's confession was voluntary is one of federal law.

"Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination."

Miller v. Fenton, 474 U. S. 104, 474 U. S. 110 (1985). In *Mincey v. Arizona*, 437 U. S. 385 (1978), we overturned a determination by the Supreme Court of Arizona that a statement of the defendant was voluntary, saying

"we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record."

Id. at 437 U. S. 398.

The admissibility of a confession such as that made by respondent Fulminante depends upon whether it was voluntarily made.

"The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. "

Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 602 (1961) (quoted in *Schneckloth v. Bustamonte*, 412 U. S. 218, 412 U. S. 225-226 (1973)).

In this case, the parties stipulated to the basic facts at the hearing in the Arizona trial court on respondent's motion to suppress the confession. Anthony Sarivola, an inmate at the Ray Brook Prison, was a paid confidential informant for the FBI. While at Ray Brook, various rumors reached Sarivola that Oreste Fulminante, a fellow inmate who had befriended Sarivola, had killed his step-daughter in Arizona. Sarivola passed these rumors on to his FBI contact, who told him "to find out more about it." Sarivola, having already discussed the rumors with the defendant on several occasions, asked him whether the rumors were true, adding that he might be in a position to protect Fulminante from physical recriminations in prison, but that "[he] must tell him the truth." Fulminante then confessed to Sarivola that he had, in fact, killed his step-daughter in Arizona, and provided Sarivola with substantial details about the manner in which he killed the child. At the suppression hearing, Fulminante stipulated to the fact that "[a]t no time did the defendant indicate he was in fear of other inmates, nor did he ever seek Mr. Sarivola's *protection.'" App. at 10. The trial court was also aware, through an excerpt from Sarivola's interview testimony which the defendant appended to his reply memorandum, that Sarivola believed Fulminante's time was "running short," and that he would "have went out of the prison horizontally." Id. at 28. The trial court found that respondent's confession was voluntary.*

The Supreme Court of Arizona stated that the trial court committed no error in finding the confession voluntary based on the record before it. But it overturned the trial court's finding of voluntariness based on the more comprehensive trial record before it, which included, in addition to the facts stipulated at the suppression hearing, a statement made by Sarivola at the trial that "the defendant had been receiving *rough treatment from the guys, and if the defendant would tell the truth, he could be protected.'" 161 Ariz. 237, 244, n. 1, 778 P.2d 602, 609, n. 1 (1989). It also had before it the presentence report, which showed that Fulminante was no stranger to the criminal justice system: he had six prior felony convictions, and had been imprisoned on three prior occasions.*

On the basis of the record before it, the Supreme Court stated:

"Defendant contends that, because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that, in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was 'extremely coercive,' because the 'obvious' inference from the promise was that his life would be in jeopardy if he did not confess. We agree."

Id. at 243, 778 P.2d at 608.

Exercising our responsibility to make the independent examination of the record necessary to decide this federal question, I am at a loss to see how the Supreme Court of Arizona reached the conclusion that it did. Fulminante offered no evidence that he believed that his life was in danger or that he, in fact, confessed to Sarivola in order to obtain the proffered protection. Indeed, he had stipulated that "[a]t no time did the defendant indicate he was in fear of other inmates, nor did he ever seek Mr. Sarivola's *protection.'" App. at 10. Sarivola's testimony that he told Fulminante that "if [he] would tell the truth, he could be protected," adds little, if anything, to the substance of the parties' stipulation. The decision of the Supreme Court of Arizona rests on an assumption that is squarely contrary to this stipulation, and one that is not supported by any testimony of Fulminante.*

The facts of record in the present case are quite different from those present in cases where we have found confessions to be coerced and involuntary. Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation." *Illinois v. Perkins*, 496 U. S. 292,496 U. S. 297 (1990). The fact that Sarivola was a government informant does not, by itself, render Fulminante's confession involuntary, since we have consistently accepted the use of informants in the discovery of evidence of a crime as a legitimate investigatory procedure consistent with the Constitution. *See, e.g., Kuhlmann v. Wilson*, 477 U. S. 436 (1986); *United States v. White*, 401 U. S. 745 (1971); *Hoffa v. United States*, 385 U. S. 293, 385 U. S. 304 (1966). The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons, and presumably able to fend for himself. In concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.

II

Since this Court's landmark decision in *Chapman v. California*, 386 U. S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless error analysis to a wide range of errors, and has recognized that most constitutional errors can be harmless. *See, e.g., Clemons v. Mississippi*, 494 U. S. 738,494 U. S. 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U. S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 491 U. S. 263, 491 U. S. 266(1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*,481 U. S. 497, 481 U. S. 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U. S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U. S. 683, 476 U. S. 691(1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U. S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U. S. 114, 464 U. S. 117-118, and n. 2 (1983) (denial of a defendant's right to be present at trial); *United States v. Hasting*, 461 U. S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U. S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser-included offense in a capital case in violation of the Due Process Clause); *Kentucky v. Whorton*, 441 U. S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*,

434 U. S. 220, 434 U. S. 232(1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); *Brown v. United States*, 411 U. S. 223, 411 U. S. 231-232 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause); *Milton v. Wainwright*, 407 U. S. 371 (1972) (confession obtained in violation of *Massiah v. United States*, 377 U. S. 201 (1964)); *Chambers v. Maroney*, 399 U. S. 42, 399 U. S. 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U. S. 1, 399 U. S. 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

The common thread connecting these cases is that each involved "trial error" — error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In applying harmless error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless error doctrine is essential to preserve the

"principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial, rather than on the virtually inevitable presence of immaterial error."

Van Arsdall, *supra*, 475 U.S. at 475 U. S. 681 (citations omitted).

In *Chapman v. California*, *supra*, the Court stated that

"Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,([n. 8]) this statement in *Fahy [v. State of Connecticut*, 375 U. S. 85 (1963)] itself belies any belief that all trial errors which violate the Constitution automatically call for reversal."

"___"

"8. *See, e.g., Payne v. Arkansas*, 356 U. S. 560 (coerced confession); *Gideon v. Wainwright*, 372 U. S. 335 (right to counsel); *Tumey v. Ohio*, 273 U. S. 510 (impartial judge)."

Id., 386 U.S. at 386 U. S. 23.

It is on the basis of this language in *Chapman* that JUSTICE WHITE, in dissent, concludes that the principle of *stare decisis* requires us to hold that an involuntary confession is not subject to harmless error analysis. I believe that there are several reasons which lead to a contrary conclusion. In the first place, the quoted language from *Chapman* does not, by its terms, adopt any such rule in that case. The language that "[a]lthough our prior cases have indicated," coupled with the relegation of the cases themselves to a footnote, is more appropriately regarded as a historical reference to the holdings of these cases. This view is buttressed by an examination of the opinion in *Payne v. Arkansas*, 356 U. S. 560 (1958), which is the case referred to for the proposition that an involuntary confession may not be subject to harmless error analysis. There the Court said:

"Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And, in these circumstances, this Court has uniformly held that, even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

Id. at 356 U. S. 567-568.

It is apparent that the State's argument which the Court rejected in *Payne* is not the harmless error analysis later adopted in *Chapman*, but a much more lenient rule which would allow affirmance of a conviction if the evidence other than the involuntary confession was sufficient to sustain the verdict. This is confirmed by the dissent of Justice Clark in that case, which adopted the more lenient test. Such a test would, of course — unlike the harmless error test — make the admission of an involuntary confession virtually risk-free for the state.

The admission of an involuntary confession — a classic "trial error" — is markedly different from the other two constitutional violations referred to in the *Chapman*footnote as not being subject to harmless error analysis. One of those cases, *Gideon v. Wainwright*, 372 U. S. 335 (1963), involved the total deprivation of the right to counsel at trial. The other, *Tumey v. Ohio*, 273 U. S. 510 (1927), involved a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which

defy analysis by "harmless error" standards. The entire conduct of the trial, from beginning to end, is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U. S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U. S. 168, 465 U. S. 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U. S. 39, 467 U. S. 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

"Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

Rose v. Clark, 478 U.S. at 478 U. S. 577-578 (citation omitted).

It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category. The admission of an involuntary confession is a "trial error," similar in both degree and kind to the erroneous admission of other types of evidence.

The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment — of evidence seized in violation of the Fourth Amendment — or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment. When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Nor can it be said that the admission of an involuntary confession is the type of error which "transcends the criminal process." This Court has applied harmless error analysis to the violation of other constitutional rights similar in magnitude and importance, and involving the same level of police misconduct. For instance, we have previously held that the admission of a defendant's statements obtained in violation of the Sixth Amendment is subject to harmless error analysis. In *Milton v. Wainwright*, 407 U. S. 371 (1972), the Court held the admission of a confession obtained in violation of *Massiah v. United States*, 377 U. S. 201 (1964), to be harmless beyond a reasonable doubt. We have also held that the admission of an out-of-court statement by a nontestifying codefendant is subject to harmless error analysis. *Brown v. United States*, 411 U.S. at 411 U. S. 231-232; *Schneble v. Florida*,405 U. S. 427 (1972); *Harrington v. California*, 395 U. S. 250 (1969). The inconsistent treatment of statements elicited in violation of the Sixth and Fourteenth Amendments, respectively, can be supported neither by evidentiary or deterrence concerns nor by a belief that there is something more "fundamental" about involuntary confessions. This is especially true in a case such as this one, where there are no allegations of physical violence on behalf of the police. The impact of a confession obtained in violation of the Sixth Amendment has the same evidentiary impact as does a confession obtained in violation of a defendant's due process rights. Government misconduct that results in violations of the Fourth and Sixth Amendments may be at least as reprehensible as conduct that results in an involuntary confession. For instance, the prisoner's confession to an inmate-informer at issue in *Milton*, which the Court characterized as implicating the Sixth Amendment right to counsel, is similar on its facts to the one we face today. Indeed, experience shows that law enforcement violations of these constitutional guarantees can involve conduct as egregious as police conduct used to elicit statements in violation of the Fourteenth Amendment. It is thus impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment.

Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors — in particular cases, it may be devastating to a defendant — but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless error test entirely. The Supreme Court of Arizona, in its first opinion in the present case, concluded that the admission of Fulminante's confession *was* harmless error. That court concluded that a second and more explicit confession of the crime made by Fulminante after he was released from prison was not tainted by the first confession, and that the second confession, together with physical evidence from the wounds (the victim had been shot twice in the head with a large calibre weapon at close range and a ligature was found around her neck) and other evidence introduced at trial rendered the admission of the first confession harmless beyond a reasonable doubt. 161 Ariz. at 24246, 778 P.2d at 61611.

III

I would agree with the finding of the Supreme Court of Arizona in its initial opinion — in which it believed harmless error analysis was applicable to the admission of involuntary confessions — that the admission of Fulminante's confession was harmless. Indeed, this seems to me to be a classic case of harmless error: a second confession giving more details of the crime than the first was admitted in evidence and found to be free of any constitutional objection. Accordingly, I would affirm the holding of the Supreme Court of Arizona in its initial opinion, and reverse the judgment which it ultimately rendered in this case.

JUSTICE KENNEDY, concurring in the judgment.

For the reasons stated by THE CHIEF JUSTICE, I agree that Fulminante's confession to Anthony Sarivola was not coerced. In my view, the trial court did not err in admitting this testimony. A majority of the Court, however, finds the confession coerced, and proceeds to consider whether harmless error analysis may be used when a coerced confession has been admitted at trial. With the case in this posture, it is appropriate for me to address the harmless error issue.

Again for the reasons stated by THE CHIEF JUSTICE, I agree that harmless error analysis should apply in the case of a coerced confession. That said, the court conducting a harmless error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence. If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. For the reasons given by JUSTICE WHITE in 499 U. S. I cannot with confidence find admission of Fulminante's confession to Anthony Sarivola to be harmless error.

The same majority of the Court does not agree on the three issues presented by the trial court's determination to admit Fulminante's first confession: whether the confession was inadmissible because coerced; whether harmless error analysis is appropriate; and if so whether any error was harmless here. My own view that the confession was not coerced does not command a majority.

In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the confession was coerced and inadmissible. I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence, and so I concur in the judgment to affirm the ruling of the Arizona Supreme Court.

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7.5: Berghuis v. Thompkins 560 U.S. 370 (2010)

OCTOBER TERM, 2009
BERGHUIS V. THOMPKINS

SUPREME COURT OF THE UNITED STATES

BERGHUIS, WARDEN *v*. THOMPKINS

certiorari to the united states court of appeals for the sixth circuit

No. 08–1470. Argued March 1, 2010—Decided June 1, 2010

After advising respondent Thompkins of his rights, in full compliance with *Miranda*v. *Arizona*, 384 U. S. 436, Detective Helgert and another Michigan officer interrogated him about a shooting in which one victim died. At no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. The trial court denied the motion. At trial on first-degree murder and other charges, the prosecution called Eric Purifoy, who drove the van in which Thompkins and a third accomplice were riding at the time of the shooting, and who had been convicted of firearm offenses but acquitted of murder and assault. Thompkins' defense was that Purifoy was the shooter. Purifoy testified that he did not see who fired the shots. During closing arguments, the prosecution suggested that Purifoy lied about not seeing the shooter and pondered whether Purifoy's jury had made the right decision. Defense counsel did not ask the court to instruct the jury that it could consider evidence of the outcome of Purifoy's trial only to assess his credibility, not to establish Thompkins' guilt. The jury found Thompkins guilty, and he was sentenced to life in prison without parole. In denying his motion for a new trial, the trial court rejected as nonprejudicial his ineffective-assistance-of-counsel claim for failure to request a limiting instruction about the outcome of Purifoy's trial. On appeal, the Michigan Court of Appeals rejected both Thompkins' *Miranda* and his ineffective-assistance claims. The Federal District Court denied his subsequent habeas request, reasoning that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation, and that it was not unreasonable, for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), see 28 U. S. C. §2254(d)(1), for the State Court of Appeals to determine that he had waived his right to remain silent. The Sixth Circuit reversed, holding that the state court was unreasonable in finding an implied waiver of Thompkins' right to remain silent and in rejecting his ineffective-assistance-of-counsel claim.

Held:

1. The state court's decision rejecting Thompkins' *Miranda* claim was correct under *de novo* review and therefore necessarily reasonable under AEDPA's more deferential standard of review. Pp. 7–17.

(a) Thompkins' silence during the interrogation did not invoke his right to remain silent. A suspect's *Miranda* right to counsel must be invoked "unambiguously." *Davis* v. *United States*, 512 U. S. 452, 459. If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation, *ibid.*, or ask questions to clarify the accused's intent, *id.*, at 461–462. There is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked. The unambiguous invocation requirement results in an objective inquiry that "avoid[s] difficulties of proof and … provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, *supra*, at 458–459. Had Thompkins said that he wanted to remain silent or that he did not want to talk, he would have invoked his right to end the questioning. He did neither. Pp. 8–10.

(b) Thompkins waived his right to remain silent when he knowingly and voluntarily made a statement to police. A waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U. S. 412, 421. Such a waiver may be "implied" through a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." *North Carolina* v. *Butler*, 441 U. S. 369, 373. If the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver. The record here shows

that Thompkins waived his right to remain silent. First, the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke. See *Burbine*, *supra*, at 421. Second, his answer to the question about God is a "course of conduct indicating waiver" of that right. *Butler*, *supra*, at 373. Had he wanted to remain silent, he could have said nothing in response or unambiguously invoked his *Miranda* rights, ending the interrogation. That he made a statement nearly three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Third, there is no evidence that his statement was coerced. See *Burbine*, *supra*, at 421. He does not claim that police threatened or injured him or that he was fearful. The interrogation took place in a standard-sized room in the middle of the day, and there is no authority for the proposition that a 3-hour interrogation is inherently coercive. Cf. *Colorado*v. *Connelly*, 479 U. S. 157, 163–164, n. 1. The fact that the question referred to religious beliefs also does not render his statement involuntary. *Id.*, at 170. Pp. 10–15.

(c) Thompkins argues that, even if his answer to Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they first obtained a waiver. However, a rule requiring a waiver at the outset would be inconsistent with *Butler*'s holding that courts can infer a waiver "from the actions and words of the person interrogated." 441 U. S., at 373. Any waiver, express or implied, may be contradicted by an invocation at any time, terminating further interrogation. When the suspect knows that *Miranda* rights can be invoked at any time, he or she can reassess his or her immediate and long-term interests as the interrogation progresses. After giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived *Miranda* rights. Thus, the police were not required to obtain a waiver of Thompkins' *Miranda* rights before interrogating him. Pp. 15–17.

2. Even if his counsel provided ineffective assistance, Thompkins cannot show prejudice under a *de novo* review of this record. To establish ineffective assistance, a defendant "must show both deficient performance and prejudice." *Knowles* v. *Mirzayance*, 556 U. S. ___, ___. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland* v. *Washington*, 466 U. S. 668, 694, considering "the totality of the evidence before the judge or jury," *id.*, at 695. Here, the Sixth Circuit did not account for the other evidence presented against Thompkins. The state court rejected his claim that he was prejudiced by evidence of Purifoy's earlier conviction. Even if it used an incorrect legal standard, this Court need not determine whether AEDPA's deferential standard of review applies here, since Thompkins cannot show prejudice under *de novo* review, a more favorable standard for him. *De novo* review can be used in this case because a habeas petitioner will not be entitled to relief if his or her claim is rejected on *de novo* review. See §2254(a). Assuming that failure to request a limiting instruction here was deficient representation, Thompkins cannot show prejudice, for the record shows that it was not reasonably likely that such an instruction would have made any difference in light of other evidence of guilt. The surviving victim identified Thompkins as the shooter, and the identification was supported by a surveillance camera photograph. A friend testified that Thompkins confessed to him, and the details of that confession were corroborated by evidence that Thompkins stripped and abandoned the van after the shooting. The jury, moreover, was capable of assessing Purifoy's credibility, as it was instructed to do. Pp. 17–19.

547 F. 3d 572, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, and Alito, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer, JJ., joined.

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7.6: Salinas v. Texas 570 US____ (2013)

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SUPREME COURT OF THE UNITED STATES

_____

No. 12–246

_____

GENOVEVO SALINAS, PETITIONER v. TEXAS

on writ of certiorari to the court of criminal appeals of texas

[June 17, 2013]

Justice Alito announced the judgment of the Court and delivered an opinion in which The Chief Justice and Justice Kennedy join.

Without being placed in custody or receiving Miranda warnings, petitioner voluntarily answered the questions of a police officer who was investigating a murder. But petitioner balked when the officer asked whether a ballistics test would show that the shell casings found at the crime scene would match petitioner's shotgun. Petitioner was subsequently charged with murder, and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. Petitioner claims that this argument violated the Fifth Amendment, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question. It has long been settled that the privilege "generally is not self-executing" and that a witness who desires its protection " 'must claim it.' " Minnesota v. Murphy, 465 U. S. 420, 425, 427 (1984) (quoting United States v. Monia, 317 U. S. 424, 427 (1943)). Although "no ritualistic formula is necessary in order to invoke the privilege," Quinn v. United States, 349 U. S. 155, 164 (1955) , a witness does not do so by simply standing mute. Because petitioner was required to assert the privilege in order to benefit from it, the judgment of the Texas Court of Criminal Appeals rejecting petitioner's Fifth Amendment claim is affirmed.

I

On the morning of December 18, 1992, two brothers were shot and killed in their Houston home. There were no witnesses to the murders, but a neighbor who heard gunshots saw someone run out of the house and speed away in a dark-colored car. Police recovered six shotgun shell casings at the scene. The investigation led police to petitioner, who had been a guest at a party the victims hosted the night before they were killed. Police visited petitioner at his home, where they saw a dark blue car in the driveway. He agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning.

Petitioner's interview with the police lasted approximately one hour. All agree that the interview was noncustodial, and the parties litigated this case on the assumption that he was not read Miranda warnings. See Mi- randa v. Arizona, 384 U. S. 436 (1966) . For most of the interview, petitioner answered the officer's questions. But when asked whether his shotgun "would match the shells recovered at the scene of the murder," App. 17, petitioner declined to answer. Instead, petitioner "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." Id., at 18. After a few moments of silence, the officer asked additional questions, which petitioner answered. Ibid.

Following the interview, police arrested petitioner on outstanding traffic warrants. Prosecutors soon concluded that there was insufficient evidence to charge him with the murders, and he was released. A few days later, police obtained a statement from a man who said he had heard petitioner confess to the killings. On the strength of that additional evidence, prosecutors decided to charge peti- tioner, but by this time he had absconded. In 2007, police discovered petitioner living in the Houston area under an assumed name.

Petitioner did not testify at trial. Over his objection, prosecutors used his reaction to the officer's question dur- ing the 1993 interview as evidence of his guilt. The jury found petitioner guilty, and he received a 20-year sentence. On direct appeal to the

Court of Appeals of Texas, petitioner argued that prosecutors' use of his silence as part of their case in chief violated the Fifth Amendment. The Court of Appeals rejected that argument, reasoning that petitioner's prearrest, pre-Miranda silence was not "compelled" within the meaning of the Fifth Amendment. 368 S. W. 3d 550, 557–559 (2011). The Texas Court of Criminal Appeals took up this case and affirmed on the same ground. 369 S. W. 3d 176 (2012).

We granted certiorari, 568 U. S. ___ (2013), to resolve a division of authority in the lower courts over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a noncustodial police interview as part of its case in chief. Compare, e.g., United States v. Rivera, 944 F. 2d 1563, 1568 (CA11 1991), with United States v. Moore, 104 F. 3d 377, 386 (CADC 1997). But because petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question.

II

A

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." Garner v. United States, 424 U. S. 648 , n. 11 (1976). To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who " 'desires the protection of the privilege . . . must claim it' " at the time he relies on it. Murphy, 465 U. S., at 427 (quoting Monia, 317 U. S., at 427). See also United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 113 (1927) .

That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, see Hoffman v. United States, 341 U. S. 479, 486 (1951) , or cure any potential self-incrimination through a grant of immunity, see Kastigar v. United States, 406 U. S. 441, 448 (1972) . The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer. See Roberts v. United States, 445 U. S. 552 , n. 7 (1980) ("A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give"); Hutcheson v. United States, 369 U. S. 599 –611 (1962) (declining to treat invocation of due process as proper assertion of the privilege). In these ways, insisting that witnesses expressly invoke the privilege "assures that the Government obtains all the information to which it is entitled." Garner, supra, at 658, n. 11.

We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here. First, we held in Griffin v. California, 380 U. S. 609 –615 (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an "absolute right not to testify." Turner v. United States, 396 U. S. 398, 433 (1970) (Black, J., dissenting); see United States v. Patane, 542 U. S. 630, 637 (2004) (plurality opinion). Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because pe- titioner had no comparable unqualified right during his interview with police, his silence falls outside the Griffin exception.

Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in Miranda, we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. 384 U. S., at 467–468, and n. 37. Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege "unless [he] fails to claim [it] after being suitably warned." Murphy, supra, at 429–430.

For similar reasons, we have held that threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. Garrity v. New Jersey, 385 U. S. 493, 497 (1967) (public employment). See also Lefkowitz v. Cunningham, 431 U. S. 801 –804 (1977) (public office); Lefkowitz v. Turley, 414 U. S. 70 –85 (1973) (public contracts). And where assertion of the privilege would itself tend to incriminate, we have allowed witnesses to exercise the privilege through silence. See, e.g., Leary v. United States, 395 U. S. 6 –29 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); Albertson v. Subversive Activities Control Bd., 382 U. S. 70 –79 (1965) (members of the Communist Party not required to complete registration form "where response to any of the form's questions . . . might involve [them] in the admission of a crucial element of a crime"). The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him "a 'free

choice to admit, to deny, or to refuse to answer.' " Garner, 424 U. S., at 656–657 (quoting Lisenba v. California, 314 U. S. 219, 241 (1941)).

Petitioner cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and "was free to leave at any time during the interview." Brief for Petitioner 2–3 (internal quotation marks omitted). That places petitioner's situation outside the scope of Miranda and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege. The dissent elides this point when it cites our precedents in this area for the proposition that "[c]ircumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment." Post, at 7–8 (opinion of Breyer, J.). The critical question is whether, under the "circumstances" of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

B

Petitioner urges us to adopt a third exception to the in- vocation requirement for cases in which a witness stands mute and thereby declines to give an answer that of- ficials suspect would be incriminating. Our cases all but foreclose such an exception, which would needlessly burden the Government's interests in obtaining testimony and prosecuting criminal activity. We therefore decline petitioner's invitation to craft a new exception to the "general rule" that a witness must assert the privilege to subsequently benefit from it. Murphy, 465 U. S., at 429.

Our cases establish that a defendant normally does not invoke the privilege by remaining silent. In Roberts v. United States, 445 U. S. 552 , for example, we rejected the Fifth Amendment claim of a defendant who remained silent throughout a police investigation and received a harsher sentence for his failure to cooperate. In so ruling, we explained that "if [the defendant] believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate." Id., at 560. See also United States v. Sullivan, 274 U. S. 259 –264 (1927); Vajtauer, 273 U. S., at 113. [1] A witness does not expressly invoke the privilege by standing mute.

We have also repeatedly held that the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incrim- inate the witness. Thus, in Murphy we held that the defendant's self-incriminating answers to his probation of- ficer were properly admitted at trial because he failed to invoke the privilege. 465 U. S., at 427–428. In reaching that conclusion, we rejected the notion "that a witness must 'put the Government on notice by formally availing himself of the privilege' only when he alone 'is reasonably aware of the incriminating tendency of the questions.' " Id., at 428 (quoting Roberts, supra, at 562, n.* (Brennan, J., concurring)). See also United States v. Kordel, 397 U. S. 1, 7 (1970) . [2]

Petitioner does not dispute the vitality of either of those lines of precedent but instead argues that we should adopt an exception for cases at their intersection. Thus, petitioner would have us hold that although neither a wit- ness' silence nor official suspicions are enough to excuse the express invocation requirement, the invocation requirement does not apply where a witness is silent in the face of official suspicions. For the same reasons that neither of those factors is sufficient by itself to relieve a witness of the obligation to expressly invoke the privilege, we conclude that they do not do so together. A contrary result would do little to protect those genuinely relying on the Fifth Amendment privilege while placing a needless new burden on society's interest in the admission of evidence that is probative of a criminal defendant's guilt.

Petitioner's proposed exception would also be very difficult to reconcile with Berghuis v. Thompkins, 560 U. S. 370 (2010) . There, we held in the closely related context of post-Miranda silence that a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes. 560 U. S., at ___ (slip op., at 3, 8–10). If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.

Petitioner and the dissent attempt to distinguish Berg- huis by observing that it did not concern the admissi- bility of the defendant's silence but instead involved the admissibility of his subsequent statements. Post, at 8–9 (opinion of Breyer, J.). But regardless of whether prosecutors seek to use silence or a confession that follows, the logic of Berghuis applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege. [3]

In support of their proposed exception to the invocation requirement, petitioner and the dissent argue that reliance on the Fifth Amendment privilege is the most likely explanation for silence in a case such as this one. Reply Brief 17; see post, at 9–10 (Breyer, J., dissenting). But whatever the most probable explanation, such silence is "insolubly ambiguous." See Doyle, v. Ohio, 426 U. S. 610, 617 (1976) . To be sure, someone might decline to answer a police officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner alone knew why he did not answer the officer's question, and it was therefore his "burden . . . to make a timely assertion of the privilege." Garner, 424 U. S., at 655.

At oral argument, counsel for petitioner suggested that it would be unfair to require a suspect unschooled in the particulars of legal doctrine to do anything more than remain silent in order to invoke his "right to remain silent." Tr. of Oral Arg. 26–27; see post, at 10 (Breyer, J., dissenting); Michigan v. Tucker, 417 U. S. 433, 439 (1974) (observing that "virtually every schoolboy is familiar with the concept, if not the language" of the Fifth Amendment). But popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be "compelled in any criminal case to be a witness against himself"; it does not establish an unqualified "right to remain silent." A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim. See Hoffman, 341 U. S., at 486–487. [4]

In any event, it is settled that forfeiture of the privilege against self-incrimination need not be knowing. Murphy, 465 U. S., at 427–428; Garner, supra, at 654, n. 9. Statements against interest are regularly admitted into evidence at criminal trials, see Fed. Rule of Evid. 804(b)(3), and there is no good reason to approach a defendant's silence any differently.

C

Finally, we are not persuaded by petitioner's arguments that applying the usual express invocation requirement where a witness is silent during a noncustodial police interview will prove unworkable in practice. Petitioner and the dissent suggest that our approach will "unleash complicated and persistent litigation" over what a suspect must say to invoke the privilege, Reply Brief 18; see post, at 11–12 (opinion of Breyer, J.), but our cases have long required that a witness assert the privilege to subsequently benefit from it. That rule has not proved difficult to apply. Nor did the potential for close cases dissuade us from adopting similar invocation requirements for suspects who wish to assert their rights and cut off police questioning during custodial interviews. Berghuis, 560 U. S., at ___ (slip op., at 8–10) (requiring suspect to unambiguously assert privilege against self-incrimination to cut off custodial questioning); Davis v. United States, 512 U. S. 452, 459 (1994) (same standard for assertions of the right to counsel).

Notably, petitioner's approach would produce its own line-drawing problems, as this case vividly illustrates. When the interviewing officer asked petitioner if his shotgun would match the shell casings found at the crime scene, petitioner did not merely remain silent; he made movements that suggested surprise and anxiety. At precisely what point such reactions transform "silence" into expressive conduct would be a difficult and recurring question that our decision allows us to avoid.

We also reject petitioner's argument that an express invocation requirement will encourage police officers to " 'unfairly "tric[k]" ' " suspects into cooperating. Reply Brief 21 (quoting South Dakota v. Neville, 459 U. S. 553, 566 (1983)). Petitioner worries that officers could unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution. But as petitioner himself concedes, police officers "have done nothing wrong" when they "accurately stat[e] the law." Brief for Petitioner 32. We found no constitutional infirmity in government officials telling the defendant in Murphy that he was required to speak truthfully to his parole officer, 465 U. S., at 436–438, and we see no greater danger in the interview tactics petitioner identifies. So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation.

* * *

Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.

Notes

1 The dissent argues that in these cases "neither the nature of the questions nor the circumstances of the refusal to answer them provided any basis to infer a tie between the silence and the ." Post, at 5–6 (opinion of Breyer, J.). But none of our precedents suggests that governmental officials are obliged to guess at the meaning of a witness' unexplained silence when implicit reliance on

the seems probable. Roberts does not say as much, despite its holding that the defendant in that case was required to explain the basis for his failure to cooperate with an investigation that led to his prosecution. 445 U. S., at 559.

2 Our cases do not support the distinction the dissent draws between silence and the failure to invoke the privilege before making incriminating statements. See post, at 7 (Breyer, J., dissenting). For example, Murphy, a case in which the witness made incriminating statements after failing to invoke the privilege, repeatedly relied on Robertsand Vajtauer—two cases in which witnesses remained silent and did not make incriminating statements. 465 U. S., at 427, 429, 455–456, n. 20. Similarly, Kordel cited Vajtauer, among other cases, for the proposition that the defendant's "failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." 397 U. S., at 10, and n. 18.

3 Petitioner is correct that due process prohibits prosecutors from pointing to the fact that a defendant was silent after he heard Miranda warnings, Doyle v. Ohio, –618 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him, Jenkins v. Anderson, .

4 The dissent suggests that officials in this case had no "special need to know whether the defendant sought to rely on the protections of the ." Post, at 4 (opinion of Breyer, J.). But we have never said that the government must demonstrate such a need on a case-by-case basis for the invocation requirement to apply. Any such rule would require judicial hypothesizing about the probable strategic choices of prosecutors, who often use immunity to compel testimony from witnesses who invoke the .

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7.7: Miranda v. Arizona 384 US 436 (1966)

U.S. Supreme Court

Miranda v. Arizona, 384 U.S. 436 (1966)

Miranda v. Arizona

No. 759

Argued February 28-March 1, 1966

Decided June 13, 1966*

384 U.S. 436

CERTIORARI TO THE SUPREME COURT OF ARIZONA

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

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

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We dealt with certain phases of this problem recently in *Escobedo v. Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. [Footnote 1] A wealth of scholarly material has been written tracing its ramifications and underpinnings. [Footnote 2] Police and prosecutor

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have speculated on its range and desirability. [Footnote 3] We granted certiorari in these cases, 382 U.S. 924, 925, 937, in order further to explore some facets of the problems thus exposed of applying the privilege against self-incrimination to in-custody interrogation, and to give

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concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough reexamination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution — that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel" — rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And, in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens v. Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

"The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688 and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

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questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

Brown v. Walker, 161 U. S. 591, 596-597 (1896). In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems v. United States*, 217 U. S. 349, 373 (1910):

". . . our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

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meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in Escobedo, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow, but, briefly stated, it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [Footnote 4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

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process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features — incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that, in this country, they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. [Footnote 5]

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In a series of cases decided by this Court long after these studies, the police resorted to physical brutality — beating, hanging, whipping — and to sustained and protracted questioning incommunicado in order to extort confessions. [Footnote 6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep. Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965). [Footnote 7]

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The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved — such as these decisions will advance — there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

"To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey):"

"It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means."

"Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short-cut, and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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are not so likely to use your wits.' We agree with the conclusion expressed in the report, that"

"The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of Justice is held by the public."

"IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931)."

Again we stress that the modern practice of in-custody interrogation is psychologically, rather than physically, oriented. As we have stated before,

"Since *Chambers v. Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."

Blackburn v. Alabama, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms. A valuable source of information

about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. [Footnote 8] These

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texts are used by law enforcement agencies themselves as guides. [Footnote 9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the

"principal psychological factor contributing to a successful interrogation is *privacy* — being alone with the person under interrogation. [Footnote 10]"

The efficacy of this tactic has been explained as follows:

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home, he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. [Footnote 11]"

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and, from outward appearance, to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, [Footnote 12] to cast blame on the victim or on society. [Footnote 13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already — that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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One writer describes the efficacy of these characteristics in this manner:

"In the preceding paragraphs, emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours, pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable. [Footnote 14]"

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge killing, for example, the interrogator may say:

"Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him, and that's why you carried a gun — for your own protection. You knew him for what he was, no good. Then when you met him, he probably started using foul, abusive language and he gave some indication

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that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe? [Footnote 15]"

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that,

"Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial. [Footnote 16]"

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly," or the "Mutt and Jeff" act:

". . . In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime, and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics, and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room. [Footnote 17] "

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The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up.

"The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party. [Footnote 18]"

Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

"The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations. [Footnote 19]"

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent.

"This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses

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the subject with the apparent fairness of his interrogator. [Footnote 20]"

After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege, and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes, and I were in yours, and you called me in to ask me about this, and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over. [Footnote 21]"

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

"[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself, rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his

family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' [Footnote 22] "

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From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." [Footnote 23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals. [Footnote 24]

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This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend v. Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.* at 307-310. The defendant in *Lynumn v. Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court, as in those cases, reversed the conviction of a defendant in *Haynes v. Washington*, 373 U. S. 503(1963), whose persistent request during his interrogation was to phone his wife or attorney. [Footnote 25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda v. Arizona*, the police arrested the defendant and took him to a special interrogation room, where they secured a confession. In No. 760, *Vignera v. New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover v. United States*, the defendant was handed over to the Federal Bureau of Investigation by

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local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California v. Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Footnote 26] The current practice of incommunicado interrogation is at odds with one of our

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Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came, and the fervor with which it was defended. Its roots go back into ancient times. [Footnote 27] Perhaps

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the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. *The Trial of John Lilburn and John Wharton*, 3 How.St.Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:

"Another fundamental right I then contended for was that no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so."

Haller & Davies, The Leveller Tracts 1647-1653, p. 454 (1944)

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. [Footnote 28] These sentiments worked their way over to the Colonies, and were implanted after great struggle into the Bill of Rights. [Footnote 29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that

"illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."

Boyd v. United States, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status, and has always been "as broad as the mischief

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against which it seeks to guard." *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus, we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald*, 233 F.2d 556, 579, 581-582 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). We have recently noted that the privilege against self-incrimination — the essential mainstay of our adversary system — is founded on a complex of values, *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 55-57, n. 5 (1964); *Tehan v. Shott*, 382 U. S. 406, 414-415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev.1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. Florida*, 309 U. S. 227, 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation.

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In this Court, the privilege has consistently been accorded a liberal construction.*Albertson v. SACB*, 382 U. S. 70, 81 (1965); *Hoffman v. United States*, 341 U. S. 479, 486 (1951); *Arndstein v. McCarthy*, 254 U. S. 71, 72-73 (1920); *Counselman v. Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. [Footnote 30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram v. United States*, 168 U. S. 532, 542 (1897), this Court held:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

"Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

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would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when, but for the improper influences, he would have remained silent. . . ."

168 U.S. at 549. *And see id.* at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan v. United States*, 266 U. S. 1. He stated:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States*, 168 U. S. 532."

266 U.S. at 14-15. In addition to the expansive historical development of the privilege and the sound policies which have nurtured

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its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover v. United States*, stating:

"We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law enforcement officer. [Footnote 31]"

Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb v. United States*, 318 U. S. 332 (1943), and *Mallory v. United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U.S. at 343-344, and in *Mallory*, 354 U.S. at 455-456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself. [Footnote 32]

Our decision in *Malloy v. Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

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privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffin v. California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent — that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U.S. at 7-8. [Footnote 33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

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making a free and rational choice. [Footnote 34] The implications of this proposition were elaborated in our decision in *Escobedo v. Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S. at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege — the choice on his part to speak to the police — was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U.S. at 481, 488, 491. [Footnote 35] This heightened his dilemma, and

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made his later statements the product of this compulsion. *Cf. Haynes v. Washington*, 373 U. S. 503, 373 U. S. 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege — to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would he the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pretrial privilege, noted in many of the Court's prior decisions: the protection of rights at trial. [Footnote 36] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the factfinding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel,

"all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

Mapp v. Ohio, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). *Cf. Pointer v. Texas*, 380 U. S. 400 (1965).

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III

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons

suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rulemaking capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

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unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it — the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury. [Footnote 37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule, and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information

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as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; [Footnote 38] a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system — that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

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warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent, without more, "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. *Cf. Escobedo v. Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions, as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present, the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police, and that the statement is rightly reported by the prosecution at trial. *See Crooker v. California*, 357 U. S. 433, 443-448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

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may be the person who most needs counsel. As the California Supreme Court has aptly put it:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request, and, by such failure, demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it."

People v. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal.Rptr. 169, 177-178 (1965) (Tobriner, J.). In *Carnley v. Cochran*, 369 U. S. 506, 513 (1962), we stated:

"[I]t is settled that, where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."

This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. [Footnote 39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

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circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us, as well as the vast majority of confession cases with which we have dealt in the past, involve those unable to retain counsel. [Footnote 40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. [Footnote 41] Denial

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of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, 372 U. S. 335 (1963), and *Douglas v. California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that, if he is indigent, a lawyer will be appointed to represent him. Without

this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present. [Footnote 42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. [Footnote 43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner,

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at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [Footnote 44] At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that, if police propose to interrogate a person, they must make known to him that he is entitled to a lawyer and that, if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U. S. 458 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place, and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained. A statement we made in *Carnley v. Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also Glasser v. United States, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

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some information on his own prior to invoking his right to remain silent when interrogated. [Footnote 45]

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not

voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege, and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly,

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for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were, in fact, truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation, and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word, and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today, or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. *See Escobedo v. Illinois*, 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of

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responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. [Footnote 46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, [Footnote 47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today.

To summarize, we hold that, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to

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protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree

to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [Footnote 48]

IV

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. *See, e.g., Chambers v. Florida*, 309 U. S. 227, 240-241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

"Decency, security and liberty alike demand that government officials shall be subjected to the same

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rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fail to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Olmstead v. United States, 277 U. S. 438, 485 (1928) (dissenting opinion). [Footnote 49] In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [Footnote 50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath — to protect to the extent of his ability the rights of his client.

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In fulfilling this responsibility, the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case, authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant. [Footnote 51] Further examples are chronicled in our prior cases. *See, e.g., Haynes v. Washington*, 373 U. S. 503, 518-519 (1963); *Rogers v. Richmond*, 365 U. S. 534, 541 (1961); *Malinski v. New York*, 324 U. S. 401,402 (1945). [Footnote 52]

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It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that, in such circumstances, a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California v. Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until

defendant confessed. At that time, they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause. [Footnote 53]

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Over the years, the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice, and, more recently, that he has a right to free counsel if he is unable to pay. [Footnote 54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

"At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation, and am submitting herewith a statement of the questions and of the answers which we have received."

" (1) When an individual is interviewed by agents of the Bureau, what warning is given to him?"

" The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F.2d 684 (1965), and *Jackson v. U.S.*, 337 F.2d 136 (1964), *cert. den.*, 380 U.S. 935."

" After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warning

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to read counsel of his own choice, or anyone else with whom he might wish to speak."

" (2) When is the warning given?"

" The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U.S. v. Konigsberg*, 336 F.2d 844 (1964), *cert. den.*, 379 U.S. 933, but, in any event, it must precede the interview with the person for a confession or admission of his own guilt."

" (3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?"

" When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz v. U.S.*, 351 F.2d 287 (1965). It may be continued, however, as to all matters other than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram v. U.S.*, 354 F.2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts."

" A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell v. U.S.*, 351 F.2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private. "

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" (4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?"

" If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding, further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for

counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge. [Footnote 55]"

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience. [Footnote 56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure, since 1912 under the Judges' Rules, is significant. As recently

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strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. [Footnote 57]

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The right of the individual to consult with an attorney during this period is expressly recognized. [Footnote 58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation. [Footnote 59] In India, confessions made to police not in the presence of a magistrate have been excluded

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by rule of evidence since 1872, at a time when it operated under British law. [Footnote 60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895. [Footnote 61] Similarly, in our country, the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement, and that any statement he makes may be used against him. [Footnote 62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals. [Footnote 63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined. [Footnote 64]

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rulemaking. [Footnote 65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions, and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. *See Hopt v. Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us, and it is our

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

V

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

No. 759. *Miranda v. Arizona*

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

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

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

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

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

No. 760. *Vignera v. New York*

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

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

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

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

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

No. 761. *Westover v. United States*

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

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

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

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

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

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

immediately following the state interrogation in the same police station — in the same compelling surroundings. Thus, in obtaining a confession from Westover

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

No. 584. *California v. Stewart*

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

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

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

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

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

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

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

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

It is so ordered.

* Together with No. 760, *Vignera v. New York*, on certiorari to the Court of Appeals of New York and No. 761, *Westover v. United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28-March 1, 1966, and No. 584, *California v. Stewart*, on certiorari to the Supreme Court of California, argued February 28-March 2, 1966.

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

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

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

I

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

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

II

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

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

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

"Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And certainly we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this, where it is necessary to make fine judgments as to the effect of

psychologically coercive pressures and inducements on the mind and will of an accused. . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded."

Id. at 373 U. S. 514-515.

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III

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

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

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

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

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

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

I

. INTRODUCTION

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

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

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules

is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim, in short, is toward "voluntariness" in a utopian sense, or, to view it from a different angle, voluntariness with a vengeance.

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

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II

. CONSTITUTIONAL PREMISES

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

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

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

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

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

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

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

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

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

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

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

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed,

"the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents. . . ."

8 Wigmore, Evidence § 2266, at 401 (McNaughton rev.1961). Practice under the two doctrines has also differed in a number of important respects. [Footnote 6]

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

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion. [Footnote 7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial, rather than inquisitorial, values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this, indeed, is why, at present, "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of

the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

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

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

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

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

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

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

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

The only attempt in this Court to carry the right to counsel into the stationhouse occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. *See* 378 U.S. 485-488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical," yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor, but not to himself. This danger shrinks markedly in the police station, where, indeed, the lawyer, in fulfilling his

professional responsibilities, of necessity may become an obstacle to truthfinding. *See infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as

"the domino method of constitutional adjudication . . . , wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."

Friendly, *supra*, n. 10, at 950.

III

. POLICY CONSIDERATIONS

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

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

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect, and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can, in themselves, exert a tug on the suspect to confess, and, in this light,

"[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser."

Ashcraft v. Tennessee, 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions. [Footnote 11]

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

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

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

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, *see* Developments, *supra*, n. 2, at 941-944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. *See infra*, n.19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, [Footnote 14] and that the

Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

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

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

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

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

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

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

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

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

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson v. Zerbst*, 304 U. S. 458, *Mapp v. Ohio*, 367 U. S. 643, and *Gideon v. Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had, in fact, been recently fixed as Department of Justice policy. *See* Beaney, Right to Counsel 29-30, 342 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted

some such rule. *See* 367 U.S. at 651. In *Gideon*, which extended *Johnson v. Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. *See* 372 U.S. at 345. By contrast, in this case, new restrictions on police

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

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

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

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the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence, but not counsel, has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion, confessions can be, and apparently quite frequently are, admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify. [Footnote 20] India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon, the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. *See* Developments, *supra*, n. 2, at 1106-1110; *Reg. v. Ramasamy* [1965] A.C. 1 (P.C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and, in many other respects, Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country. [Footnote 21] The Court ends its survey by imputing

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

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

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

IV

. CONCLUSIONS

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

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

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

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

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

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taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas v. Jeannette*, 319 U. S. 157, 181 (separate opinion):

"This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

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

I

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later,

"[b]ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And, so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates."

Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when

"[c]onsidered in the light to be shed by grammar and the dictionary . . . , appear to signify simply that nobody shall be

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compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant."

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

A few years later, the Fifth Amendment privilege was similarly extended to encompass the then well established rule against coerced confessions:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

Bram v. United States, 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau v. McDowell*, 256 U. S. 465, 475; *Powers v. United States*, 223 U. S. 303, 313; *Shotwell v. United States*, 371 U. S. 341, 347, it has also been questioned, *see Brown v. Mississippi*, 297 U. S. 278, 285; *United States v. Carignan*,

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

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

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

168 U.S. at 558. In this respect, the Court was wholly consistent with prior and subsequent pronouncements in this Court.

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

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confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in

Sparf and Hansen v. United States, 156 U. S. 51, 55:

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

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

And in *Wilson v. United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There, the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness.

"The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down

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

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers v. United States*, 223 U. S. 303, cited *Wilson*approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb v. United States*, 318 U. S. 332, 346; *accord*, *United States v. Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan v. United States*, 266 U. S. 1, 14; *United States v. Carignan*, 342 U. S. 36, 39. Likewise, in *Crooker v. California*, 357 U. S. 433, 437, the Court said that

"the bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained."

And finally, in *Cicenia v. Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. *See generally Culombe v. Connecticut*, 367 U. S. 568, 587-602 (opinion of Frankfurter, J.); 3 Wigmore, Evidence § 851, at 313 (3d ed.1940); *see also* Joy, Admissibility of Confessions 38, 46 (1842).

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

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

II

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

Indeed, it is what it must do, and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

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

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

III

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if compelled. Hence, the core of the Court's opinion is that, because of the

"compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice,"

ante at 458, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, *see Mapp v. Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, *see Gideon v. Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may

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

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

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

Today's result would not follow even if it were agreed that, to some extent, custodial interrogation is inherently coercive. *See Ashcraft v. Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived

the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba v. California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes v. Washington*, 373 U. S. 503, 513; *Lynumn v. Illinois*, 372 U. S. 528, 534. The duration and nature of *incommunicado*custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. *See, e.g., Ashcraft v. Tennessee*, 322 U. S. 143; *Haynes v. Washington*, 373 U. S. 503. [Footnote 3]

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

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

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

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

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

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

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

IV

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

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

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advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion — that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife, or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, *see Escobedo v. Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown v. Walker*, 161 U. S. 591, 596; *see also Hopt v. Utah*, 110 U. S. 574, 584-585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability, and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary, it may provide psychological relief, and enhance the prospects for rehabilitation. This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight, or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all, and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel, and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest

several suspects, as where the body of the victim is discovered in a house having several residents, *compare Johnson v. State*, 238 Md. 140, 207 A.2d 643 (1965), *cert. denied*, 382 U.S. 1013, it will often

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

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

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

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

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

Footnotes

[Footnote 1]

Compare United States v. Childress, 347 F.2d 448 (C.A. 7th Cir.1965), *with Collins v. Beto*, 348 F.2d 823 (C.A. 5th Cir.1965). *Compare People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361, 42 Cal.Rptr. 169 (1964), *with People v. Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33 (1964).

[Footnote 2]

See, e.g., Enker & Elsen, Counsel for the Suspect: *Massiah v. United States* and *Escobedo v. Illinois*, 49 Minn.L.Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1 (1965); Dowling, *Escobedo* and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J.Crim.L., C. & P. S. 143, 156 (1965).

The complex problems also prompted discussions by jurists. *Compare* Bazelon, Law, Morality, and Civil Liberties, 12 U.C.L.A.L.Rev. 13 (1964), *with* Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929 (1965).

[Footnote 3]

For example, the Los Angeles Police Chief stated that,

"If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!"

Parker, 40 L.A.Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that

"[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement."

L.A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:*

"What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite."

N.Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that

"Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."

Quoted in Herman, *supra*, n 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J.Crim.L., C. & P.S. 21 (1961).

[Footnote 4]

This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

[Footnote 5]

See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931) [Wickersham Report]; Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif.L.Rev. 83 (1930); Kauper, Judicial Examination of the Accused — A Remedy for the Third Degree, 30 Mich.L.Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U.Chi.L.Rev. 345, 357 (1936).*See also* Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw.U.L.Rev. 16 (1957).

[Footnote 6]

Brown v. Mississippi, 297 U. S. 278 (1936); *Chambers v. Florida*, 309 U. S. 227 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *White v. Texas*, 310 U. S. 530 (1940); *Vernon v. Alabama*, 313 U.S. 547 (1941); *Ward v. Texas*, 316 U. S. 547 (1942); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Malinski v. New York*, 324 U. S. 401 (1945); *Leyra v. Denno*, 347 U. S. 556 (1954). *See also Williams v. United States*, 341 U. S. 97 (1951).

[Footnote 7]

In addition, *see People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953); *Wakat v. Harlib*, 253 F.2d 59 (C.A. 7th Cir.1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier v. State*, 213 Md. 556, 132 A.2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner v. People*, 113 Colo.194, 156 P.2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People v. Matlock*, 51 Cal.2d 682, 336 P.2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L.Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J.Pub.L. 25 (1965).

[Footnote 8]

The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97-115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244-437, 490-521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash.U.L.Q. 331; Barrett, Police Practices and the Law — From Arrest to Release or Charge, 50 Calif.L.Rev. 11 (1962); Sterling, *supra*, n 7, at 47-65.

[Footnote 9]

The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed.1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory, and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences, and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[Footnote 10]

Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

[Footnote 11]

O'Hara, *supra*, at 99.

[Footnote 12]

Inbau & Reid, *supra*, at 34-43, 87. For example, in *Leyra v. Denno*, 347 U. S. 556(1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.* at 562, and again, "We know that morally, you were just in anger. Morally, you are not to be condemned," *id.* at 582.

[Footnote 13]

Inbau Reid, *supra*, at 43-55.

[Footnote 14]

O'Hara, *supra*, at 112.

[Footnote 15]

Inbau & Reid, *supra*, at 40.

[Footnote 16]

Ibid.

[Footnote 17]

O'Hara, *supra*, at 104, Inbau & Reid, *supra*, at 58-59. *See Spano v. New York*, 360 U. S. 315 (1959). A variant on the technique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski v. New York*, 324 U. S. 401, 407 (1945):

"Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology — let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[Footnote 18]

O'Hara, *supra*, at 105-106.

[Footnote 19]

Id. at 106.

[Footnote 20]

Inbau & Reid, *supra*, at 111.

[Footnote 21]

Ibid.

[Footnote 22]

Inbau & Reid, *supra*, at 112.

[Footnote 23]

Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed.1953).

[Footnote 24]

Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying:

"Call it what you want — brainwashing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten."

N.Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N.Y. Times, Oct. 20, 1964, p. 22, col. 1; N.Y. Times, Aug. 25, 1965, p. 1, col. 1. In general, *see* Borchard, Convicting the Innocent (1932); Frank & Frank, Not Guilty (1957).

[Footnote 25]

In the fourth confession case decided by the Court in the 1962 Term, *Fay v. Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his codefendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. *See United States v. Murphy*, 222 F.2d 698 (C.A.2d Cir.1955) (Frank, J.); *People v. Bonino*, 1 N.Y.2d 752, 135 N.E.2d 51 (1956).

[Footnote 26]

The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Professor Sutherland's recent article, Crime and Confession, 79 Harv.L.Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy, and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[Footnote 27]

Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 116, III Yale Judaica Series 52-53. *See also* Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).

[Footnote 28]

See Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 9-11 (1949); 8 Wigmore, Evidence 289-295 (McNaughton rev.1961). *See also* Lowell, The Judicial Use of Torture, Parts I and II, 11 Harv.L.Rev. 220, 290 (1897).

[Footnote 29]

See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va.L.Rev. 763 (1935); *Ullmann v. United States*, 350 U. S. 422, 445-449 (1956) (DOUGLAS, J., dissenting).

[Footnote 30]

Compare Brown v. Walker, 161 U. S. 591 (1896); *Quinn v. United States*, 349 U. S. 155(1955).

[Footnote 31]

Brief for the United States, p. 28. To the same effect, *see* Brief for the United States, pp. 40-49, n. 44, *Anderson v. United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17-18, *McNabb v. United States*, 318 U. S. 332 (1943).

[Footnote 32]

Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. *See generally* Hogan & Snee, The *McNabb-Mallory* Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 1 (1958).

[Footnote 33]

The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers v. Richmond*, 365 U. S. 534, 544 (1961); *Wan v. United States*, 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, *e.g.*, *Malinski v. New York*, 324 U. S. 401, 404 (1945); *Bram v. United States*, 168 U. S. 532, 540-542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson v. Denno*, 378 U. S. 368 (1964); *United States v. Carignan*, 342 U. S. 36, 38 (1951); *see also Wilson v. United States*, 162 U. S. 613, 624 (1896). Appellate review is exacting, *see Haynes v. Washington*, 373 U. S. 503 (1963); *Blackburn v. Alabama*, 361 U. S. 199(1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay v. Noia*, 372 U. S. 391 (1963); *Townsend v. Sain*, 372 U. S. 293 (1963). In addition, *see Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964).

[Footnote 34]

See Lisenba v. California, 314 U. S. 219, 241 (1941); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Malinski v. New York*, 324 U. S. 401 (1945); *Spano v. New York*, 360 U. S. 315 (1959); *Lynumn v. Illinois*, 372 U. S. 528 (1963); *Haynes v. Washington*, 373 U. S. 503 (1963).

[Footnote 35]

The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel, and excludes any statement obtained in its wake. *See People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (Fuld, J.)

[Footnote 36]

In re Groban, 352 U. S. 330, 340-352 (1957) (BLACK, J., dissenting); Note, 73 Yale L.J. 1000, 1048-1051 (1964); Comment, 31 U.Chi.L.Rev. 313, 320 (1964) and authorities cited.

[Footnote 37]

See p. 454, *supra.* Lord Devlin has commented:

"It is probable that, even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."

Devlin, The Criminal Prosecution in England 32 (1958).

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his

privilege in the face of accusation. *Cf. Griffin v. California*, 380 U. S. 609 (1965); *Malloy v. Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964); Developments in the Law — Confessions, 79 Harv.L.Rev. 935, 1041-1044 (1966). *See also Bram v. United States*, 168 U. S. 532, 562 (1897).

[Footnote 38]

Cf. Betts v. Brady, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. *See generally* Kamisar, *Betts v. Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich.L.Rev. 219 (1962).

[Footnote 39]

See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 440, 480 (1964).

[Footnote 40]

Estimates of 50-90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn.L.Rev. 737, 738-739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L.Rev. 428, 433 (1965).

[Footnote 41]

See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 1, 64-81 (1965). As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963):

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law, but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[Footnote 42]

Cf. United States ex rel. Brown v. Fay, 242 F.Supp. 273, 277 (D.C.S.D.N.Y.1965); *People v. Witenski*, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

[Footnote 43]

While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple, and the rights involved too important, to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

[Footnote 44]

If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

[Footnote 45]

Although this Court held in *Rogers v. United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial factfinding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

[Footnote 46]

The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times, such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect."

Chalmer v. H. M. Advocate, [1954] Sess.Cas. 66, 78 (J.C.).

[Footnote 47]

See People v. Dorado, 62 Cal.2d 338, 354, 398 P.2d 361, 371 42 Cal.Rptr. 169, 179 (1965).

[Footnote 48]

In accordance with our holdings today and in *Escobedo v. Illinois*, 378 U. S. 478, 492, *Crooker v. California*, 357 U. S. 433 (1958) and *Cicenia v. Lagay*, 357 U. S. 504 (1958), are not to be followed.

[Footnote 49]

In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[Footnote 50]

Schaefer, Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956).

[Footnote 51]

Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[Footnote 52]

Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes v. Washington*, 373 U. S. 503, 518-519 (1963); *Lynumn v. Illinois*, 372 U. S. 528, 537-538 (1963); *Rogers v. Richmond*, 365 U. S. 534, 541 (1961); *Blackburn v. Alabama*, 361 U. S. 199, 206 (1960).

[Footnote 53]

See, e.g., Report and Recommendations of the [District of Columbia] Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

[Footnote 54]

In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory."

"* * * *"

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts — but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually — and without end — be violated. . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative."

"* * * *"

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L.Rev. 175, 177-182 (1952).

[Footnote 55]

We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[Footnote 56]

Among the crimes within the enforcement jurisdiction of the FBI are kidnapping, 18 U.S.C. § 1201 (1964 ed.), white slavery, 18 U.S.C. §§ 2421-2423 (1964 ed.), bank robbery, 18 U.S.C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U.S.C. §§ 2311-2317 (1964 ed.), all manner of conspiracies, 18 U.S.C. § 371 (1964 ed.), and violations of civil rights 18 U.S.C. §§ 241-242 (1964 ed.). *See also*18 U.S.C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

[Footnote 57]

[1964] Crim.L.Rev. at 166-170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."

"The caution shall be in the following terms: "

" You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."

"When, after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."

"III . . . "

"* * * * ."

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted."

"* * * *"

"IV. All written statements made after caution shall be taken in the following manner: "

"(a) If a person says that he wants to make a statement, he shall be told that it is intended to make a written record of what he says."

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write, or that he would like someone to write it for him, a police officer may offer to write the statement for him. . . ."

"(b) Any person writing his own statement shall be allowed to do so without any prompting, as distinct from indicating to him what matters are material."

"* * * *"

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England 137-141 (1958).

Despite suggestions of some laxity in enforcement of the Rules, and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. *See, e.g.*, [1964] Crim.L.Rev. at 182, and articles collected in [1960] Crim.L.Rev. at 298-356.

[Footnote 58]

The introduction to the Judges' Rules states in part:

"These Rules do not affect the principles"

"* * * *"

"(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that, in such a case, no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so. . . ."

[1964] Crim.L.Rev. at 166-167.

[Footnote 59]

As stated by the Lord Justice General in *Chalmers v. H.M Advocate*, [1954] Sess.Cas. 66, 78 (J.C.):

"The theory of our law is that, at the stage of initial investigation, the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e.g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged, he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

[Footnote 60]

"No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25.

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

Indian Evidence Act § 26. *See* 1 Ramaswami & Rajagopalan, Law of Evidence in India 553-569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting:

"[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession."

Sarwan Singh v. State of Punjab, 44 All India Rep. 1957, Sup.Ct. 637, 644.

[Footnote 61]

I Legislative Enactments of Ceylon 211 (1958).

[Footnote 62]

10 U.S.C. § 831(b) (1964 ed.)

[Footnote 63]

United States v. Rose, 24 CMR 251 (1957); *United States v. Gunnels*, 23 CMR 354 (1957).

[Footnote 64]

Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20(3). *See* Tope, The Constitution of India 63-67 (1960).

[Footnote 65]

Brief for United States in No. 761, *Westover v. United States*, pp. 44-47; Brief for the State of New York as *amicus curiae*, pp. 35-39. *See also* Brief for the National District Attorneys Association as *amicus curiae*, pp. 23-26.

[Footnote 66]

Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that, during the interrogation, he did not tell Miranda that anything he said would be held against

him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

[Footnote 67]

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

[Footnote 68]

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

[Footnote 69]

The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim. *See, e.g., United States ex rel. Angelet v. Fay*, 333 F.2d 12, 16 (C.A.2d Cir.1964), *aff'd*, 381 U. S. 654 (1965). *Cf. Ziffrin, Inc. v. United States*, 318 U. S. 73, 78 (1943).

[Footnote 70]

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

[Footnote 71]

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

[Footnote 1]

E.g., Inbau & Reid, Criminal Interrogation and Confessions (196); O'Hara, Fundamentals Of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

[Footnote 2]

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

[Footnote 3]

The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As in Brother HARLAN points out, *post*, pp. 521-523, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 484-46, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (*See also* the examples cited by the Solicitor General, *Westover v. United States*, 342 F.2d 684, 685 (1965) ("right to consult counsel"); *Jackson v. United States*, 337 F.2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that, whenever the suspect

"decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point. . . . When counsel appears in person, he is permitted to confer with his client in private."

This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states:

"[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge."

So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself, and that he may have counsel appointed only when brought before the judge or at trial — but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

[Footnote 4]

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

[Footnote 1]

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

[Footnote 2]

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

[Footnote 3]

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

[Footnote 4]

Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col.L.Rev. 62, 73 (1966):

"In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice."

See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St.L.J. 449, 452-458 (1964); Developments, *supra*, n. 2, at 964-984.

[Footnote 5]

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

[Footnote 6]

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

[Footnote 7]

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

[Footnote 8]

This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy v. Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." *Ante*, p. 463. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has, in recent years, been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U.S. at 7.

[Footnote 9]

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

[Footnote 10]

Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. *See generally* Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 9'9, 943-948 (1965).

[Footnote 11]

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

[Footnote 12]

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

[Footnote 13]

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

[Footnote 14]

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

[Footnote 15]

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

[Footnote 16]

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."

Snyder v. Massachusetts, 291 U. S. 97, 122 (Cardozo, J.).

[Footnote 17]

A narrow reading is given in: *United States v. Robinson*, 354 F.2d 109 (C.A.2d Cir.); *Davis v. North Carolina*, 339 F.2d 770 (C.A.4th Cir.); *Edwards v. Holman*, 342 F.2d 679 (C.A. 5th Cir.); *United States ex rel. Townsend v. Ogilvie*, 334 F.2d 837 (C.A. 7th Cir.); *People v. Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33; *State v. Fox*, ___ Iowa ___, 131 N.W.2d 684; *Rowe v. Commonwealth*, 394 S.W.2d 751 (Ky.); *Parker v. Warden*, 236 Md. 236, 203 A.2d 418; *State v. Howard*, 383 S.W.2d 701 (Mo.); *Bean v. State*, ___

Nev. ___, 398 P.2d 251; *State v. Hodgson*, 44 N.J. 151, 207 A.2d 542; *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852; *Commonwealth ex rel. Linde v. Maroney*, 416 Pa. 331, 206 A.2d 288; *Browne v. State*, 24 Wis.2d 491, 131 N.W.2d 169.

An ample reading is given in: *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (C.A.3d Cir.); *Wright v. Dickson*, 336 F.2d 878 (C.A. 9th Cir.); *People v. Dorado*, 62 Cal.2d 338, 398 P.2d 361; *State v. Dufour*, ___ R.I. ___, 206 A.2d 82; *State v. Neely*, 239 Ore. 487, 395 P.2d 557, *modified*, 398 P.2d 482.

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

[Footnote 18]

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

[Footnote 19]

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

[Footnote 20]

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

[Footnote 21]

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

[Footnote 22]

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

[Footnote 23]

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

[Footnote 24]

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

[Footnote 25]

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

[Footnote 1]

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

[Footnote 2]

In fact, the type of sustained interrogation described by the Court appears to be the exception, rather than the rule. A survey of 399 cases in one city found that, in almost half of the cases, the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law — From Arrest to Release or Charge, 50 Calif.L.Rev. 11, 41-45 (1962). Questioning tends to be confused and sporadic,

and is usually concentrated on confrontations with witnesses or new items of evidence as these are obtained by officers conducting the investigation. *See generally* LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, A Model Code of Pre-Arraignment Procedure, Commentary § 5.01, at 170, n. 4 (Tent.Draft No. 1, 1966).

[Footnote 3]

By contrast, the Court indicates that, in applying this new rule, it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante* at 468. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed, and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. *See United States v. Bolden*, 355 F.2d 453 (C.A. 7th Cir.1965), *petition for cert. pending*, No. 1146, O.T. 1965 (Secret Service agent); *People v. Du Bont*, 235 Cal.App.2d 844, 45 Cal.Rptr. 717, *pet. for cert. pending* No. 1053, Misc., O.T. 1965 (former police officer).

[Footnote 4]

Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years, the group had accumulated 434,000 charges. FBI, Uniform Crime Reports — 1964, 27-28. In 1963 and 1964, between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25-27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia, between 28% and 35% of those sentenced had prior prison records, and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

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

[Footnote 5]

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

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

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7.8: Schmerber v. California 384 US 757 (1966)

U.S. Supreme Court

Schmerber v. California, 384 U.S. 757 (1966)

Schmerber v. California

No. 658

Argued April 25, 1966

Decided June 20, 1966

384 U.S. 757

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Petitioner was hospitalized following an accident involving an automobile which he had apparently been driving. A police officer smelled liquor on petitioner's breath and noticed other symptoms of drunkenness at the accident scene and at the hospital, placed him under arrest, and informed him that he was entitled to counsel, that he could remain silent, and that anything he said would be used against him. At the officer's direction, a physician took a blood sample from petitioner despite his refusal on advice of counsel to consent thereto. A report of the chemical analysis of the blood, which indicated intoxication, was admitted in evidence over objection at petitioner's trial for driving while intoxicated. Petitioner was convicted, and the conviction was affirmed by the appellate court, which rejected his claims of denial of due process, of his privilege against self-incrimination, of his right to counsel, and of his right not to be subjected to unreasonable searches and seizures.

Held:

1. *Breithaupt v. Abram*, 352 U. S. 432, in which a claim of denial of due process of law was rejected in a similar situation is controlling as to the due process aspect. Pp. 384 U. S. 759-760.

2. The privilege against self-incrimination is not available to an accused in a case such as this, where there is not even a shadow of compulsion to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. Pp. 384 U. S. 760-765

3. Petitioner's limited claim, that he was denied his right to counsel by virtue of the withdrawal of blood over his objection on his counsel's advice is rejected, since he acquired no right merely because counsel advised that he could assert one. Pp.384 U. S. 765-766.

4. In view of the substantial interests in privacy involved, petitioner's right to be free of unreasonable searches and seizures applies to the withdrawal of his blood, but, under the facts in this case, there was no violation of that right. Pp. 384 U. S. 766-772.

(a) There was probable cause for the arrest, and the same facts as established probable cause justified the police in requiring petitioner to submit to a test of his blood alcohol content. In view of the time required to bring petitioner to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant, and the clear indication that, in fact, evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest. Pp. 384 U. S. 770-771.

(b) The test chosen to measure petitioner's blood alcohol level was a reasonable one, since it was an effective means of determining intoxication, imposed virtually no risk, trauma or pain, and was performed in a reasonable manner by a physician in a hospital. P. 384 U. S. 771.

Affirmed.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor. [Footnote 1] He had been arrested at a hospital while receiving treatment for injuries suffered in an

accident involving the automobile that he had apparently been driving. [Footnote 2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that, in that circumstance, the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction. [Footnote 3] In view of constitutional decisions since we last considered these issues in *Breithaupt v. Abram*, 352 U. S. 432 — *see Escobedo v. Illinois*, 378 U. S. 478; *Malloy v. Hogan*, 378 U. S. 1, and *Mapp v. Ohio*, 367 U. S. 643 — we granted certiorari. 382 U.S. 971. We affirm.

I

THE DUE PROCESS CLAUSE CLAIM

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment.

There, however, the driver was unconscious at the time the blood was withdrawn, and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that, under such circumstances, the withdrawal did not offend "that *sense of justice' of which we spoke in Rochin v. California, 342 U. S. 165." 352 U.S. at 352 U. S. 435. Breithaupt thus requires the rejection of petitioner's due process argument, and nothing in the circumstances of this case [Footnote 4] or in supervening events persuades us that this aspect of Breithaupt should be overruled.*

II

THE PRIVILEGE AGAINST SELF-INCRIMINATION CLAIM

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself," citing *Twining v. New Jersey*, 211 U. S. 78. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by *Malloy v. Hogan*, 378 U. S. 1,378 U. S. 8. We there held that

"[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, [Footnote 5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that, in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled "to be a witness against himself." [Footnote 6]

If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In *Miranda v. Arizona*, *ante*, at 384 U. S. 460, the Court said of the interests protected by the privilege:

"All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our

accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."

As the passage in *Miranda* implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through

"the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"

Ibid. The leading case in this Court is *Holt v. United States*, 218 U. S. 245. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as "based upon an extravagant extension of the Fifth Amendment," and went on to say:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

218 U.S. at 218 U. S. 252-253. [Footnote 7]

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States*, 116 U. S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. [Footnote 8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 562.

In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. [Footnote 9] Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III

THE RIGHT TO COUNSEL CLAIM

This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is

strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV

THE SEARCH AND SEIZURE CLAIM

In *Breithaupt*, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of *Wolf v. Colorado*, 338 U. S. 25. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled *Wolf* in that respect, holding in *Mapp v. Ohio*, 367 U. S. 643, that the exclusionary rule adopted for federal prosecutions in *Weeks v. United States*, 232 U. S. 383, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In *Wolf*, we recognized "[t]he security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society." 338 U.S. at 338 U. S. 27. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in *Mapp*.

The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," within the meaning of that Amendment.

Because we are dealing with intrusions into the human body, rather than with state interferences with property relationships or private papers — "houses, papers, and effects" — we write on a clean slate. Limitations on the kinds of property which may be seized under warrant, [Footnote 10] as distinct from the procedures for search and the permissible scope of search, [Footnote 11] are not instructive in this context. We begin with the assumption that, once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol contest, the Fourth Amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor. [Footnote 12] The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance." The officer saw petitioner again at the hospital, within two hours of the accident. There, he noticed similar symptoms of drunkenness. He thereupon informed petitioner

"that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence."

While early cases suggest that there is an unrestricted

"right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime,"

Weeks v. United States, 232 U. S. 383, 232 U. S. 392; *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors — first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, *United States v. Rabinowitz*, 339 U. S. 56, 339 U. S. 72-73 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone. *People v. Chiagles*, 237 N.Y. at 197-198, 142 N.E. at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search

"be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. United States, 333 U. S. 10, 333 U. S. 13-14; *see also Aguilar v. Texas*, 378 U. S. 108, 378 U. S. 110-111. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence," *Preston v. United States*, 376 U. S. 364, 376 U. S. 367. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. *See Breithaupt v. Abram*, 352 U.S. at 352 U. S. 436, n. 3. Such tests are a commonplace in these days of periodic physical examination, [Footnote 13] and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the "Breathalyzer" test petitioner refused, *see* n 9, *supra*. We need not decide whether such wishes would have to be respected. [Footnote 14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment — for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today told that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

[Footnote 1]

California Vehicle Code § 23102(a) provides, in pertinent part, "It is unlawful for any person who is under the influence of intoxicating liquor . . . to drive a vehicle upon any highway. . . ." The offense is a misdemeanor.

[Footnote 2]

Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

[Footnote 3]

This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeal was denied. *See Edwards v. California*, 314 U. S. 160.

[Footnote 4]

We

"cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest."

Breithaupt v. Abram, 352 U.S. at 352 U. S. 441. (WARREN, C.J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. *Compare* the discussion at 384 U. S. *infra*.

[Footnote 5]

A dissent suggests that the report of the blood test was "testimonial" or "communicative," because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or headshake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

[Footnote 6]

Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give "evidence" against himself. But our decision cannot turn on the Fifth Amendment's use of the word "witness."

"[A]s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation. . . ."

Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 584-585. 8 Wigmore, Evidence § 2252 (McNaughton rev. 1961).

[Footnote 7]

Compare Wigmore's view,

"that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence."

8 Wigmore, Evidence § 2263 (McNaughton rev. 1961). California adopted the Wigmore formulation in *People v. Trujillo*, 32 Cal.2d 105, 194 P.2d 681 (1948); with specific regard to blood tests, *see People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8 (1953); *People v. Duroncelay*, 48 Cal.2d 766, 312 P.2d 690 (1957). Our holding today, however, is not to be understood as adopting the Wigmore formulation.

[Footnote 8]

The cases are collected in 8 Wigmore, Evidence § 2265 (McNaughton rev. 1961). *See also United States v. Chibbaro*, 361 F.2d 365 (C.A.3d Cir. 1966); *People v. Graves*, 64 Cal.2d 208, 49 Cal.Rptr. 386, 388, 411 P.2d 114, 116 (1966); Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand.L.Rev. 485 (1957).

[Footnote 9]

This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test — products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. *See* text at n 13 *infra*.

Petitioner has raised a similar issue in this case in connection with a police request that he submit to a "breathalyzer" test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. California*, 380 U. S. 609. We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, *see Miranda v. Arizona*, *ante* at 384 U. S. 468, n. 37. Since trial here was conducted after our decision in *Malloy v. Hogan*, *supra*,making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

[Footnote 10]

See, e.g., Gouled v. United States, 255 U. S. 298; *Boyd v. United States*, 116 U. S. 616; *contra, People v. Thayer*, 63 Cal.2d 635, 47 Cal.Rptr. 780, 408 P.2d 108 (1965); *State v. Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 54 Geo.L.J. 593 (1966).

[Footnote 11]

See, e.g. Silverman v. United States, 365 U. S. 505; *Abel v. United States*, 362 U. S. 217,362 U. S. 235; *United States v. Rabinowitz*, 339 U. S. 56.

[Footnote 12]

California law authorizes a peace officer to arrest

"without a warrant . . . [w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Cal.Penal Code § 836.3. Although petitioner was ultimately prosecuted for a misdemeanor he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal.Vehicle Code § 23101. California's test of probable cause follows the federal standard. *People v. Cockrell*, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965).

[Footnote 13]

The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service, as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance, and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Breithaupt v. Abram, 352 U.S. at 352 U. S. 436.

[Footnote 14]

See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup.Ct.Rev. 75, 82-83.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

In joining the Court's opinion, I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that, apart from this consideration, the case in no way implicates the Fifth Amendment. *Cf.* my dissenting opinion and that of MR. JUSTICE WHITE in *Miranda v. Arizona*, *ante*, pp. 384 U. S. 504, 384 U. S. 526.

MR. CHIEF JUSTICE WARREN, dissenting.

While there are other important constitutional issues in this case, I believe it is sufficient for me to reiterate my dissenting opinion in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, as the basis on which to reverse this conviction.

MR. JUSTICE BLACK with whom MR. JUSTICE DOUGLAS joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that

"the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense."

To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that

". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

(Footnote omitted.) I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself. In the first place, it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project, which proved to be successful, was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words "testimonial" and "communicative." These words are not models of clarity and precision, as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used "testimonial" which, according to the latest edition of his treatise revised by McNaughton, means "communicative" (8 Wigmore, Evidence § 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination "within limits the strictest possible." 8 Wigmore, Evidence § 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication that the Fifth Amendment goes no further than to bar the use of forced self-incriminating statements coming from a "person's own lips." It concedes, as it must so long as *Boyd v. United States*,116 U. S. 616, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content, but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In

such a situation, blood, of course, is not oral testimony given by an accused, but it can certainly "communicate" to a court and jury the fact of guilt.

The Court itself, at page 384 U. S. 764, expresses its own doubts, if not fears, of its own shadowy distinction between compelling "physical evidence" like blood which it holds does not amount to compelled self-incrimination, and "eliciting responses which are essentially testimonial." And, in explanation of its fears, the Court goes on to warn that

"To compel a person to submit to testing [by lie detectors, for example] in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.'*Counselman v. Hitchcock*, 142 U. S. 547, 142 U. S. 562."

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against compulsory self-incrimination the broad and liberal construction that *Counselman*and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in *Boyd v. United States*, *supra*, which Professor Wigmore criticized severely, *see* 8 Wigmore, Evidence, § 2264 (3d ed. 1940), pp. 366-373, makes that one among the greatest constitutional decisions of this Court. In that case, 116 U.S. at 116 U. S. 634-635, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the law,

". . . are within the reason of criminal proceedings for all the purposes of . . . that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . . within the meaning of the fifth amendment to the constitution. . . . *"

Obviously, the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this, the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

"A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Boyd v. United States, *supra*, at 116 U. S. 635.

The Court went on to say, at 116 U. S. 637, that to require

"an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself."

The Court today departs from the teachings of *Boyd.* Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference, I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in *Miranda v. Arizona*, *ante*, p. 384 U. S. 436. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact, I think the interpretive constitutional philosophy used in *Miranda*, unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-incrimination a broad and liberal construction in line with the wholesome admonitions in the *Boyd* case. The closing sentence in the Fifth Amendment section of the Court's opinion in the present case is enough by itself, I think, to expose the unsoundness of what the Court here holds. That sentence reads:

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds. "

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional

protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons, as well as those set out in concurring opinions of BLACK and DOUGLAS, JJ., in *Rochin v. California*, 342 U. S. 165, 342 U. S. 174, 342 U. S. 177, and my concurring opinion in *Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 661, and the dissenting opinions in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, 352 U. S. 442, I dissent from the Court's holding and opinion in this case.

* A majority of the Court applied the same constitutional interpretation to the search and seizure provisions of the Fourth Amendment over the dissent of Mr. Justice Miller, concurred in by Chief Justice Waite.

MR. JUSTICE DOUGLAS, dissenting.

I adhere to the views of THE CHIEF JUSTICE in his dissent in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440, and to the views I stated in my dissent in that case (*id.*, 352 U. S. 442), and add only a word.

We are dealing with the right of privacy which, since the *Breithaupt* case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights.*Griswold v. Connecticut*, 381 U. S. 479. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. *Id.*, 381 U. S. 484. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons." *Ibid.* No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.

MR. JUSTICE FORTAS, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. *Cf.* CHIEF JUSTICE WARREN's dissenting opinion in *Breithaupt v. Abram*, 352 U. S. 432, 352 U. S. 440.

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CHAPTER OVERVIEW

8: 6th amendment – What is effective representation?

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8.1: Powell v. Alabama 287 US 45 (1932)

U.S. Supreme Court

Powell v. Alabama, 287 U.S. 45 (1932)

Powell v. Alabama

Nos. 98, 99, and 100

Argued October 10, 1932

Decided November 7, 1932

287 U.S. 45

CERTIORARI TO THE SUPREME COURT OF ALABAMA

1. The rule denying the aid of counsel to persons charged with felony, which (except as to legal questions) existed in England

when our Constitution was formed, was rejected in this country by the Colonies before the Declaration of Independence, and is not a test of whether the right to counsel in such cases is embraced in the guarantee of "due process of law." P. 287 U. S. 65.

2. The rule that no part of the Constitution shall be treated as superfluous is an aid to construction which, in some instances, may be conclusive, but which must yield to more compelling considerations whenever they exist. P. 287 U. S. 67.

3. The fact that the right of an accused person to have counsel for his defense was guaranteed expressly (as respects the federal Government) by the Sixth Amendment, notwithstanding the presence of the due process clause in the Fifth Amendment, does not exclude that right from the concept "due process of law." Pp. 287 U. S. 66-68.

4. The right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. Pp. 287 U. S. 68-71.

5. In a capital case, where the defendant is unable to employ counsel and is incapable of making his own defense adequately because of ignorance, feeble-mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. P. 287 U. S. 71.

6. In a case such as this, the right to have counsel appointed, when necessary, is a logical corollary to the right to be heard by counsel. P. 287 U. S. 72.

7. In such circumstances, the trial court has power, even in the absence of statute, to appoint an attorney for the accused, and the attorney, as an officer of the court, is bound to serve. P. 287 U. S. 73.

224 Ala. 524, 531, 540, reversed.

CERTIORARI, 286 U.S. 540, to review judgments affirming sentences to death based upon convictions for rape. There was one indictment against these petitioners and two other persons. The petitioners were tried in three groups, as shown in the caption, pursuant to an order of severance obtained by the State.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were argued together and submitted for decision as one case.

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a state court of first instance on March 31, and the record recites that, on the same day, the defendants were arraigned and entered pleas of not guilty. There is a further recital to the effect that, upon the arraignment, they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed.

During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants, and then, of course, anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here, both sides accepted that as a correct statement of the facts concerning the matter.

There was a severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the three cases was called for trial, each defendant was arraigned, and, having the indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day. Under the Alabama statute, the punishment for rape is to be fixed by the jury, and, in its discretion, may be from ten years' imprisonment to death. The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. Chief Justice Anderson thought the defendants had not been accorded a fair trial, and strongly dissented. 224 Ala. 524; *id.*, 531; *id.*, 540, 141 So. 215, 195, 201.

In this court, the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment, specifically as follows: (1) they were not given a fair, impartial and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial, and (3) they were tried before juries from which qualified members of their own race were systematically excluded. These questions were properly raised and saved in the courts below.

The only one of the assignments which we shall consider is the second, in respect of the denial of counsel, and it becomes unnecessary to discuss the facts of the case or the circumstances surrounding the prosecution except insofar as they reflect light upon that question.

The record shows that, on the day when the offense is said to have been committed, these defendants, together with a number of other negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took place between the negroes and the white boys in the course of which the white boys, with the exception of one named Gilley, were thrown off the train. A message was sent ahead, reporting the fight and asking that every negro be gotten off the train. The participants in the fight, and the two girls, were in an open gondola car. The two girls testified that each of them was assaulted by six different negroes in turn, and they identified the seven defendants as having been among the number. None of the white boys was called to testify, with the exception of Gilley, who was called in rebuttal.

Before the train reached Scottsboro, Alabama, a sheriff's posse seized the defendants and two other negroes. Both girls and the negroes then were taken to Scottsboro, the county seat. Word of their coming and of the alleged assault had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence, but it does appear that the attitude of the community was one of great hostility. The sheriff thought it.necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military. Soldiers took the defendants to Gadsden for safekeeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial, escorted them to Scottsboro for trial a few days later, and guarded the courthouse and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard. The record does not disclose their ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. With any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do. The sole inquiry which we are permitted to make is whether the federal Constitution was contravened (*Rogers v. Peck*, 199 U. S. 425, 199 U. S. 434; *Hebert v. Louisiana*, 272 U. S. 312, 272 U. S. 316), and as to that, we confine ourselves, as already suggested, to the inquiry whether the defendants were in substance denied the right of counsel, and, if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

First. The record shows that, immediately upon the return of the indictment, defendants were arraigned, and pleaded not guilty. Apparently they were not asked whether they had, or were able to, employ counsel, or wished to have counsel appointed, or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said,

"and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases, judging from the number and activity of counsel that appeared immediately or shortly after their conviction."

224 Ala. at pp. 554-555, 141 So. 201.

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

April 6, six days after indictment, the trials began. When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. Roddy, a Tennessee lawyer not a member of the local bar, addressed the court, saying that he had not been employed, but that people who were interested had spoken to him about the case. He was asked by the court whether he intended to appear for the defendants, and answered that he would like to appear along with counsel that the court might appoint. The record then proceeds:

"The Court: If you appear for these defendants, then I will not appoint counsel; if local counsel are willing to appear and assist you under the circumstances, all right, but I will not appoint them."

"Mr. Roddy: Your Honor has appointed counsel, is that correct?"

"The Court: I appointed all the members of the bar for the purpose of arraigning the defendants, and then, of course, I anticipated them to continue to help them if no counsel appears. " "Mr Roddy: Then I don't appear then as counsel, but I do want to stay in, and not be ruled out in this case."

"The Court: Of course, I would not do that –"

"Mr. Roddy: I just appear here through the courtesy of Your Honor."

"The Court: Of course, I give you that right; . . ."

And then, apparently addressing all the lawyers present, the court inquired:

". . . well, are you all willing to assist?"

"Mr. Moody: Your Honor appointed us all, and we have been proceeding along every line we know about it under Your Honor's appointment."

"The Court: The only thing I am trying to do is, if counsel appears for these defendants, I don't want to impose on you all, but if you feel like counsel from Chattanooga –"

"Mr. Moody: I see his situation, of course, and I have not run out of anything yet. Of course, if Your Honor purposes to appoint us, Mr. Parks, I am willing to go on with it. Most of the bar have been down and conferred with these defendants in this case; they did not know what else to do."

"The Court: The thing, I did not want to impose on the members of the bar if counsel unqualifiedly appears; if you all feel like Mr. Roddy is only interested in a limited way to assist, then I don't care to appoint –"

"Mr. Parks: Your Honor, I don't feel like you ought to impose on any member of the local bar if the defendants are represented by counsel."

"The Court: That is what I was trying to ascertain, Mr. Parks."

"Mr. Parks: Of course, if they have counsel, I don't see the necessity of the Court appointing anybody; if they haven't counsel, of course, I think it is up to the Court to appoint counsel to represent them. " "The Court: I think you are right about it, Mr. Parks, and that is the reason I was trying to get an expression from Mr. Roddy."

"Mr. Roddy: I think Mr. Parks is entirely right about it, if I was paid down here and employed, it would be a different thing, but I have not prepared this case for trial, and have only been called into it by people who are interested in these boys from Chattanooga. Now, they have not given me an opportunity to prepare the case, and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of the people who are interested, and not as paid counsel, and certainly I haven't any money to pay them, and nobody I am interested in had me to come down here has put up any fund of money to come down here and pay counsel. If they should do it, I would be glad to turn it over — a counsel but I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial, and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation of it and not being familiar with the procedure in Alabama, . . ."

Mr. Roddy later observed:

"If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent."

"The Court: Well gentlemen, if Mr. Roddy only appears as assistant that way, I think it is proper that I appoint members of this bar to represent them, I expect that is right. If Mr. Roddy will appear, I wouldn't of course, I would not appoint anybody. I don't see, Mr. Roddy, how I can make a qualified appointment or a limited appointment. Of course, I don't mean to cut off your assistance in any way — Well gentlemen, I think you understand it. "

"Mr. Moody: I am willing to go ahead and help Mr. Roddy in anything I can do about it, under the circumstances."

"The Court: All right, all the lawyers that will; of course, I would not require a lawyer to appear if –"

"Mr. Moody: I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do."

"The Court: All right."

And in this casual fashion, the matter of counsel in a capital case was disposed of.

It thus will be seen that, until the very morning of the trial, no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear, but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that, prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial. It is true that he said that, before doing so, he had understood Mr. Roddy would be employed as counsel for the defendants. This the lawyer in question, of his own accord, frankly stated to the court, and no doubt he acted with the utmost good faith. Probably other members of the bar had a like understanding. In any event, the circumstance lends emphasis to the conclusion that, during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself. *People ex rel. Burgess v. Risley*, 66 How.Pr. (N.Y.) 67; *Batchelor v. State*, 189 Ind. 69, 76, 125 N.E. 773.

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel

that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case. Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this, the court responded, "All right, all the lawyers that will; of course, I would not require a lawyer to appear if — ." And Mr. Moody continued, "I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do." With this dubious understanding, the trials immediately proceeded. The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: " . . . the record indicates that the appearance was rather *pro forma* than zealous and active. . . ." Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities. This conclusion finds ample support in the reasoning of an overwhelming array of state decisions, among which we cite the following: *Sheppard v. State*, 165 Ga. 460, 464, 141 S.E.196; *Reliford v. State*, 140 Ga. 777, 79 S.E. 1128; *McArver v. State*, 114 Ga. 514, 40 S.E. 779; *Sanchez v. State*, 199 Ind. 235, 246, 157 N.E. l; *Batchelor v. State*, 189 Ind. 69, 76, 125 N.E. 773; *Mitchell v. Commonwealth*, 225 Ky. 83, 7 S.W. (2d) 823; *Jackson v. Commonwealth*, 215 Ky. 800, 287 S.W. 17; *State v. Collins*, 104 La. 629, 29 So. 180; *State v. Pool*, 50 La.Ann. 449, 23 So. 503; *People ex rel. Burgess v. Risley*, 66 How.Pr.(N.Y.) 67; *State ex rel. Tucker v. Davis*, 9 Okla.Cr. 94, 130 Pac. 962; *Commonwealth v. O'Keefe*, 298 Pa. 169,

148 Atl. 73; *Shaffer v. Territory*, 14 Ariz. 329, 333, 127 Pac. 746.

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.

As the court said in *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 Atl. 73:

"It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

"* * * *"

"A prompt and vigorous administration of the criminal law is commendable, and we have no desire to clog the wheels of justice. What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest is not due process of law, regardless of the merits of the case."

Compare Reliford v. State, 140 Ga. 777, 778, 79 S.E. 1128.

Second. The Constitution of Alabama provides that, in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel, and a state statute requires the court in a capital case where the defendant is unable to employ counsel to appoint counsel for him. The state supreme court held that these provisions had not been infringed, and with that holding we are powerless to interfere. The question, however, which it is our duty, and within our power, to decide is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution.

If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process. Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time, parties in civil cases and persons accused

of misdemeanors were entitled to the full assistance of counsel. After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when, by act of Parliament, the full right was granted in respect of felonies generally. 1 Cooley's Const.Lim., 8th ed., 698, *et seq.*, and notes.

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously, and sometimes passionately assailed by English statesmen and lawyers. As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For upon what face of reason," he says, "can that assistance be denied to save the life of a man which yet is allowed him in prosecutions for every petty trespass?" 4 Blackstone 355. One of the grounds upon which Lord Coke defended the rule was that, in felonies, the court itself was counsel for the prisoner. 1 Cooley's Const.Lim., *supra.* But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

The rule was rejected by the colonies. Before the adoption of the federal Constitution, the Constitution of Maryland had declared "That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel; . . ." (Art. XIX, Constitution of 1776). The Constitution of Massachusetts, adopted in 1780 (Part the First, Art. XII), the Constitution of New Hampshire, adopted in 1784 (Part I, Art. XV), the Constitution of New York of 1777 (Art. XXXIV), and the Constitution of Pennsylvania of 1776 (Art. IX), had also declared to the same effect. And, in the case of Pennsylvania, as early as 1701, the Penn Charter (Art. V) declared that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors", and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700-1781, Vol. 1, p. 134) that, in capital cases, learned counsel should be assigned to the prisoners.

In Delaware, the Constitution of 1776 (Art. 25), adopted the common law of England, but expressly excepted such parts as were repugnant to the rights and privileges contained in the Declaration of Rights, and the Declaration of Rights, which was adopted on September 11, 1776, provided (Art. 14) "That in all Prosecutions for criminal Offences, every Man hath a Right . . . to be allowed Counsel, . . ." In addition, Penn's Charter, already referred to, was applicable in Delaware. The original Constitution of New Jersey of 1776 (Art. XVI) contained a provision like that of the Penn Charter, to the effect that all criminals should be admitted to the same privileges of counsel as their prosecutors. The original Constitution of North Carolina (1776) did not contain the guarantee, but c. 115, § 85, Sess.Laws, N.Car., 1777 (N.Car.Rev.Laws, 1715-1796, Vol. 1, 316), provided

". . . That every person accused of any crime or misdemeanor whatsoever shall be entitled to council in all matters which may be necessary for his defence, as well to facts as to law; . . ."

Similarly, in South Carolina, the original Constitution of 1776 did not contain the provision as to counsel, but it was provided as early as 1731 (Act of August 20, 1731, § XLIII, Grimke, S.Car.Pub.Laws, 1682-1790, p. 130) that every person charged with treason, murder, felony, or other capital offense should be admitted to make full defense by counsel learned in the law. In Virginia, there was no constitutional provision on the subject, but, as early as August, 1734 (c. VII, § III, Laws of Va. 8th Geo. II, Hening's Stat. at Large, Vol. 4, p. 404), there was an act declaring that, in all trials for capital offenses, the prisoner, upon his petition to the court, should be allowed counsel.

The original Constitution of Connecticut (Art. I, § 9) contained a provision that, "In all criminal prosecutions, the accused shall have the right to be heard by himself and by counsel"; but this constitution was not adopted until 1818. However, it appears that the English common law rule had been rejected in practice long prior to 1796. *See* Zephaniah Swift's "A System of the Laws of the State of Connecticut," printed at Windham by John Byrne, 1795-1796, Vol. II, Bk. 5, "Of Crimes and Punishments," c. XXIV, "Of Trials," pp. 398-399. *

The original Constitution of Georgia (1777) did not contain a guarantee in respect of counsel, but the Constitution of 1798 (Art. III, § 8) provided that

". . . no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both."

What the practice was prior to 1798 we are unable to discover. The first constitution adopted by Rhode Island was in 1842, and this constitution contained the usual guarantee in respect of the assistance of counsel in criminal prosecutions. As early as 1798, it was provided by statute, in the very language of the Sixth Amendment to the Federal Constitution, that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence; . . ."

An Act Declaratory of certain Rights of the People of this State, § 6, Rev.Pub.Laws, Rhode Island and Providence Plantations, 1798. Furthermore, while the statute itself is not available, it is recorded as a matter of history that, in 1668 or 1669, the colonial assembly enacted that any person who was indicted might employ an attorney to plead in his behalf. 1 Arnold, History of Rhode Island, 336.

It thus appears that, in at least twelve of the thirteen colonies, the rule of the English common law, in the respect now under consideration, had been definitely rejected, and the right to counsel fully recognized in all criminal prosecutions, save that, in one or two instances, the right was limited to capital offenses or to the more serious crimes, and this court seems to have been of the opinion that this was true in all the colonies. In *Holden v. Hardy*, 169 U. S. 366, 169 U. S. 386, Mr. Justice Brown, writing for the court, said:

"The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. *Lowe v. Kansas*, 163 U. S. 81, 163 U. S. 85. *Compare 59 U. S. Hoboken Land & Improvement Co.*, 18 How. 272, 59 U. S. 276-277; *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 100-101. Plainly, as appears from the foregoing, this test, as thus qualified, has not been met in the present case.

We do not overlook the case of *Hurtado v. California*, 110 U. S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a state for murder. In support of that conclusion the court (pp. 110 U. S. 534-535) referred to the fact that the Fifth Amendment, in addition to containing the due process of law clause, provides in explicit terms that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . ", and said that, since no part of this important amendment could be regarded as superfluous, the obvious inference is that, in the sense of the Constitution, due process of law was not intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case, and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the states, was to be interpreted as having been used in the same sense and with no greater extent, and that, if it had been the purpose of that Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect.

The Sixth Amendment, in terms, provides that, in all criminal prosecutions, the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone. In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 166 U. S. 241, this court held that a judgment of a state court, even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in *Norwood v. Baker*, 172 U. S. 269, 172 U. S. 277; *Smyth v. Ames*, 169 U. S. 466, 169 U. S. 524, and *San Diego Land Co. v. National City*, 174 U. S. 739, 174 U. S. 754.

Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging the right. *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 666; *Stromberg v. California*, 283 U. S. 359, 283 U. S. 368; *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 707.

These later cases establish that, notwithstanding the sweeping character of the language in the *Hurtado* case, the rule laid down is not without exceptions. The rule is an aid to construction, and in some instances may be conclusive, but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Hebert v. Louisiana*, 272 U. S. 312, 272 U. S. 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 99, where Mr. Justice Moody, speaking for the court, said that

". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.

It never has been doubted by this court, or any other, so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that, by "the law of the land" is intended "a law which hears before it condemns" have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U. S. 366, 169 U. S. 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 85 U. S. 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard.

"Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

What, then, does a hearing include? Historically and in practice, in our own country, at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The decisions all point to that conclusion. In *Cooke v. United States*, 267 U. S. 517,267 U. S. 537, it was held that, where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain. The court added, "We think this includes the assistance of counsel, if requested, . . ." In numerous other cases, the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel. *See, for example, Felts v. Murphy*, 201 U. S. 123, 201 U. S. 129; *Frank v. Mangum*, 237 U. S. 309, 237 U. S. 344; *Kelley v. Oregon*, 273 U. S. 589, 273 U. S. 591. In *Ex parte Hidekuni Iwata*, 219 Fed. 610, 611, the federal district judge enumerated among the elements necessary to due process of law in a deportation case the opportunity at some stage of the hearing to secure and have the advice and assistance of counsel. In *Ex parte Chin Loy You*, 223 Fed. 833, also a deportation case, the district judge held that, under the particular

circumstances of the case, the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the judge said,

". . . but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."

In *Ex parte Riggins*, 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that, if the state should deprive a person of the benefit of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and, after discussing the development of the English law upon that subject, says: "With us, it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." 1 Cooley's Const.Lim., 8th ed., 700. The same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel a necessarily included in due process of law. 2 Story on the Constitution, 4th ed., § 1949, p. 668. The state decisions which refer to the matter invariably recognize the right to the aid of counsel as fundamental in character. *E.g.*, *People v. Napthaly*, 105 Cal. 641, 644, 39 Pac. 29; *Cutts v. State*, 54 la. 21, 23, 45 So. 491; *Martin v. State*, 51 Ga. 567, 568; *Sheppard v. State*, 165 Ga. 460, 464, 141 S.E.196; *State v. Moore*, 61 Kan. 732, 734, 60 Pac. 748; *State v. Ferris*, 16 La.Ann. 424; *State v. Simson*, 38 La.Ann. 23, 24; *State v. Briggs*, 58 W.Va. 291, 292, 52 S.E. 218.

In the light of the facts outlined in the forepart of this opinion — the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and, above all, that they stood in deadly peril of their lives — we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to,

"that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

Holden v. Hardy, *supra.* In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel. *Compare Carpenter & Sprague v. Dane County*, 9 Wis. 274; *Dane County v. Smith*, 13 Wis. 585, 586. *Hendryx v. State*,130 Ind. 265, 268-269, 29 N.E. 1131; *Cutts v. State*, 54 Fla. 21, 23, 45 So. 491; *People v. Goldenson*, 76 Cal. 328, 344, 19 Pac. 161; *Delk v. State*, 99 Ga. 667, 669-670, 26 S.E. 752.

In *Hendryx v. State*, *supra*, there was no statute authorizing the assignment of an attorney to defend an indigent person accused of crime, but the court held that such an assignment was necessary to accomplish the ends of public justice, and that the court possessed the inherent power to make it. "Where a prisoner," the court said (p. 269),

"without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. . . . Such a trial is not far removed from an *ex parte* proceeding."

Let us suppose the extreme case of a prisoner charged with a capital offense who is deaf and dumb, illiterate and feeble minded, unable to employ counsel, with the whole power of the state arrayed against him, prosecuted by counsel for the state without assignment of counsel for his defense, tried, convicted and sentenced to death. Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law, and we

venture to think that no appellate court, state or federal, would hesitate so to decide. *See Stephenson v. State*, 4 Ohio App. 128; Williams v. State, *163 Ark. 623, 628, 260 S.W. 721;* Grogan v. Commonwealth, *222 Ky. 484, 485, 1 S.W.2d 779; Mullen v. State*, 28 Okla.Cr. 218, 230, 230 Pac. 285; *Williams v. Commonwealth*, (Ky.), 110 S.W. 339, 340. The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here, and its power to do so, even in the absence of a statute, cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment. *See* Cooley, Const.Lim., *supra*, 700 and note.

The United States, by statute, and every state in the Union, by express provision of law or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states, the rule applies broadly to all criminal prosecutions; in others, it is limited to the more serious crimes; and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

The judgments must be reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

* This ancient work, consisting of six books, has long been out of print. A copy of it is preserved in the locked files of the Library of Congress. The following extract from the pages cited is both interest ing and instructive:

“The attorney for the state then proceeds to lay before the jury all the evidence against the prisoner, without any remarks or arguments. The prisoner by himself, or counsel, is then allowed to produce witnesses to counteract and obviate the testimony against him, and to exculpate himself with the same freedom as in civil cases. We have never admitted that cruel and illiberal principle of the common law of England that, when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed when the most trifling pittance of property is in question. The flimsy pretence that the court are to be counsel for the prisoner will only heighten our indignation at the practice, for it is apparent to the least consideration that a court can never furnish a person accused of a crime with the advice and assistance necessary to make his defence. This doctrine might with propriety have been advanced at the time when, by the common law of England, no witnesses could be adduced on the part of the prisoner to manifest his innocence, for he could then make no preparation for his defense. One cannot read without horror and astonishment the abominable maxims of law which deprived persons accused and on trial for crimes of the assistance of counsel, except as to points of law, and the advantage of witnesses to exculpate themselves from the charge. It seems by the ancient practice that, whenever a person was accused of a crime, every expedient was adopted to convict him and every privilege denied him to prove his innocence. In England, however, as the law now stands, prisoners are allowed the full advantage of witnesses, but excepting in a few cases, the common law is enforced in denying them counsel except as to points of law”

“Our ancestors, when they first enacted their laws respecting crimes, influenced by the illiberal principles which they had imbibed in their native country, denied counsel to prisoners to plead for them to anything but points of law. It is manifest that there is as much necessity for counsel to investigate matters of fact as points of law if truth is to be discovered.”

“The legislature has become so thoroughly convinced of the impropriety and injustice of shackling and restricting a prisoner with respect to his defence that they have abolished all those odious laws, and every person, when he is accused of a crime, is entitled to every possible privilege in making his defence and manifesting his innocence by the instrumentality of counsel and the testimony of witnesses.”

The early statutes of Connecticut, upon examination, do not seem to be as clear as this last paragraph would indicate; but Mr. Swift, writing in 1796, was in a better position to know how the statutes had been interpreted and applied in actual practice than the reader of today, and we see no reason to reject his statement.

MR. JUSTICE BUTLER, dissenting.

The Court, putting aside — they are utterly without merit — all other claims that the constitutional rights of petitioners were infringed, grounds its opinion and judgment upon a single assertion of fact. It is that petitioners “were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial.” If that is true, they were denied due process of law and are entitled to have the judgments against them reversed.

But no such denial is shown by the record.

Nine defendants, including Patterson, were accused in one indictment, and he was also separately indicted. Instead of trying them *en masse*, the State gave four trials, and so lessened the danger of mistake and injustice that inevitably attends an attempt in a single trial to ascertain the guilt or innocence of many accused. Weems and Norris were tried first. Patterson was tried next on the separate indictment. Then five were tried. These eight were found guilty. The other defendant, Roy Wright, was tried last, and not convicted. The convicted defendants took the three cases to the state supreme court, where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.

There were three painstaking opinions, a different justice writing for the court in each case. 224 Ala. 524, 531, 540, 141 So. 215, 195, 201. Many of the numerous questions decided were raised at the trial, and reflect upon defendants' counsel much credit for zeal and diligence on behalf of their clients. Seven justices heard the cases. The chief justice, alone dissenting, did not find any contention for the accused sufficient, in itself, to warrant a reversal, but alluded to a number of considerations which he deemed sufficient, when taken together, to warrant the conclusion that the defendants did not have a fair trial. The court said (p. 553):

"We think it a bit inaccurate to say Mr. Roddy appeared only as *amicus curiae.* [This refers to a remark in the dissenting opinion.] He expressly announced he was there from the beginning at the instance of friends of the accused; but not being paid counsel asked to appear not as employed counsel, but to aid local counsel appointed by the court, and was permitted so to appear. The defendants were represented as shown by the record and pursuant to appointment of the court by Hon. Milo Moody, an able member of the local bar of long and successful experience in the trial of criminal, as well as civil, cases. We do not regard the representation of the accused by counsel as *pro forma.* A very rigorous and rigid cross-examination was made of the state's witnesses, the alleged victims of rape, especially in the cases first tried. A reading of the records discloses why experienced counsel would not travel over all the same ground in each case."

The informality disclosed by the colloquy between court and counsel, which is quoted in the opinion of this Court and so heavily leaned on, is not entitled to any weight. It must be inferred from the record that Mr. Roddy at all times was in touch with the defendants and the people who procured him to act for them. Mr. Moody and others of the local bar also acted for defendants at the time of the first arraignment, and, as appears from the part of the record that is quoted in the opinion, thereafter proceeded in the discharge of their duty, including conferences with the defendants. There is not the slightest ground to suppose that Roddy or Moody were by fear or in any manner restrained from full performance of their duties. Indeed, it clearly appears that the State, by proper and adequate show of its purpose and power to preserve order, furnished adequate protection to them and the defendants.

When the first case was called for trial, defendants' attorneys had already prepared, and then submitted, a motion for change of venue, together with supporting papers. They were ready to, and did at once, introduce testimony of witnesses to sustain that demand. They had procured, and were ready to offer, evidence to show that the defendants Roy Wright and Eugene Williams were under age. The record shows that the State's evidence was ample to warrant a conviction. And three defendants each, while asserting his own innocence, testified that he saw others accused commit the crime charged. When regard is had to these and other disclosures that may have been, and probably were, made by petitioners to Roddy and Moody before the trial, it would be difficult to think of anything that counsel erroneously did or omitted for their defense.

If there had been any lack of opportunity for preparation, trial counsel would have applied to the court for postponement. No such application was made. There was no suggestion, at the trial or in the motion for a new trial which they made, that Mr. Roddy or Mr. Moody was denied such opportunity, or that they were not, in fact, fully prepared. The amended motion for new trial, by counsel who succeeded them, contains the first suggestion that defendants were denied counsel or opportunity to prepare for trial. But neither Mr. Roddy nor Mr. Moody has given any support to that claim. Their silence requires a finding that the claim is groundless, for if it had any merit, they would be bound to support it. And no one has come to suggest any lack of zeal or good faith on their part.

If correct, the ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denial of due process is enough, and with this, the opinion should end. But the Court goes on to declare that

"the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."

This is an extension of federal authority into a field hitherto occupied exclusively by the several States. Nothing before the Court calls for a consideration of the point. It was not suggested below, and petitioners do not ask for its decision here. The Court,

without being called upon to consider it, adjudges without a hearing an important constitutional question concerning criminal procedure in state courts.

It is a wise rule, firmly established by a long course of decisions here, that constitutional questions — even when properly raised and argued — are to be decided only when necessary for a determination of the rights of the parties in controversy before it. Thus, in the *Charles River Bridge Case,* 11 Pet. 420, the Court said (p. 36 U. S. 553):

"Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them, and the Court deem it proper to avoid volunteering an opinion on any question involving the construction of the constitution where the case itself does not bring the question directly before them, and make it their duty to decide upon it."

And see Davidson v. New Orleans, 96 U. S. 97, 96 U. S. 103, *et seq. Haguenstein v. Lynham*, 100 U. S. 483, 100 U. S. 490. *Blair v. United States*, 250 U. S. 273, 250 U. S. 279. *Adkins v. Children's Hospital*, 261 U. S. 525, 261 U. S. 544.

The record wholly fails to reveal that petitioners have been deprived of any right guaranteed by the Federal Constitution, and I am of opinion that the judgment should be affirmed.

MR. JUSTICE McREYNOLDS concurs in this opinion.

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8.2: Gideon v. Wainwright 372 US 335 (1963)

U.S. Supreme Court

Gideon v. Wainwright, 372 U.S. 335 (1963)

Gideon v. Wainwright

No. 155

Argued January 15, 1963

Decided March 18, 1963

372 U.S. 335

CERTIORARI TO THE SUPREME COURT OF FLORIDA

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him, but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman, but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied all relief.

Held: The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment.*Betts v. Brady*, 316 U. S. 455, overruled. Pp. 372 U. S. 336-345.

Reversed and cause remanded.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." [Footnote 1] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when *Betts v. Brady*,316 U. S. 455, was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. [Footnote 2] To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding *in forma pauperis*,we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts v. Brady*, 316 U. S. 455, be reconsidered?"

I

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one

for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and, on review, this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which, for reasons given, the Court deemed to be the only applicable federal constitutional provision. The Court said:

"Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

316 U.S. at 316 U. S. 462. Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding, if left standing, would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration, we conclude that *Betts v. Brady* should be overruled.

II

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. [Footnote 3] Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that, while the Sixth Amendment laid down

"no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

316 U.S. at 316 U. S. 465. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered

"[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date."

316 U.S. at 316 U. S. 465. On the basis of this historical data, the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." 316 U.S. at 316 U. S. 471. It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon, the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell v. Alabama*, 287 U. S. 45 (1932), a case upholding the right of counsel, where the Court held that, despite sweeping language to the contrary in *Hurtado v. California*, 110 U. S. 516 (1884), the Fourteenth Amendment "embraced" those "*fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S. at287 U. S. 67. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature," and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition*

for redress of grievances. [Footnote 4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, [Footnote 5] the Fourth Amendment's prohibition of unreasonable searches and seizures, [Footnote 6] and the Eighth's ban on cruel and unusual punishment. [Footnote 7] On the other hand, this Court in Palko v. Connecticut, 302 U. S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that

"immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states,"

and that guarantees "in their origin . . . effective against the federal government alone" had, by prior cases,

"been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption."

302 U.S. at 302 U. S. 324-326.

We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that "the right to the aid of counsel is of this fundamental character." *Powell v. Alabama*, 287 U. S. 45, 287 U. S. 68 (1932). While the Court, at the close of its *Powell* opinion, did, by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Grosjean v. American Press Co., 297 U. S. 233, 297 U. S. 243-244 (1936). And again, in 1938, this Court said:

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

Johnson v. Zerbst, 304 U. S. 458, 304 U. S. 462 (1938). To the same effect, *see Avery v. Alabama*, 308 U. S. 444 (1940), and *Smith v. O'Grady*, 312 U. S. 329 (1941). In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument. . . ." 316 U.S. at 316 U. S. 462-463. The fact is that, in deciding as it did — that "appointment of counsel is not a fundamental right, essential to a fair trial" — the Court in *Betts v. Brady* made an abrupt break with its own well considered precedents. In returning to these old precedents, sounder, we believe, than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble

ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama:*

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

287 U.S. at 287 U. S. 68-69. The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down," and that it should now be overruled. We agree.

The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

[Footnote 1]

Later, in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, "I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights."

[Footnote 2]

Of the many such cases to reach this Court, recent examples are *Carnley v. Cochran,* 369 U. S. 506 (1962); *Hudson v. North Carolina,* 363 U. S. 697 (1960); *Moore v. Michigan,* 355 U. S. 155 (1957). Illustrative cases in the state courts are *Artrip v. State,* 136 So.2d 574 (Ct.App.Ala.1962); *Shafer v. Warden,* 211 Md. 635, 126 A.2d 573 (1956). For examples of commentary, *see* Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 De Paul L.Rev. 213 (1959); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. of Chi.L.Rev. 1 (1962); The Right to Counsel, 45 Minn.L.Rev. 693 (1961).

[Footnote 3]

Johnson v. Zerbst, 304 U. S. 458 (1938).

[Footnote 4]

E.g., Gitlow v. New York, 268 U. S. 652, 268 U. S. 666 (1925) (speech and press); *Lovell v. City of Griffin,* 303 U. S. 444, 303 U. S. 450 (1938) (speech and press); *Staub v. City of Baxley,* 355 U. S. 313, 355 U. S. 321 (1958) (speech); *Grosjean v. American Press Co.,* 297 U. S. 233, 297 U. S. 244 (1936) (press); *Cantwell v. Connecticut,* 310 U. S. 296,310 U. S. 303 (1940) (religion); *De Jonge v. Oregon,* 299 U. S. 353, 299 U. S. 364 (1937) (assembly); *Shelton v. Tucker,* 364 U. S. 479, 364 U. S. 486, 488 (1960) (association); *Louisiana ex rel. Gremillion v. NAACP,* 366 U. S. 293, 366 U. S. 296 (1961) (association); *Edwards v. South Carolina,* 372 U. S. 229 (1963) (speech, assembly, petition for redress of grievances).

[Footnote 5]

E.g., Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 166 U. S. 235-241 (1897); *Smyth v. Ames,* 169 U. S. 466, 169 U. S. 522-526 (1898).

[Footnote 6]

E.g., Wolf v. Colorado, 338 U. S. 25, 338 U. S. 27-28 (1949); *Elkins v. United States,* 364 U. S. 206, 364 U. S. 213 (1960); *Mapp v. Ohio,* 367 U. S. 643, 367 U. S. 655 (1961).

[Footnote 7]

Robinson v. California, 370 U. S. 660, 370 U. S. 666 (1962).

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.

Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 362-363, 144 U. S. 370-371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson v. California*, 332 U. S. 46, 332 U. S. 71-72, 124. *And see Poe v. Ullman*, 367 U. S. 497, 367 U. S. 515-522 (dissenting opinion). That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 83 U. S. 118-119, 83 U. S. 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker v. Sauvinet*, 92 U. S. 90, 92 U. S. 90, 92 U. S. 92. [Footnote 2/1] Unfortunately, it has never commanded a Court. Yet, happily, all constitutional questions are always open. *Erie R. Co. v. Tompkins*, 304 U. S. 64. And what we do today does not foreclose the matter.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. [Footnote 2/2] Mr. Justice Jackson shared that view. [Footnote 2/3]

]But that view has not prevailed, [Footnote 2/4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-dow versions of what the Bill of Rights guarantees.

[Footnote 2/1]

Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. *See Slaughter-House Cases*, *supra*, at 83 U. S. 118-119; *O'Neil v. Vermont*, *supra*, at 144 U. S. 363. Justices Harlan and Brewer accepted the same theory in the *O'Neil* case (*see id.* at 144 U. S. 370-371), though Justice Harlan indicated that all "persons," not merely "citizens," were given this protection. *Ibid.* In *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 117, Justice Harlan's position was made clear:

"In my judgment, immunity from self-incrimination is protected against hostile state action not only by . . . [the Privileges and Immunities Clause], but [also] by . . . [the Due Process Clause]."

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in *Maxwell v. Dow*, 176 U. S. 581.

[Footnote 2/2]

See Roth v. United States, 354 U. S. 476, 354 U. S. 501, 506; *Smith v. California*, 361 U. S. 147, 361 U. S. 169.

[Footnote 2/3]

Beauharnais v. Illinois, 343 U. S. 250, 343 U. S. 288. *Cf.* the opinions of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 672, and *Whitney v. California*, 274 U. S. 357, 274 U. S. 372.

[Footnote 2/4]

The cases are collected by MR. JUSTICE BLACK in *Speiser v. Randall*, 357 U. S. 513,357 U. S. 530. *And see Eaton v. Price*, 364 U. S. 263, 364 U. S. 274-276.

MR. JUSTICE CLARK, concurring in the result.

In *Bute v. Illinois*, 333 U. S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel, but stated that,

"if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps."

Id. at 339 U. S. 674. Prior to that case, I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. [Footnote 3/1] At the next Term of the Court, Mr. Justice Reed revealed that the Court was divided as to noncapital cases, but that "the due process clause . . . requires counsel for all persons charged with serious crimes. . . ." *Uveges v. Pennsylvania*, 335 U. S. 437, 335 U. S. 441 (1948). Finally, in *Hamilton v. Alabama*, 368 U. S. 52 (1961), we said that, "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 368 U. S. 55.

That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear both from the language of the Amendment and from this Court's interpretation. *See Johnson v. Zerbst*, 304 U. S. 458 (1938). It is equally clear from the above cases, all decided after *Betts v. Brady*, 316 U. S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In *Kinsella v. United States ex rel. Singleton*, 361 U. S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid v. Covert*, 354 U. S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, [Footnote 3/2] as we noted that:

"Obviously Fourteenth Amendment cases dealing with state action have no application here, but if they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature."

361 U.S. at 361 U. S. 246-247.

I must conclude here, as in *Kinsella*, *supra*, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty," just as for deprival of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life — a value judgment not universally accepted [Footnote 3/3] — or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

[Footnote 3/1]

It might, however, be said that there is such an implication in *Avery v. Alabama*, 308 U. S. 444 (1940), a capital case in which counsel had been appointed, but in which the petitioner claimed a denial of "effective" assistance. The Court, in affirming, noted that,

"[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction."

Id. at 308 U. S. 445. No "special circumstances" were recited by the Court, but, in citing *Powell v. Alabama*, 287 U. S. 45 (1932), as authority for its dictum, it appears that the Court did not rely solely on the capital nature of the offense.

[Footnote 3/2]

Portents of today's decision may be found as well in *Griffin v. Illinois*, 351 U. S. 12(1956), and *Ferguson v. Georgia*, 365 U. S. 570 (1961). In *Griffin*, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In *Ferguson*, we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that

"[o]ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel."

365 U.S. at 365 U. S. 596.

[Footnote 3/3]

See, e.g., Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188-189 (1962).

MR. JUSTICE HARLAN, concurring.

I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well considered precedents." *Ante*, p. 372 U. S. 344. In 1932, in *Powell v. Alabama*, 287 U. S. 45, a capital case, this Court declared that, under the particular facts there

presented —

"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and, above all, that they stood in deadly peril of their lives"

(287 U.S. at 287 U. S. 71) — the state court had a duty to assign counsel for the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, *see* 287 U.S. at 287 U. S. 52, 287 U. S. 57-58, 287 U. S. 71, and were clearly regarded as important to the result.

Thus, when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital, as well as capital, trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, *see Johnson v. Zerbst*, 304 U. S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama*, was not limited to capital cases was, in truth, not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [Footnote 4/1] Such dicta continued to appear in subsequent decisions, [Footnote 4/2] and any lingering doubts were finally eliminated by the holding of *Hamilton v. Alabama*, 368 U. S. 52.

In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote. [Footnote 4/3] However, no such decision has been cited to us, and I have found none, after *Quicksall v. Michigan*, 339 U. S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. [Footnote 4/4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted, in itself, special circumstances requiring the services of counsel at trial. In truth, the *Betts v. Brady* rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. [Footnote 4/5] To continue a rule which is honored by this Court only with lip service is not a healthy thing, and, in the long run, will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" [Footnote 4/6] and thus valid against the States, I do not read our past decisions to suggest that, by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. *Cf. Roth v. United States*, 354 U. S. 476, 354 U. S. 496-508 (separate opinion of this writer). In what is done today, I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*, 302 U. S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

[Footnote 4/1]

Avery v. Alabama, 308 U. S. 444, 308 U. S. 445.

[Footnote 4/2]

E.g., *Bute v. Illinois*, 333 U. S. 640, 333 U. S. 674; *Uveges v. Pennsylvania*, 335 U. S. 437,335 U. S. 441.

[Footnote 4/3]

E.g., *Foster v. Illinois*, 332 U. S. 134; *Bute v. Illinois*, 333 U. S. 640; *Gryger v. Burke*, 334 U. S. 728.

[Footnote 4/4]

E.g., *Williams v. Kaiser*, 323 U. S. 471; *Hudson v. North Carolina*, 363 U. S. 697; *Chewning v. Cunningham*, 368 U. S. 443.

[Footnote 4/5]

See, e.g., *Commonwealth ex rel. Simon v. Maroney*, 405 Pa. 562, 176 A.2d 94 (1961); *Shaffer v. Warden*, 211 Md. 635, 126 A.2d 573 (1956); *Henderson v. Bannan*, 256 F.2d 363 (C.A. 6th Cir.1958).

[Footnote 4/6]

Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325.

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8.3: Texas v. Cobb 532 US 162 (2001)

OCTOBER TERM, 2000

Syllabus

TEXAS *v.* COBB

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS No. 99-1702. Argued January 16, 200l-Decided April 2, 2001

While under arrest for an unrelated offense, respondent confessed to a home burglary, but denied knowledge of a woman and child's disappearance from the home. He was indicted for the burglary, and counsel was appointed to represent him. He later confessed to his father that he had killed the woman and child, and his father then contacted the police. While in custody, respondent waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and confessed to the murders. He was convicted of capital murder and sentenced to death. On appeal to the Texas Court of Criminal Appeals, he argued, *inter alia*, that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel, which he claimed attached when counsel was appointed in the burglary case. The court reversed and remanded, holding that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged.

Held: Because the Sixth Amendment right to counsel is "offense specific," it does not necessarily extend to offenses that are "factually related" to those that have actually been charged. Pp.167-174.

(a) In *McNeil* v. *Wisconsin*, 501 U. S. 171, 176, this Court held that a defendant's statements regarding offenses for which he has not been charged are admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. Although some lower courts have read into *McNeil's* offense-specific definition an exception for crimes that are "factually related" to a charged offense, and have interpreted *Brewer* v. *Williams*, 430 U. S. 387, and *Maine* v. *Moulton*, 474 U. S. 159, to support this view, this Court declines to do so. *Brewer* did not address the question at issue here. And to the extent *Moulton* spoke to the matter at all, it expressly referred to the offensespecific nature of the Sixth Amendment right to counsel. In predicting that the offense-specific rule will prove disastrous to suspects' constitutional rights and will permit the police almost total license to conduct unwanted and uncounseled interrogations, respondent fails to appreciate two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda*, *supra*, at 479. Here, police scrupulously

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followed *Miranda's* dictates when questioning respondent. Second, the Constitution does not negate society's interest in the police's ability to talk to witnesses and suspects, even those who have been charged with other offenses. See *McNeil*, *supra*, at 181. Pp. 167-172.

(b) Although the Sixth Amendment right to counsel clearly attaches only to charged offenses, this Court has recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U. S. 299, 304. The *Blockburger* test has been applied to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 164-166. There is no constitutional difference between "offense" in the double jeopardy and right-to-counsel contexts. Accordingly, when the Sixth Amendment right to counsel attaches, it encompasses offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test. Pp. 172-174.

(c) At the time respondent confessed to the murders, he had been indicted for burglary but had not been charged in the murders. As defined by Texas law, these crimes are not the same offense under *Blockburger.* Thus, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and his confession was therefore admissible. P. 174.

Reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 174. BREYER, J., filed a

dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 177.

Gregory S. *Coleman*, Solicitor General of Texas, argued the cause for petitioner. With him on the briefs were *John Cornyn*, Attorney General, *Andy Taylor*, First Assistant Attorney General, and S. *Kyle Duncan*, Assistant Solicitor General.

Lisa Schiavo Blatt argued the cause for the United States as amicus curiae urging reversal. With her on the brief were Solicitor General Waxman, Assistant Attorney Gen-

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eral Robinson, Deputy Solicitor General Dreeben, and Deborah Watson.

Roy E. Greenwood, by appointment of the Court, 531 U. S. 807, argued the cause for respondent. With him on the brief were *David A. Schulman* and *Lee Haidusek*. *

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Texas Court of Criminal Appeals held that a criminal defendant's Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses "closely related factually" to the charged offense. We hold that our decision in *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), meant what it said, and that the Sixth Amendment right is "offense specific."

In December 1993, Lindsey Owings reported to the Walker County, Texas, Sheriff's Office that the home he

*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Edward B. Foley*, State Solicitor, *David M. Gormley*, Associate Solicitor, and *Elise W Porter* and *Norman E. Plate*, Assistant Solicitors, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Janet Napolitano* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *John M. Bailey* of Connecticut, *Robert A. Butterworth* of Florida, *Carla* J. *Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *Michael* C. *Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *W A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Mark L. Earley* of Virginia, and *Gay Woodhouse* of Wyoming; for the Criminal Justice Legal Foundation by *Kent* S. *Scheidegger* and *Charles L. Hobson;* and for the National Association of Police Organizations et al. by *Patrick* F. *Philbin* and *Stephen R. McSpadden*.

Sheri Lynn Johnson and *Jeffrey* J. *Pokorak* filed a brieffor the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging affirmance.

Stephen G. *Tipps* and *Jennifer L. Walker Elrod* filed a brief for the Texas District & County Attorneys Association et al. as *amici curiae*.

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shared with his wife, Margaret, and their 16-month-old daughter, Kori Rae, had been burglarized. He also informed police that his wife and daughter were missing. Respondent Raymond Levi Cobb lived across the street from the Owings. Acting on an anonymous tip that respondent was involved in the burglary, Walker County investigators questioned him about the events. He denied involvement. In July 1994, while under arrest for an unrelated offense, respondent was again questioned about the incident. Respondent then gave a written statement confessing to the burglary, but he denied knowledge relating to the disappearances. Respondent was subsequently indicted for the burglary, and Hal Ridley was appointed in August 1994 to represent respondent on that charge.

Shortly after Ridley's appointment, investigators asked and received his permission to question respondent about the disappearances. Respondent continued to deny involvement. Investigators repeated this process in September 1995, again with Ridley's permission and again with the same result.

In November 1995, respondent, free on bond in the burglary case, was living with his father in Odessa, Texas. At that time, respondent's father contacted the Walker County Sheriff's Office to report that respondent had confessed to him that he killed Margaret Owings in the course of the burglary. Walker County investigators directed respondent's father to the Odessa police station, where he gave a statement. Odessa police then faxed the statement to Walker County, where investigators secured a warrant

for respondent's arrest and faxed it back to Odessa. Shortly thereafter, Odessa police took respondent into custody and administered warnings pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Respondent waived these rights.

After a short time, respondent confessed to murdering both Margaret and Kori Rae. Respondent explained that when Margaret confronted him as he was attempting to re-

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move the Owings' stereo, he stabbed her in the stomach with a knife he was carrying. Respondent told police that he dragged her body to a wooded area a few hundred yards from the house. Respondent then stated:

"'I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then.'" App. to Pet. for Cert. A-9 to A-10.

Respondent later led police to the location where he had buried the victims' bodies.

Respondent was convicted of capital murder for murdering more than one person in the course of a single criminal transaction. See Tex. Penal Code Ann. § 19.03(a)(7)(A) (1994). He was sentenced to death. On appeal to the Court of Criminal Appeals of Texas, respondent argued, *inter alia*, that his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. Relying on *Michigan* v. *Jackson*, 475 U. S. 625 (1986), respondent contended that his right to counsel had attached when Ridley was appointed in the burglary case and that Odessa police were therefore required to secure Ridley's permission before proceeding with the interrogation.

The Court of Criminal Appeals reversed respondent's conviction by a divided vote and remanded for a new trial. The court held that "once the right to counsel attaches to

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the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." 2000 WL 275644, *3 (2000) (citations omitted). Finding the capital murder charge to be "factually interwoven with the burglary," the court concluded that respondent's Sixth Amendment right to counsel had attached on the capital murder charge even though respondent had not yet been charged with that offense. *Id.*, at *4. The court further found that respondent had asserted that right by accepting Ridley's appointment in the burglary case. See ibid. Accordingly, it deemed the confession inadmissible and found that its introduction had not been harmless error. See id., at *4-*5. Three judges dissented, finding *Michigan* v. *Jackson* to be distinguishable and concluding that respondent had made a valid unilateral waiver of his right to counsel before confessing. See 2000 WL, at *5-*13 (opinion of McCormick, P. J.).

The State sought review in this Court, and we granted certiorari to consider first whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged, and second whether respondent made a valid unilateral waiver of that right in this case. 530 U. S. 1260 (2000). Because we answer the first question in the negative, we do not reach the second.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." In *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), we explained when this right arises:

"The Sixth Amendment right [to counsel] … is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, in-

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formation, or arraignment." *Id.*, at 175 (citations and internal quotation marks omitted).

Accordingly, we held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See id., at 176.

Some state courts and Federal Courts of Appeals, however, have read into *McNeil's* offense-specific definition an exception for crimes that are "factually related" to a charged offense. 1 Several of these courts have interpreted *Brewer* v. *Williams*, 430 U. S. 387 (1977), and *Maine* v. *Moulton*, 474 U. S. 159 (1985)-both of which were decided well before *McNeil-to* support this view, which respondent now invites us to approve. We decline to do so.

In *Brewer*, a suspect in the abduction and murder of a 10-year-old girl had fled from the scene of the crime in Des Moines, Iowa, some 160 miles east to Davenport, Iowa, where he surrendered to police. An arrest warrant was issued in Des Moines on a charge of abduction, and the suspect was arraigned on that warrant before a Davenport judge. Des Moines police traveled to Davenport, took the man into custody, and began the drive back to Des Moines. Along the way, one of the officers persuaded the suspect to lead police to the victim's body. The suspect ultimately was convicted of the girl's murder. This Court upheld the federal habeas court's conclusion that police had violated the suspect's Sixth Amendment right to counsel. We held that the officer's comments to the suspect constituted in-

1 See, *e. g.*, *United States* v. *Covarrubias*, 179 F.3d 1219, 1223-1224 *(CA9* 1999); *United States* v. *Melgar*, 139 F.3d 1005, 1013 *(CA4 1998); United States* v. *Doherty*, 126 F.3d 769, 776 *(CA6* 1997); *United States* v. *Arnold*, 106 F.3d 37, 41 *(CA3* 1997); *United States* v. *Williams*, 993 F.2d 451, 457 *(CA5* 1993); *Commonwealth* v. *Rainwater*, 425 Mass. 540, 556, 681 N. E. 2d 1218, 1229 (1997); *In re Pack*, 420 Pa. Super. 347, 354-356, 616 A. 2d 1006, 1010-1011 (1992).

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terrogation and that the suspect had not validly waived his right to counsel by responding to the officer. See 430 U. S., at 405-406.

Respondent suggests that *Brewer* implicitly held that the right to counsel attached to the factually related murder when the suspect was arraigned on the abduction charge. See Brief for Respondent 4. The Court's opinion, however, simply did not address the significance of the fact that the suspect had been arraigned only on the abduction charge, nor did the parties in any way argue this question. Constitutional rights are not defined by inferences from opinions which did not address the question at issue. Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us").

Moulton is similarly unhelpful to respondent. That case involved two individuals indicted for a series of thefts, one of whom had secretly agreed to cooperate with the police investigation of his codefendant, Moulton. At the suggestion of police, the informant recorded several telephone calls and one face-to-face conversation he had with Moulton during which the two discussed their criminal exploits and possible alibis. In the course of those conversations, Moulton made various incriminating statements regarding both the thefts for which he had been charged and additional crimes. In a superseding indictment, Moulton was charged with the original crimes as well as burglary, arson, and three additional thefts. At trial, the State introduced portions of the recorded face-to-face conversation, and Moulton ultimately was convicted of three of the originally charged thefts plus one count of burglary. Moulton appealed his convictions to the Supreme Judicial Court of Maine, arguing that introduction of the recorded conversation violated

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his Sixth Amendment right to counsel. That court agreed, holding:

"'Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired.'" 474 U. S., at 168 (quoting *State* v. *Moulton*, 481 A. 2d 155, 161 (1984)).

We affirmed.

Respondent contends that, in affirming reversal of both the theft and burglary charges, the *Moulton* Court must have concluded that Moulton's Sixth Amendment right to counsel attached to the burglary charge. See Brief for Respondent 13-14; see also Brief for the National Association of Criminal Defense Lawyers et al. as *Amici Curiae 22-23*. But the *Moulton* Court did not address the question now before us, and to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amendment right to counsel:

"The police have an interest in the thorough investigation of crimes for *whichformal charges* have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and *formally charged* with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to *pending charges*, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused …. On the other hand, to exclude

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evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 U. S., at 179-180 (emphasis added; footnote omitted).

See also id., at 168 ("[T]he purpose of their meeting was to discuss the *pending charges"); id.*, at 177 ("[T]he police knew … that Moulton and [the informant] were meeting for the express purpose of discussing the *pending charges* … " (emphasis added)). Thus, respondent's reliance on *Moulton* is misplaced and, in light of the language employed there and subsequently in *McNeil*, puzzling.

Respondent predicts that the offense-specific rule will prove "disastrous" to suspects' constitutional rights and will "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations." Brief for Respondent 8-9. Besides offering no evidence that such a parade of horribles has occurred in those jurisdictions that have not enlarged upon *McNeil*, he fails to appreciate the significance of two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. See *Miranda* v. *Arizona*, *384* U. S., at 479; *Dickerson* v. *United States*, 530 U. S. 428, 435 (2000) (quoting *Miranda).* In the present case, police scrupulously followed *Miranda's* dictates when questioning respondent.2 Second, it is critical to recognize that the Con-

2 Curiously, while predicting disastrous consequences for the core values underlying the Sixth Amendment, see *post*, at 179-183 (opinion of BREYER, J.), the dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson)* in protecting a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses,

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stitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

"Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *McNeil*, 501 U. S., at 181 (quoting *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986)).

See also *Moulton*, *supra*, at 180 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities").

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recog-

defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

It is also worth noting that, contrary to the dissent's suggestion, see *post*, at 177-178, 179, there is no "background principle" of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present. The dissent would expand the Sixth Amendment right to the assistance of counsel in a criminal prosecution into a rule which" 'exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client

relationship."' *Post*, at 181 (quoting ABA Ann. Model Rule of Profesional Conduct 4.2 (4th ed. 1999)). Every profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions. The Sixth Amendment right to counsel is personal to the defendant and specific to the offense.

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nized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging instrument. In *Blockburger* v. *United States*, 284 U. S. 299 (1932), we explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offence." See, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 164-166 (1977). We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.3

While simultaneously conceding that its own test "lacks the precision for which police officers may hope," *post*, at 186, the dissent suggests that adopting *Blockburger's* definition of "offense" will prove difficult to administer. But it is the dissent's vague iterations of the "'closely related to'" or "'inextricably intertwined with'" test, *post*, at 186, that would defy simple application. The dissent seems to presuppose that officers will possess complete knowledge of the circumstances surrounding an incident, such that the officers will be able to tailor their investigation to avoid addressing factually related offenses. Such an assumption, however, ignores the reality that police often are not yet aware of the

3 In this sense, we could just as easily describe the Sixth Amendment as "prosecution specific," insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution. And, indeed, the text of the Sixth Amendment confines its scope to "all criminal *prosecutions.*"

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exact sequence and scope of events they are investigatingindeed, that is why police must investigate in the first place. Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether.

It remains only to apply these principles to the facts at hand. At the time he confessed to Odessa police, respondent had been indicted for burglary of the Owings residence, but he had not been charged in the murders of Margaret and Kori Rae. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*. Compare Tex. Penal Code Ann. § 30.02(a) (1994) (requiring entry into or continued concealment in a habitation or building) with § 19.03(a)(7)(A) (requiring murder of more than one person during a single criminal transaction). Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent's confession was therefore admissible.

The judgment of the Court of Criminal Appeals of Texas is reversed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

The Court's opinion is altogether sufficient to explain why the decision of the Texas Court of Criminal Appeals should be reversed for failure to recognize the offense-specific nature of the Sixth Amendment right to counsel. It seems advisable, however, to observe that the Court has reached its conclusion without the necessity to reaffirm or give approval to the decision in *Michigan* v. *Jackson*, 475 U. S. 625 (1986). This course is wise, in my view, for the underlying theory of *Jackson* seems questionable.

As the facts of the instant case well illustrate, it is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free

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choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* rule, and the related preventative rule of *Edwards* v. *Arizona*, 451 U. S. 477(1981), serve to

protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, supersedes the suspect's voluntary choice to speak with investigators. After *Jackson* had been decided, the Court made the following observation with respect to *Edwards:*

"Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny-not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused 'knowingly and intelligently' pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial." *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988).

There is little justification for not applying the same course of reasoning with equal force to the court-made preventative rule announced in *Jackson;* for *Jackson*, after all, was a wholesale importation of the *Edwards* rule into the Sixth Amendment.

In the instant case, Cobb at no time indicated to law enforcement authorities that he elected to remain silent about the double murder. By all indications, he made the voluntary choice to give his own account. Indeed, even now Cobb does not assert that he had no wish to speak at the time he confessed. While the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, if *Jackson* were to apply it would override that choice.

There is further reason to doubt the wisdom of the *Jackson* holding. Neither *Miranda* nor *Edwards* enforces the

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Fifth Amendment right unless the suspect makes a clear and unambiguous assertion of the right to the presence of counsel during custodial interrogation. *Davis* v. *United States*, 512 U. S. 452, 459 (1994). Where a required *Miranda* warning has been given, a suspect's later confession, made outside counsel's presence, is suppressed to protect the Fifth Amendment right of silence only if a reasonable officer should have been certain that the suspect expressed the unequivocal election of the right.

The Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning. It is the commencement of a formal prosecution, indicated by the initiation of adversary judicial proceedings, that marks the beginning of the Sixth Amendment right. See *ante*, at 167-168 (quoting *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991)). These events may be quite independent of the suspect's election to remain silent, the interest which the *Edwards* rule serves to protect with respect to *Miranda* and the Fifth Amendment, and it thus makes little sense for a protective rule to attach absent such an election by the suspect. We ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent.

Even if *Jackson* is to remain good law, its protections should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards.* Cobb made no such assertion here, yet JUSTICE BREYER'S dissent rests upon the assumption that the *Jackson* rule should operate to exclude the confession no matter. There would be little justification for this extension of a rule that, even in a more limited application, rests on a doubtful rationale.

JUSTICE BREYER defends *Jackson* by arguing that, once a suspect has accepted counsel at the commencement of ad-

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versarial proceedings, he should not be forced to confront the police during interrogation without the assistance of counsel. See *post*, at 179-181. But the acceptance of counsel at an arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards.*

With these further remarks, I join in full the opinion of the Court.

JUSTICE BREYER, with whom JUSTICE STEVENS, JusTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, "offense," when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963); *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932).

Second, the right attaches when adversary proceedings, triggered by the government's formal accusation of a crime, begin. See *Brewer* v. *Williams*, 430 U. S. 387, 401 (1977); *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972); *Massiah* v. *United States*, 377 U. S. 201, 206 (1964).

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights. See *Michigan* v. *Jackson*, 475 U. S. 625, 633, 636 (1986) (waiver

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of right to presence of counsel is assumed invalid unless accused initiates communication); *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985) (Sixth Amendment gives defendant right "to rely on counsel as a 'medium' between him and the State"). Cf. ABA Model Rule of Professional Conduct 4.2 (2001) (lawyer is generally prohibited from communicating with a person known to be represented by counsel "about the subject of the representation" without counsel's "consent"); Green, A Prosecutor's Communications with Defendants:

What Are the Limits?, 24 Crim. L. Bull. 283, 284, and n.5 (1988) (version of Model Rule 4.2 or its predecessor has been adopted by all 50 States).

Fourth, the particular aspect of the right here at issuethe rule that the police ordinarily must communicate with the defendant through counsel-has important limits. In particular, recognizing the need for law enforcement officials to investigate "new or additional crimes" not the subject of current proceedings, *Maine* v. *Moulton*, *supra*, at 179, this Court has made clear that the right to counsel does not attach to any and every crime that an accused may commit or have committed, see *McNeil* v. *Wisconsin*, 501 U. S. 171, 175-176 (1991). The right "cannot be invoked once for all future prosecutions," and it does not forbid "interrogation unrelated to the charge." *Id.*, at 175, 178. In a word, as this Court previously noted, the right is "offense specific." *Id.*, at 175.

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words "offense specific." These words appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text. See U. S. Const., Amdt. 6 (guaranteeing right to counsel "[i]n all criminal prosecutions"). The definition of these words is not selfevident. Sometimes the term "offense" may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and

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sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an "offense"-for Sixth Amendment purposes-includes factually related aspects of a single course of conduct other than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment's basic objectives as set forth in this Court's case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that "offense" means the crime set forth within "the four corners of a charging instrument," along with other crimes that "would be considered the same offense" under the test established by *Blockburger* v. *United States*, 284 U. S. 299 (1932). *Ante*, at 173. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority's rule, while leaving the Fifth Amendment's protections in place, threatens to diminish severely the additional protection that, under this Court's rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel. See, *e. g.*, *Michigan* v. *Jackson*, *supra*, at 632 (Sixth Amendment prevents police from questioning represented defendant through informants even when Fifth Amendment would not); *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980) (Fifth Amendment right, unlike Sixth, applies only in custodial interrogation).

JUSTICE KENNEDY, JUSTICE SCALIA, and JUSTICE THOMAS, if not the majority, apparently believe these protections constitutionally unimportant, for, in their view, "the underlying theory of *Jackson* seems questionable." *Ante*, at 174 (KENNEDY,

J., concurring). Both the majority and

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concurring opinions suggest that a suspect's ability to invoke his Fifth Amendment right and "refuse any police questioning" offers that suspect adequate constitutional protection. *Ante*, at 172, n. 2 (majority opinion); see also *ante*, at 175-176 (KENNEDY, J., concurring). But that is not so.

Jackson focuses upon a suspect-perhaps a frightened or uneducated suspect-who, hesitant to rely upon his own unaided judgment in his dealings with the police, has invoked his constitutional right to legal assistance in such matters. See *Michigan* v. *Jackson*, 475 U. S., at 634, n. 7 (" 'The simple fact that [a] defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly"') (quoting *People* v. *Bladel*, 421 Mich. 39, 63-64, 365 N. W. 2d 56, 67 (1984)). *Jackson* says that, once such a request has been made, the police may not simply throw that suspect-who does not trust his own unaided judgment-back upon his own devices by requiring him to rely for protection upon that same unaided judgment that he previously rejected as inadequate. In a word, the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees. See *McNeil* v. *Wisconsin*, *supra*, at 177178 ("The purpose of the Sixth Amendment counsel guarantee … is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary"') (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984)). The Constitution does not take away with one hand what it gives with the other. See *Gideon* v. *Wainwright*, 372 U. S., at 344 (Sixth Amendment means that a person charged with a crime need not "face his accusers without a lawyer to assist him"); *Michigan* v. *Jackson*, *supra*, at 633, 635 (presuming "that the defendant requests the lawyer's services at every critical stage of the prosecution" even if the defendant fails to invoke his Fifth Amendment rights at the time of interrogation); cf. *Edwards* v. *Arizona*, 451 U. S. 477, 484-485 (1981) (when

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accused has expressed desire to deal with police through counsel, police may not reinitiate interrogation until counsel has been made available); ABA Ann. Model Rule of Professional Conduct 4.2, p.398, comment. (4th ed. 1999) ("Rule 4.2 … exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship").

For these reasons, the Sixth Amendment right at issue is independent of the Fifth Amendment's protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. See, *e. g.*, *Michigan* v. *Jackson*, *supra*, at 636 ("We conclude that the assertion [of the right to counsel] is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment").

JUSTICE KENNEDY primarily relies upon *Patterson* v.

Illinois, 487 U. S. 285 (1988), in support of his conclusion that *Jackson* is not good law. He quotes *Patterson's* statement that the Constitution does" 'not ba[r] an accused from making an *initial* election as to whether'" to speak with the police without counsel's assistance. *Ante*, at 175 (quoting *Patterson* v. *Illinois*, *supra*, at 291).

This statement, however, cannot justify the overruling of *Jackson*. That is because, in *Patterson* itself, this Court noted, "as a matter of some significance," that, at the time he was interrogated, *the defendant had neither retained nor accepted the appointment of counsel*. 487 U. S., at 290, n. 3. We characterized our holding in *Jackson* as having depended upon "the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police," 487 U. S., at 291 (quoting *Michigan* v. *Jackson*, *supra*, at 631), and explained that, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect," 487 U. S., at 290, n.3 (citing *Maine* v. *Moulton*, 474 U. S., at 176).

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JUSTICE KENNEDY also criticizes *Jackson* on the ground that it prevents a suspect "from … making thee] choice" to "give … a forthright account of the events that occurred." *Ante*, at 177. But that is not so. A suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.

Unlike JUSTICE KENNEDY, the majority does not call *Jackson* itself into question. But the majority would undermine that case by significantly diminishing the Sixth Amendment protections that the case provides. That is because criminal codes are lengthy and highly detailed, often proliferating "overlapping and related statutory offenses" to the point where prosecutors can easily "spin out a startlingly numerous series of offenses from a single … criminal transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 445, n. 10 (1970). Thus, an armed robber who reaches across a store counter, grabs the cashier, and demands "your money or your life," may through that single instance of conduct have committed several "offenses," in the majority's sense of the term, including armed robbery, assault, battery, trespass, use of a firearm to commit a felony, and perhaps possession of a firearm by a felon, as well. A person who is using and selling drugs on a single occasion might be guilty of possessing various drugs, conspiring to sell drugs, being under the influence of illegal drugs, possessing drug paraphernalia, possessing a gun in relation to the drug sale, and, depending upon circumstances, violating various gun laws as well. A protester blocking an entrance to a federal building might also be trespassing, failing to disperse, unlawfully assembling, and obstructing Government administration all at one and the same time.

The majority's rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking questions about any other related crime not actually charged in

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the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger's* definition it counts as the "same crime"), all *without notifying counsel.* Indeed, the majority's rule would permit law enforcement officials to question anyone charged with any crime in anyone of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sensewhat common sense-does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation. It will undermine the lawyer's role as "'medium'" between the defendant and the government. *Maine* v. *Moulton, supra,* at 176. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

In fact, under the rule today announced by the majority, two of the seminal cases in our Sixth Amendment jurisprudence would have come out differently. In *Maine* v. *Moulton,* which the majority points out "expressly referred to the offense-specific nature of the Sixth Amendment right to counsel," *ante,* at 170, we treated burglary and theft as the same offense for Sixth Amendment purposes. Despite the opinion's clear statement that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," 474 U. S., at 180, n. 16, the Court affirmed the lower court's reversal of both burglary and theft charges even though, at the time that the incriminating statements at issue were made, Moulton had been charged only with theft by receiving, id., at 162, 167, 180. Under the majority's rule, in contrast, because theft by re-

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ceiving and burglary each required proof of a fact that the other did not, only Moulton's theft convictions should have been overturned. Compare Me. Rev. Stat. Ann., Tit. 17-A, § 359 (1981) (theft) (requiring knowing receipt, retention, or disposal of stolen property with the intent to deprive the owner thereof), with § 401 (burglary) (requiring entry of a structure without permission and with the intent to commit a crime).

In *Brewer* v. *Williams,* the effect of the majority's rule would have been even more dramatic. Because first-degree murder and child abduction each required proof of a fact not required by the other, and because at the time of the impermissible interrogation Williams had been charged only with abduction of a child, Williams' murder conviction should have remained undisturbed. See 430 U. S., at 390, 393-395, 406. Compare Iowa Code § 690.2 (1950 and Supp. 1978) (first-degree murder) (requiring a killing) with Iowa Code § 706.2 (1950) (repealed 1978) (child-stealing) (requiring proof that a child under 16 was taken with the intent to conceal the child from his or her parent or guardian). This is not to suggest that this Court has previously addressed and decided the question presented by this case. Rather, it is to point out that the Court's conception of the Sixth Amendment right at the time that *Moulton* and *Brewer* were decided naturally presumed that it extended to factually related but uncharged offenses.

At the same time, the majority's rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word "offense" ought to encompass something beyond "the four corners of the charging instrument,"

imports into Sixth Amendment law the definition of "offense" set forth in *Blockburger* v. *United States*, 284 U. S. 299 (1932), a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word "offence" but otherwise has no relevance here. Whatever Fifth Amendment virtues *Block-*

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burger may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the "same offense" unless each requires proof of a fact that the other does not. See *ante*, at 173 (majority opinion). That means that most of the different crimes mentioned above are not the "same offense." Under many States' laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Compare, *e.* g., Cal. Penal Code Ann. § 211 (West 1999) (robbery) (requiring taking of personal property of another) with § 240 (assault) (requiring attempt to commit violent injury). Hence the extension of the definition of "offense" that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority's rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. See, *e. g.*, *United States* v. *Woodward*, 469 U. S. 105, 108 (1985) *(per curiam)* (holding that lower court misapplied *Blockburger* test). Compare *United States* v. *Dixon*, 509 U. S. 688, 697-700 (1993) (opinion of SCALIA, J.) (applying *Blockburger* and concluding that contempt is same offense as underlying substantive crime), with 509 U. S., at 716-720 (REHNQUIST, C. J., concurring in part and dissenting in part) (applying *Blockburger* and deciding that the two are separate offenses). The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz* v. *United States*, 450 U. S. 333, 343 (1981). Yet the Court now asks, not the lawyers and judges who ordinarily work with double jeopardy law, but police officers in the field, to navigate *Blockburger* when they ques-

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tion suspects. Cf. *New York* v. *Belton*, 453 U. S. 454, 458 (1981) (noting importance of clear rules to guide police behavior). Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog … Where Armies whole have sunk."

There is, of course, an alternative. We can, and should, define "offense" in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined "offense" in the Sixth Amendment context to encompass such closely related acts. See *ante*, at 168, n. 1 (majority opinion) (citing cases from the Third, Fourth, Fifth, Sixth, and Ninth Circuits as well as state courts in Massachusetts and Pennsylvania); *Taylor* v. *State*, 726 So. 2d 841, 845 (Fla. App. 1999); *People* v. *Clankie*, 124 Ill. 2d 456, 462-466, 530 N. E. 2d 448, 451-453 *(1988); State* v. *Tucker*, 137 N. J. 259, 277-278, 645 A. 2d 111, 120-121 (1994), cert. denied, 513 U. S. 1090 (1995). These courts have found offenses "closely related" where they involved the same victim, set of acts, evidence, or motivation. See, *e. g.*, *Taylor* v. *State*, *supra*, at 845 (stolen property charges and burglary); *State* v. *Tucker*, *supra*, at 278, 645 A. 2d, at 121 (burglary, robbery, and murder of home's occupant); *In re Pack*, 420 Pa. Super. 347, 355-356, 616 A. 2d 1006, 1010 (1992) (burglary, receiving stolen property, and theft charges), appeal denied, 535 Pa. 669, 634 A. 2d 1117 (1993). They have found offenses unrelated where time, location, or factual circumstances significantly separated the

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one from the other. See, *e. g.*, *Commonwealth* v. *Rainwater*, 425 Mass. 540, 547-549, and n.7, 681 N. E. 2d 1218, 1224, and n. 7 (1997) (vehicle theft charge and earlier vehicle thefts in same area), cert. denied, 522 U. S. 1095 (1998); *Whittlesey* v. *State*, 340 Md. 30, 56-57, 665 A. 2d 223, 236 (1995) (murder and making false statements charges), cert. denied, 516 U. S. 1148 (1996); *People* v. *Dotson*, 214 Ill. App. 3d 637, 646, 574 N. E. 2d 143, 149 (murder and weapons charges), appeal denied, 141 Ill. 2d 549, 580 N. E. 2d 123 (1991).

One cannot say in favor of this commonly followed approach that it is perfectly clear-only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. See *Maine* v. *Moulton*, 474 U. S., at 162, 167, 180 (affirming reversal of both burglary and theft convictions); *Brewer* v. *Williams*, 430 U. S., at 389, 390, 393, 406 (affirming grant of habeas which vacated murder conviction). And, most importantly, the "closely related" test furthers, rather than undermines, the Sixth Amendment's "right to counsel," a right so necessary to the realization in practice of that most "noble ideal," a fair trial. *Gideon* v. *Wainwright*, 372 U. S., at 344.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were "closely related." All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes

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is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. See, *e.* g., Tr. 157 (Feb. 19, 1997) (testimony by police officer who obtained murder confession) ("Basically what he told us is he had gone over to the house to burglarize it and nobody was home"); 22 Record, State's Exh. 20 (typed statement by Cobb) (admitting that he committed the murders after entering the house and stealing stereo parts). Nor, in my view, did Cobb waive his right to counsel. See *supra*, at 180-181. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court.

Consequently, I dissent.

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8.4: Escobedo v. Illinois 378 US 478 (1964)

U.S. Supreme Court

Escobedo v. Illinois, 378 U.S. 478 (1964)

Escobedo v. Illinois

No. 615

Argued April 29, 1964

Decided June 22, 1964

378 U.S. 478

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, a 22-year-old of Mexican extraction, was arrested with his sister and taken to police headquarters for interrogation in connection with the fatal shooting, about 11 days before, of his brother-in-law. He had been arrested shortly after the shooting, but had made no statement, and was released after his lawyer obtained a writ of habeas corpus from a state court. Petitioner made several requests to see his lawyer, who, though present in the building, and despite persistent efforts, was refused access to his client. Petitioner was not advised by the police of his right to remain silent and, after persistent questioning by the police, made a damaging statement to an Assistant State's Attorney which was admitted at the trial. Convicted of murder, he appealed to the State Supreme Court, which affirmed the conviction.

Held: Under the circumstances of this case, where a police investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent, the accused has been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments, and no statement extracted by the police during the interrogation may be used against him at a trial. *Crooker v. California*, 357 U. S. 433, and *Cicenia v. Lagay*, 357 U. S. 504, distinguished, and, to the extent that they may be inconsistent with the instant case, they are not controlling. Pp. 378 U. S. 479-492.

28 Ill.2d 41, 190 N.E.2d 825, reversed and remanded.

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MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, 372 U. S. 335, 372 U. S. 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.

On the night of January 19, 1960, petitioner's brother-in-law was fatally shot. In the early hours of the next morning, at 2:30 a.m., petitioner was arrested without a warrant and interrogated. Petitioner made no statement to the police, and was released at 5 that afternoon pursuant to a state court writ of habeas corpus obtained by Mr. Warren Wolfson, a lawyer who had been retained by petitioner.

On January 30, Benedict DiGerlando, who was then in police custody and who was later indicted for the murder along with petitioner, told the police that petitioner had fired the fatal shots. Between 8 and 9 that evening, petitioner and his sister, the widow of the deceased, were arrested and taken to police headquarters. En route to the police station, the police "had handcuffed the defendant behind his back," and "one of the arresting officers told defendant that DiGerlando had named him as the one who shot" the deceased. Petitioner testified, without contradiction, that the "detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime," and that he replied, "I am sorry, but I would like to have advice from my lawyer." A police officer testified that, although petitioner was not formally charged, "he was in custody" and "couldn't walk out the door."

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Shortly after petitioner reached police headquarters, his retained lawyer arrived. The lawyer described the ensuing events in the following terms:

"On that day, I received a phone call [from 'the mother of another defendant'] and, pursuant to that phone call, I went to the Detective Bureau at 11th and State. The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client, Danny Escobedo. . . . Sergeant Pidgeon made a call to the Bureau lockup and informed me that the boy had been taken from the lockup to the Homicide Bureau. This was between 9:30 and 10:00 in the evening. Before I went anywhere, he called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs to the Homicide Bureau. There were several Homicide Detectives around, and I talked to them. I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. . . . The police officer told me to see Chief Flynn, who was on duty. I identified myself to Chief Flynn and asked permission to see my client. He said I could not. . . . I think it was approximately 11:00 o'clock. He said I couldn't see him because they hadn't completed questioning. . . . [F]or a second or two, I spotted him in an office in the Homicide Bureau. The door was open, and I could see through the office. . . . I waved to him and he waved back, and then the door was closed by one of the officers at Homicide. [Footnote 1] There were four or five officers milling

around the Homicide Detail that night. As to whether I talked to Captain Flynn any later that day, I waited around for another hour or two and went back again and renewed by [*sic*] request to see my client. He again told me I could not. . . . I filed an official complaint with Commissioner Phelan of the Chicago Police Department. I had a conversation with every police officer I could find. I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus. I left the Homicide Bureau and from the Detective Bureau at 11th and State at approximately 1:00 A.M. [Sunday morning]. I had no opportunity to talk to my client that night. I quoted to Captain Flynn the Section of the Criminal Code which allows an attorney the right to see his client. [Footnote 2]"

Petitioner testified that, during the course of the interrogation, he repeatedly asked to speak to his lawyer, and that the police said that his lawyer "didn't want to see" him. The testimony of the police officers confirmed these accounts in substantial detail.

Notwithstanding repeated requests by each, petitioner and his retained lawyer were afforded no opportunity to consult during the course of the entire interrogation. At one point, as previously noted, petitioner and his attorney came into each other's view for a few moments, but the attorney was quickly ushered away. Petitioner testified "that he heard a detective telling the attorney the latter would not be allowed to talk to [him] *until they*

were done,'" and that he heard the attorney being refused permission to remain in the adjoining room. A police officer testified that he had told the lawyer that he could not see petitioner until "we were through interrogating" him.

There is testimony by the police that, during the interrogation, petitioner, a 22-year-old of Mexican extraction with no record of previous experience with the police, "was handcuffed" [Footnote 3] in a standing position and that he "was nervous, he had circles under his eyes, and he was upset" and was "agitated" because "he had not slept well in over a week."

It is undisputed that, during the course of the interrogation, Officer Montejano, who "grew up" in petitioner's neighborhood, who knew his family, and who uses "Spanish language in [his] police work," conferred alone with petitioner "for about a quarter of an hour. . . ." Petitioner testified that the officer said to him "in Spanish that my sister and I could go home if I pinned it on Benedict DiGerlando," that

"he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando . . . that we would be able to go home that night."

Petitioner testified that he made the statement in issue because of this assurance. Officer Montejano denied offering any such assurance.

A police officer testified that, during the interrogation, the following occurred:

"I informed him of what DiGerlando told me, and, when I did, he told me that DiGerlando was [lying], and I said, 'Would you care to tell DiGerlando that?' and he said, 'Yes, I will.' So I

brought . . . Escobedo in and he confronted DiGerlando and he told him that he was lying and said, 'I didn't shoot Manuel, you did it.'"

In this way, petitioner for the first time admitted to some knowledge of the crime. After that, he made additional statements further implicating himself in the murder plot. At this point, an Assistant State's Attorney, Theodore J. Cooper, was summoned "to take" a statement. Mr. Cooper, an experienced lawyer who was assigned to the Homicide Division to take "statements from some defendants and some prisoners that they had in custody," "took" petitioner's statement by asking carefully framed questions apparently designed to assure the admissibility into evidence of the resulting answers. Mr. Cooper testified that he did not advise petitioner of his constitutional rights, and it is undisputed that no one during the course of the interrogation so advised him.

Petitioner moved both before and during trial to suppress the incriminating statement, but the motions were denied. Petitioner was convicted of murder, and he appealed the conviction.

The Supreme Court of Illinois, in its original opinion of February 1, 1963, held the statement inadmissible and reversed the conviction. The court said:

"[I]t seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement, and would be granted an immunity from prosecution."

Compare Lynumn v. Illinois, 372 U. S. 528. The State petitioned for, and the court granted, rehearing. The court then affirmed the conviction. It said:

"[T]he

officer denied making the promise and the trier of fact believed him. We find no reason for disturbing the trial court's finding that the confession was voluntary. [Footnote 4]"

28 Ill.2d 41, 45-46, 190 N.E.2d 825, 827. The court also held, on the authority of this Court's decisions in *Crooker v. California*, 357 U. S. 433, and *Cicenia v. Lagay*, 357 U. S. 504, that the confession was admissible even though "it was obtained after he had requested the assistance of counsel, which request was denied." 28 Ill.2d at 46, 190 N.E.2d at 827. We granted a writ of certiorari to consider whether the petitioner's statement was constitutionally admissible at his trial. 375 U.S. 902. We conclude, for the reasons stated below, that it was not and, accordingly, we reverse the judgment of conviction. In *Massiah v. United States*, 377 U. S. 201, this Court observed that

"a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when

legal aid and advice would help him.'"

Id. at 377 U. S. 204, quoting DOUGLAS, J., concurring in *Spano v. New York*, 360 U. S. 315, 360 U. S. 326.

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime."*Spano v New York*, 360 U. S. 315, 360 U. S. 327 (STEWART, J., concurring). Petitioner had become the accused, and the purpose of the interrogation was to "get him" to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told petitioner that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement. [Footnote 5] As this Court observed many years ago:

"It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would

be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally

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arisen, that, by denying there was hope of removing the suspicion from himself."

Bram v. United States, 168 U. S. 532, 168 U. S. 562. Petitioner, a layman, was undoubtedly unaware that, under Illinois law, an admission of "mere" complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots. *Illinois v. Escobedo*, 28 Ill.2d 41, 190 N.E.2d 825. The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation.*Powell v. Alabama*, 287 U. S. 45, 287 U. S. 69. This was the "stage when legal aid and advice" were most critical to petitioner. *Massiah v. United States*, *supra*, at 377 U. S. 204. It was a stage surely as critical as was the arraignment in *Hamilton v. Alabama*,368 U. S. 52, and the preliminary hearing in *White v. Maryland*, 373 U. S. 59. What happened at this interrogation could certainly "affect the whole trial," *Hamilton v. Alabama*, *supra*, at 368 U. S. 54, since rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Ibid.* It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether, at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.

The New York Court of Appeals, whose decisions this Court cited with approval in *Massiah*, 377 U. S. 201, at 377 U. S. 205, has recently recognized that, under circumstances such as those here, no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment. In *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, that court, in an opinion by Judge Fuld, held that a

"confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access

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to him"

could not be used against him in a criminal trial. [Footnote 6] *Id.* at 151, 193 N.E.2d at 629. The court observed that it

"would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police."

Id. at 152, 193 N.E.2d at 629. [Footnote 7]

In *Gideon v. Wainwright*, 372 U. S. 335, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. [Footnote 8] The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation, and the

"right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination."

In re Groban, 352 U.S.

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330, 352 U. S. 344 (BLACK, J., dissenting). [Footnote 9]

"One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'"

Ex parte Sullivan, 107 F.Supp. 514, 517-518.

It is argued that, if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, [Footnote 10] and "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*,338 U. S. 49, 338 U. S. 59 (Jackson, J., concurring in part and dissenting in part). This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and

advice" are surely needed. *Massiah v. United States, supra,* at 377 U. S. 204; *Hamilton v. Alabama, supra; White v. Maryland, supra.* The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. *See* Note, 73 Yale L.J. 1000, 1048-1051 (1964).

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement

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which comes to depend on the "confession" will, in the long run, be less reliable [Footnote 11] and more subject to abuses [Footnote 12] than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

"*[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer — that is, to a confession of guilt. Thus, the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized."

8 Wigmore, Evidence (3d ed.1940), 309. (Emphasis in original.)

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This Court also has recognized that

"history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . ."

Haynes v. Washington, 373 U. S. 503, 373 U. S. 519.

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that, if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. [Footnote 13] If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. [Footnote 14]

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect

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has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright,* 372 U.S. at 372 U. S. 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Crooker v. California, 357 U. S. 433, does not compel a contrary result. In that case, the Court merely rejected the absolute rule sought by petitioner, that

"every state denial of a request to contact counsel [is] an infringement of the constitutional right *without regard to the circumstances of the case.*"

Id. at 357 U. S. 440. (Emphasis in original.) In its place, the following rule was announced:

"[S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . *but also if he is deprived of counsel for any part of the pretrial proceedings*, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice. . . .' The latter determination necessarily depends upon all the circumstances of the case."

357 U.S. at 357 U. S. 439-440. (Emphasis added.) The Court, applying "these principles" to "the sum total of the circumstances [there] during the time petitioner was without counsel," *id.* at 357 U. S. 440, concluded that he had not been fundamentally prejudiced by the denial of his request for counsel. Among the critical circumstances which distinguish that case from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and

not to "say anything" in response to the questions, *id.* at 357 U. S. 437, and that petitioner there, but not here, was a well educated man who had studied criminal law while attending law school for a year. The Court's opinion in *Cicenia v. Lagay*,357 U. S. 504, decided the same day, merely said that the "contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker v. California*. . . ." That case adds nothing, therefore, to *Crooker.* In any event, to the extent that *Cicenia* or *Crooker* may be inconsistent with the principles announced today, they are not to be regarded as controlling. [Footnote 15]

Nothing we have said today affects the powers of the police to investigate "an unsolved crime," *Spano v. New York*, 360 U. S. 315, 360 U. S. 327 (STEWART, J., concurring), by gathering information from witnesses and by other "proper investigative efforts." *Haynes v. Washington*, 373 U. S. 503, 373 U. S. 519. We hold only that, when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.

The judgment of the Illinois Supreme Court is reversed, and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

[Footnote 1]

Petitioner testified that this ambiguous gesture "could have meant most anything," but that he "took it upon [his] own to think that [the lawyer was telling him] not to say anything," and that the lawyer "wanted to talk" to him.

[Footnote 2]

The statute then in effect provided in pertinent part that:

"All public officers . . . having the custody of any person . . . restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney . . . whom such person . . . may desire to see or consult. . . ."

Ill.Rev.Stat. (1959), c. 38, § 477. Repealed as of Jan. 1, 1964, by Act approved Aug. 14, 1963, H.B. No. 851.

[Footnote 3]

The trial judge justified the handcuffing on the ground that it "is ordinary police procedure."

[Footnote 4]

Compare Haynes v. Washington, 373 U. S. 503, 373 U. S. 515 (decided on the same day as the decision of the Illinois Supreme Court here), where we said:

"Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue."

"It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, *see, e.g., Ashcraft v. Tennessee*, 322 U. S. 143, 322 U. S. 147-148; 'we cannot escape the responsibility of making our own examination of the record,' *Spano v. New York*, 360 U. S. 315, 360 U. S. 316."

(Emphasis in original.)

[Footnote 5]

Although there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets.

[Footnote 6]

The English Judges' Rules also recognize that a functional, rather than a formal, test must be applied, and that, under circumstances such as those here, no special significance should be attached to formal indictment. The applicable Rule does not permit the police to question an accused, except in certain extremely limited situations not relevant here, at any time after the defendant "has been charged *or informed that he my be prosecuted.*" [1964] Crim.L.Rev. 166-170 (emphasis supplied). Although voluntary statements obtained in violation of these rules are not automatically excluded from evidence, the judge may, in the exercise of his discretion, exclude them.

"Recent cases suggest that perhaps the judges have been tightening up, [and, almost] inevitably, the effect of the new Rules will be to stimulate this tendency."

Id. at 182.

[Footnote 7]

Canon 9 of the American Bar Association's Canon of Professional Ethics provides that:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

See Broeder, *Wong Sun v. United States:* A Study in Faith and Hope, 42 Neb.L.Rev. 483, 599-604.

[Footnote 8]

Twenty-two States, including Illinois, urged us so to hold.

[Footnote 9]

The Soviet criminal code does not permit a lawyer to be present during the investigation. The Soviet trial has thus been aptly described as "an appeal from the pretrial investigation." Feifer, Justice in Moscow (1964), 86.

[Footnote 10]

See Barrett, Police Practices and the Law — From Arrest to Release or Charge, 50 Cal.L.Rev. 11, 43 (1962).

[Footnote 11]

See Committee Print, Subcommittee to Investigate Administration of the Internal Security Act, Senate Committee on the Judiciary, 85th Cong., 1st Sess., reporting and analyzing the proceedings at the XXth Congress of the Communist Party of the Soviet Union, February 25, 1956, exposing the false confessions obtained during the Stalin purges of the 1930's. *See also Miller v. United States*, 320 F.2d 767, 772-773 (opinion of Chief Judge Bazelon); Lifton, Thought Reform and the Psychology of Totalism (1961); Rogge, Why Men Confess (1959); Schein, Coercive Persuasion (1961).

[Footnote 12]

See Stephen, History of the Criminal Law, quoted in 8 Wigmore, Evidence (3d ed.1940), 312; Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, District of Columbia (1962).

[Footnote 13]

Cf. Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), 10-11:

"The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. . . . Persons [denied access to counsel] are incapable of providing the challenges that are indispensable to satisfactory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. It is also clear that a situation in which persons are

required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity. Beyond these considerations, however, is the fact that [this situation is] detrimental to the proper functioning of the system of justice, and that the loss in vitality of the adversary system thereby occasioned significantly endangers the basic interests of a free community."

[Footnote 14]

The accused may, of course, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial.*See Johnson v. Zerbst*, 304 U. S. 458. But no knowing and intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case.

[Footnote 15]

The authority of *Cicenia v. Lagay*, 357 U. S. 504, and *Crooker v. California*, 357 U. S. 433, was weakened by the subsequent decisions of this Court in *Hamilton v. Alabama*, 368 U. S. 52, *White v. Maryland*, 373 U. S. 59, and *Massiah v. United States*,377 U. S. 201 (as the dissenting opinion in the last-cited case recognized).

MR. JUSTICE HARLAN, dissenting.

I would affirm the judgment of the Supreme Court of Illinois on the basis of *Cicenia v. Lagay*, 357 U. S. 504,

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decided by this Court only six years ago. Like my Brother WHITE, *post*, p. 378 U. S. 495, I think the rule announced today is most ill-conceived, and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement.

MR. JUSTICE STEWART, dissenting.

I think this case is directly controlled by *Cicenia v. Lagay*, 357 U. S. 504, and I would therefore affirm the judgment.

Massiah v. United States, 377 U. S. 201, is not in point here. In that case, a federal grand jury had indicted Massiah. He had retained a lawyer and entered a formal plea of not guilty. Under our system of federal justice, an indictment and arraignment are followed by a trial, at which the Sixth Amendment guarantees the defendant the assistance of counsel. * But Massiah was released on bail, and thereafter agents of the Federal Government deliberately elicited incriminating statements from him in the absence of his lawyer. We held that the use of these statements against him at his trial denied him the basic protections of the Sixth Amendment guarantee. Putting to one side the fact that the case now before us is not a federal case, the vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and Massiah's, with the bland assertion that "that fact should make no difference."*Ante*, p. 378 U. S. 485.

It is "that fact," I submit, which makes all the difference. Under our system of criminal justice, the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the

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point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial. Among those guarantees are the right to a speedy trial, the right of confrontation, and the right to trial by jury. Another is the guarantee of the assistance of counsel. *Gideon v. Wainwright*, 372 U. S. 335; *Hamilton v. Alabama*,368 U. S. 52; *White v. Maryland*, 373 U. S. 59.

The confession which the Court today holds inadmissible was a voluntary one. It was given during the course of a perfectly legitimate police investigation of an unsolved murder. The Court says that what happened during this investigation "affected" the trial. I had always supposed that the whole purpose of a police investigation of a murder was to "affect" the trial of the murderer, and that it would be only an incompetent, unsuccessful, or corrupt investigation which would not do so. The Court further says that the Illinois police officers did not advise the petitioner of his "constitutional rights" before he confessed to the murder. This Court has never held that the Constitution requires the police to give any "advice" under circumstances such as these.

Supported by no stronger authority than its own rhetoric, the Court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial. It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, I think the Court perverts those precious constitutional

guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation.

Like my Brother CLARK, I cannot escape the logic of my Brother WHITE's conclusions as to the extraordinary implications which emanate from the Court's opinion in

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this case, and I share their views as to the untold and highly unfortunate impact today's decision may have upon the fair administration of criminal justice. I can only hope we have completely misunderstood what the Court has said.

* "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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

In *Massiah v. United States*, 377 U. S. 201, the Court held that, as of the date of the indictment, the prosecution is dissentitled to secure admissions from the accused. The Court now moves that date back to the time when the prosecution begins to "focus" on the accused. Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, *cf. Gideon v. Wainwright*, 372 U. S. 335; *Griffin v. Illinois*, 351 U. S. 12; *Douglas v. California*, 372 U. S. 353, or has asked to consult with counsel in the course of interrogation. *Cf. Carnley v. Cochran*, 369 U. S. 506. At the very least, the Court holds that, once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. The decision is thus another major step in the direction of the goal which the Court seemingly has in mind — to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not. It does, of course, put us one step "ahead" of the English judges who have had the good sense to leave the matter a discretionary one with the trial court.* I reject this step and

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the invitation to go farther which the Court has now issued.

By abandoning the voluntary-involuntary test for admissibility of confessions, the Court seems driven by the notion that it is uncivilized law enforcement to use an accused's own admissions against him at his trial. It attempts to find a home for this new and nebulous rule of due process by attaching it to the right to counsel guaranteed in the federal system by the Sixth Amendment and binding upon the States by virtue of the due process guarantee of the Fourteenth Amendment.*Gideon v. Wainwright, supra*. The right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial, but stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment, apparently his right to counsel attaches, a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side. I would not abandon the Court's prior cases defining with some care and analysis the circumstances requiring the presence or aid of counsel and substitute the amorphous and wholly unworkable principle that counsel is constitutionally required whenever he would or could be helpful. *Hamilton v. Alabama*, 368 U. S. 52; *White v. Maryland*, 373 U. S. 59; *Gideon v.*

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Wainwright, supra. These cases dealt with the requirement of counsel at proceedings in which definable rights could be won or lost, not with stages where probative evidence might be obtained. Under this new approach, one might just as well argue that a potential defendant is constitutionally entitled to a lawyer before, not after, he commits a crime, since it is then that crucial incriminating evidence is put within the reach of the Government by the would-be accused. Until now, there simply has been no right guaranteed by the Federal Constitution to be free from the use at trial of a voluntary admission made prior to indictment.

It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. *Malloy v. Hogan*, 378 U. S. 1. That amendment addresses itself to the very issue of incriminating admissions of an accused and resolves it by proscribing only compelled statements. Neither the Framers, the constitutional language, a century of decisions of this Court, nor Professor Wigmore provides an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion — the constitutional right not to incriminate himself by making voluntary disclosures.

Today's decision cannot be squared with other provisions of the Constitution which, in my view, define the system of criminal justice this Court is empowered to administer. The Fourth Amendment permits upon probable cause even compulsory searches of the suspect and his possessions and the use of the fruits of the search at trial, all in the absence of counsel. The Fifth Amendment and state constitutional provisions authorize, indeed require, inquisitorial grand jury proceedings at which a potential defendant, in the absence of counsel,

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is shielded against no more than compulsory incrimination. *Mulloney v. United States*, 79 F.2d 566, 578 (C.A. 1st Cir.); *United States v. Benjamin*, 120 F.2d 521, 522 (C.A.2d Cir.); *United States v. Scully*, 225 F.2d 113, 115 (C.A.2d Cir.); *United States v. Gilboy*, 160 F.Supp. 442 (D.C.M.D.Pa.). A grand jury witness, who may be a suspect, is interrogated and his answers, at least until today, are admissible in evidence at trial. And these provisions have been thought of as constitutional safeguards to persons suspected of an offense. Furthermore, until now, the Constitution has permitted the accused to be fingerprinted and to be identified in a lineup or in the courtroom itself.

The Court chooses to ignore these matters, and to rely on the virtues and morality of a system of criminal law enforcement which does not depend on the "confession." No such judgment is to be found in the Constitution. It might be appropriate for a legislature to provide that a suspect should not be consulted during a criminal investigation; that an accused should never be called before a grand jury to answer, even if he wants to, what may well be incriminating questions, and that no person, whether he be a suspect, guilty criminal or innocent bystander, should be put to the ordeal of responding to orderly noncompulsory inquiry by the State. But this is not the system our Constitution requires. The only "inquisitions" the Constitution forbids are those which compel incrimination. Escobedo's statements were not compelled, and the Court does not hold that they were.

This new American judges' rule, which is to be applied in both federal and state courts, is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent, it reflects a deep-seated distrust of law enforcement officers everywhere, unsupported by relevant data or current material based upon our own

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experience. Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.

The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all, the Court characteristically and properly looks very closely at the surrounding circumstances. *See Ward v. Texas*,316 U. S. 547; *Haley v. Ohio*, 332 U. S. 596; *Payne v. Arkansas*, 356 U. S. 560. I would continue to do so. But, in this case, Danny Escobedo knew full well that he did not have to answer, and knew full well that his lawyer had advised him not to answer.

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled, and its task made a great deal more difficult, all, in my opinion, for unsound, unstated reasons which can find no home in any of the provisions of the Constitution.

*

"[I]t seems from reported cases that the judges have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody. . . . A traditional principle of 'fairness' to criminals, which has quite possibly lost some of the reason for its existence, is maintained in words while it is disregarded in fact. . . ."

"The reader may be expecting at this point a vigorous denunciation of the police and of the judges, and a plea for a return to the Judges' Rules as interpreted in 1930. What has to be considered, however, is whether these Rules are a workable part of the machinery of justice. Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon the activities of the police in bringing criminals to book."

Williams, Questioning by the Police: Some Practical Considerations, [1960] Crim.L.Rev. 325, 331-332. *See also* [1964] Crim.L.Rev. 161-182.

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8.5: Montejo v. Louisiana 556 US 778 (2009)

OCTOBER TERM, 2008
MONTEJO V. LOUISIANA SUPREME COURT OF THE UNITED STATES

MONTEJO *v*. LOUISIANA

certiorari to the supreme court of louisiana

No. 07–1529. Argued January 13, 2009—Decided May 26, 2009

At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda* v. *Arizona*, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan* v. *Jackson*, 475 U. S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*'s prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Held:

1. *Michigan* v. *Jackson* should be and now is overruled. Pp. 3–18.

(a) The State Supreme Court's interpretation of *Jackson* would lead to practical problems. Requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption, as the court below did, might work in States that require an indigent defendant formally to request counsel before an appointment is made, but not in more than half the States, which appoint counsel without request from the defendant. Pp. 3–6.

(b) On the other hand, Montejo's solution is untenable as a theoretical and doctrinal matter. Eliminating the invocation requirement entirely would depart fundamentally from the rationale of *Jackson*, whose presumption was created by analogy to a similar prophylactic rule established in *Edwards* v. *Arizona*, 451 U. S. 477, to protect the Fifth Amendment-based *Miranda* right. Both *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about the right to counsel once they have invoked it, but a defendant who never asked for counsel has not yet made up his mind in the first instance. Pp. 6–13.

(c) *Stare decisis* does not require the Court to expand significantly the holding of a prior decision in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it.*Payne* v. *Tennessee*, 501 U. S. 808, 827. Beyond workability, the relevant factors include the precedent's antiquity, the reliance interests at stake, and whether the decision was well reasoned. *Pearson* v. *Callahan*, 555 U. S. ___, ___. The first two cut in favor of jettisoning *Jackson:* the opinion is only two decades old, and eliminating it would not upset expectations, since any criminal defendant learned enough to order his affairs based on *Jackson*'s rule would also be perfectly capable of interacting with the police on his own. As for the strength of *Jackson*'s reasoning, when this Court creates a prophylactic rule to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. *Jackson*'s marginal benefits are dwarfed by its substantial costs. Even without *Jackson*, few badgering-induced waivers, if any, would be admitted at trial because the Court has taken substantial other, overlapping measures to exclude them. Under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. 384 U. S., at 474. Under *Edwards*, once such a defendant "has invoked his *[Miranda]* right," interrogation must stop. 451 U. S., at 484. And under *Minnick* v. *Mississippi*, 498 U. S. 146, no subsequent interrogation may take place until counsel is present. *Id.*, at 153. These three layers of prophylaxis are sufficient. On the other side of the equation, the principal cost of applying *Jackson*'s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions. The Court concludes that the *Jackson* rule does not "pay its way," *United States* v. *Leon*, 468 U. S. 897, 907–908, n. 6, and thus the case should be overruled. Pp. 13–18.

2. Montejo should nonetheless be given an opportunity to contend that his letter of apology should have been suppressed under the *Edwards* rule. He understandably did not pursue an *Edwards* objection, because *Jackson* offered broader protections, but the decision here changes the legal landscape. Pp. 18–19.

06–1807 (La.), 974 So. 2d 1238, vacated and remanded.

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Alito, J., filed a concurring opinion, in which Kennedy, J., joined. Stevens, J., filed a dissenting opinion, in which Souter and Ginsburg, JJ., joined, and in which Breyer, J., joined, except for n. 5. Breyer, J., filed a dissenting opinion.

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CHAPTER OVERVIEW

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9.1: Dred Scott v. Sandford – 60 US 393 (1856)

U.S. Supreme Court

Scott v. Sandford, 60 U.S. 19 How. 393 393 (1856)

Scott v. Sandford

60 U.S. (19 How.) 393

I

1. Upon a writ of error to a Circuit Court of the United States, the transcript of the record of all the proceedings in the case is brought before the court, and is open to inspection and revision.

2. When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor — if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before this court, although it was in favor of the plaintiff — and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the Circuit Court to dismiss the case for want of jurisdiction.

3. In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction — and if this does not appear, and the judgment must be reversed by this court — and the parties cannot be consent waive the objection to the jurisdiction of the Circuit Court.

4. A free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a "citizen" within the meaning of the Constitution of the United States.

5. When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its "people or citizens." Consequently, the special rights and immunities guarantied to citizens do not apply to them. And not being "citizens" within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.

6. The only two clauses in the Constitution which point to this race treat them as persons whom it was morally lawfully to deal in as articles of property and to hold as slaves.

7. Since the adoption of the Constitution of the United States, no State can by any subsequent law make a foreigner or any other description of persons citizens of the United States, nor entitle them to the rights and privileges secured to citizens by that instrument.

8. A State, by its laws passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon a footing with its own citizens as to all the rights and privileges enjoyed by them within its dominion and by its laws. But that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor to any of the privileges and immunities of a citizen in another State.

9. The change in public opinion and feeling in relation to the African race which has taken place since the adoption of the Constitution cannot change its construction and meaning, and it must be construed and administered now according to its true meaning and intention when it was formed and adopted.

10. The plaintiff having admitted, by his demurrer to the plea in abatement, that his ancestors were imported from Africa and sold as slaves, he is not a citizen of the State of Missouri according to the Constitution of the United States, and was not entitled to sue in that character in the Circuit Court.

11. This being the case, the judgment of the court below in favor of the plaintiff on the plea in abatement was erroneous.

II

1. But if the plea in abatement is not brought up by this writ of error, the objection to the citizenship of the plaintiff is still apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken by their owner to reside in a Territory where slavery is prohibited by act of

Congress, and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the State of Illinois, and being free when he was brought back to Missouri, he was, by the laws of that State, a citizen.

2. If, therefore, the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen," and the judgment of the Circuit Court was erroneous on that ground also, without any reference to the plea in abatement.

3. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed.

The case of *Capron v. Van Noorden,* 2 Cranch 126, examined, and the principles thereby decided reaffirmed.

4. When the record, as brought here by writ of error, does not show that the Circuit Court had jurisdiction, this court has jurisdiction to review and correct the error like any other error in the court below. It does not and cannot dismiss the case for want of jurisdiction here, for that would leave the erroneous judgment of the court below in full force, and the party injured without remedy. But it must reverse the judgment and, as in any other case of reversal, send a mandate to the Circuit Court to conform its judgment to the opinion of this court.

5. The difference of the jurisdiction in this court in the cases of writs of error to State courts and to Circuit Courts of the United States pointed out, and the mistakes made as to the jurisdiction of this court in the latter case by confounding it with its limited jurisdiction in the former.

6. If the court reverses a judgment upon the ground that it appears by a particular part of the record that the Circuit Court had not jurisdiction, it does not take away the jurisdiction of this court to examine into and correct, by a reversal of the judgment, any other errors, either as to the jurisdiction or any other matter, where it appears from other parts of the record that the Circuit Court had fallen into error. On the contrary, it is the daily and familiar practice of this court to reverse on several grounds where more than one error appears to have been committed. And the error of a Circuit Court in its jurisdiction stands on the same ground, and is to be treated in the same manner as any other error upon whish its judgment is founded.

7. The decision, therefore, that the judgment of the Circuit Court upon the plea in abatement is erroneous is no reason why the alleged error apparent in the exception should not also be examined, and the judgment reversed on that ground also, if it discloses a want of jurisdiction in the Circuit Court.

8. It is often the duty of this court, after having decided that a particular decision of the Circuit Court was erroneous, to examine into other alleged errors and to correct them if they are found to exist. And this has been uniformly done by this court when the questions are in any degree connected with the controversy and the silence of the court might create doubts which would lead to further useless litigation.

III

1. The facts upon which the plaintiff relies did not give him his freedom and make him a citizen of Missouri.

2. The clause in the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States applies only to territory within the chartered limits of some one of the States when they were colonies of Great Britain, and which was surrendered by the British Government to the old Confederation of the States in the treaty of peace. It does not apply to territory acquired by the present Federal Government by treaty or conquest from a foreign nation.

3. The United States, under the present Constitution, cannot acquire territory to be held as a colony, to be governed at its will and pleasure. But it may acquire territory which, at the time, has not a population that fits it to become a State, and may govern it as a Territory until it has a population which, in the judgment of Congress, entitled it to be admitted as a State of the Union.

4. During the time it remains a Territory, Congress may legislate over it within the scope of its constitutional powers in relation to citizens of the United States, and may establish a Territorial Government, and the form of the local Government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States in respect to the rights of persons or rights of property.

IV

1. The territory thus acquired is acquired by the people of the United States for their common and equal benefit through their agent and trustee, the Federal Government. Congress can exercise no power over the rights of persons or property of a citizen in the Territory which is prohibited by the Constitution. The Government and the citizen, whenever the Territory is open to settlement, both enter it with their respective rights defined and limited by the Constitution.

2. Congress have no right to prohibit the citizens of any particular State or States from taking up their home there while it permits citizens of other States to do so. Nor has it a right to give privileges to one class of citizens which it refuses to another. The territory is acquired for their equal and common benefit, and if open to any, it must be open to all upon equal and the same terms.

3. Every citizen has a right to take with him into the Territory any article of property which the Constitution of the United States recognises as property.

4. The Constitution of the United States recognises slaves as property, and pledges the Federal Government to protect it. And Congress cannot exercise any more authority over property of that description than it may constitutionally exercise over property of any other kind.

5. The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the Territory in question to reside is an exercise of authority over private property which is not warranted by the Constitution, and the removal of the plaintiff by his owner to that Territory gave him no title to freedom.

V

1. The plaintiff himself acquired no title to freedom by being taken by his owner to Rock Island, in Illinois, and brought back to Missouri. This court has heretofore decided that the *status* or condition of a person of African descent depended on the laws of the State in which he resided.

2. It has been settled by the decisions of the highest court in Missouri that, by the laws of that State, a slave does not become entitled to his freedom where the owner takes him to reside in a State where slavery is not permitted and afterwards brings him back to Missouri.

Conclusion. It follows that it is apparent upon the record that the court below erred in its judgment on the plea in abatement, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States. And the Circuit Court had no jurisdiction, either in the cases stated in the plea in abatement or in the one stated in the exception, its judgment in favor of the defendant is erroneous, and must be reversed.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county (State court), where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

The declaration of Scott contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children.

Sandford appeared, and filed the following plea:

“DRED SCOTT)”

“v.) Plea to the Jurisdiction of the Court.”

“JOHN F. A. SANDFORD)”

“*APRIL TERM, 1854.*”

“And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action and each and every of them (if any such have accrued to the said Dred Scott) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of

the courts of the State of Missouri, for that, to-wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

"JOHN F. A. SANDFORD"

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave judgment that the demurrer should be sustained.

In May, 1854, the defendant, in pursuance of an agreement between counsel, and with the leave of the court, pleaded in bar of the action:

1. Not guilty.

2. That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do.

3. That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner and in virtue of the same legal right.

In the first of these pleas, the plaintiff joined issue, and to the second and third filed replications alleging that the defendant, of his own wrong and without the cause in his second and third pleas alleged, committed the trespasses, &c.

The counsel then filed the following agreed statement of facts, *viz:*

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. I n that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States.

In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times.

Further proof may be given on the trial for either party.

It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county; that there was a verdict and judgment in his favor; that, on a writ of error to the Supreme Court, the judgment below was reversed, and the same remanded to

the Circuit Court, where it has been continued to await the decision of this case.

In May, 1854, the cause went before a jury, who found the following verdict, *viz:*

"As to the first issue joined in this case, we of the jury find the defendant not guilty; and as to the issue secondly above joined, we of the jury find that before and at the time when, &c., in the first count mentioned, the said Dred Scott was a negro slave, the lawful property of the defendant; and as to the issue thirdly above joined, we, the jury, find that before and at the time when, &c., in the second and third counts mentioned, the said Harriet, wife of said Dred Scott, and Eliza and Lizzie, the daughters of the said Dred Scott, were negro slaves, the lawful property of the defendant."

Whereupon, the court gave judgment for the defendant.

After an ineffectual motion for a new trial, the plaintiff filed the following bill of exceptions.

On the trial of this cause by the jury, the plaintiff, to maintain the issues on his part, read to the jury the following agreed statement of facts, (*see* agreement above.) No further testimony was given to the jury by either party. Thereupon the plaintiff moved the court to give to the jury the following instruction, *viz:*

"That, upon the facts agreed to by the parties, they ought to find for the plaintiff. The court refused to give such instruction to the jury, and the plaintiff, to such refusal, then and there duly excepted."

The court then gave the following instruction to the jury, on motion of the defendant:

"The jury are instructed, that upon the facts in this case, the law is with the defendant."

The plaintiff excepted to this instruction.

Upon these exceptions, the case came up to this court.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been twice argued. After the argument at the last term, differences of opinion were found to exist among the members of the court, and as the questions in controversy are of the highest importance, and the court was at that time much pressed by the ordinary business of the term, it was deemed advisable to continue the case and direct a re-argument on some of the points in order that we might have an opportunity of giving to the whole subject a more deliberate consideration. It has accordingly been again argued by counsel, and considered by the court; and I now proceed to deliver its opinion.

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us, and that, as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error, and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court.

But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

In these last-mentioned courts, where their character and rank are analogous to that of a Circuit Court of the United States — in other words, where they are what the law terms courts of general jurisdiction — they are presumed to have jurisdiction unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true by a jury, or admitted to be true by the plaintiff, the jurisdiction cannot be disputed in an appellate court.

Now it is not necessary to inquire whether, in courts of that description, a party who pleads over in bar when a plea to the jurisdiction has been ruled against him does or does not waive his plea, nor whether, upon a judgment in his favor on the pleas in bar and a writ of error brought by the plaintiff, the question upon the plea in abatement would be open for revision in the appellate court. Cases that may have been decided in such courts, or rules that may have been laid down by common law pleaders, can have no influence in the decision in this court. Because, under the Constitution and laws of the United States, the rules which govern the pleadings in its courts in questions of jurisdiction stand on different principles, and are regulated by different laws.

This difference arises, as we have said, from the peculiar character of the Government of the United States. For although it is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it, and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution. And in regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined, and they are not authorized to take cognizance of any case which does not come within the description therein specified. Hence, when a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common law English or State court, unless the contrary appeared. But the record, when it comes before the appellate court, must show affirmatively that the inferior court had authority under the Constitution to hear and determine the case. And if the plaintiff claims a right to sue in a Circuit Court of the United States under that provision of the Constitution which gives jurisdiction in controversies between citizens of different States, he must distinctly aver in his pleading that they are citizens of different States, and he cannot maintain his suit without showing that fact in the pleadings.

This point was decided in the case of *Bingham v. Cabot,* in 3 Dall. 382, and ever since adhered to by the court. And in *Jackson v. Ashton,* 8 Pet. 148, it was held that the objection to which it was open could not be waived by the opposite party, because consent of parties could not give jurisdiction.

It is needless to accumulate cases on this subject. Those already referred to, and the cases of *Capron v. Van Noorden*, in 2 Cr. 126, and *Montalet v. Murray,* 4 Cr. 46, are sufficient to show the rule of which we have spoken. The case of *Capron v. Van Noorden* strikingly illustrates the difference between a common law court and a court of the United States.

If, however, the fact of citizenship is averred in the declaration, and the defendant does not deny it and put it in issue by plea in abatement, he cannot offer evidence at the trial to disprove it, and consequently cannot avail himself of the objection in the appellate court unless the defect should be apparent in some other part of the record. For if there is no plea in abatement, and the want of jurisdiction does not appear in any other part of the transcript brought up by the writ of error, the undisputed averment of citizenship in the declaration must be taken in this court to be true. In this case, the citizenship is averred, but it is denied by the

defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

We think they are before us. The plea in abatement and the judgment of the court upon it are a part of the judicial proceedings in the Circuit Court and are there recorded as such, and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of the *United States v. Smith,* 11 Wheat. 171, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration, and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word “citizen” is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments as much so as if an ocean had separated the red man from the white, and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States, and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they

were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And, for the same reason, it cannot introduce any person or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons who were, at the time of the adoption of the Constitution, recognised as citizens in the several States became also citizens of this new political body, but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State whose rights and liberties had been outraged by the English Government, and who declared their independence and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them, one being still a large slaveholding State and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, ch. 13, s. 5, passed a law declaring

“that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court where such marriage so happens shall think fit, to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid with any negro or mulatto, such white man or white woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid.”

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled “An act for the better preventing of a spurious and mixed issue,” &c., and it provides, that

“if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted.”

And

"that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information."

We give both of these laws in the words used by the respective legislative bodies because the language in which they are framed, as well as the provisions contained in them, show, too plainly to be misunderstood the degraded condition of this unhappy race. They were still in force when the Revolution began, and are a faithful index to the state of feeling towards the class of persons of whom they speak, and of the position they occupied throughout the thirteen colonies, in the eyes and thoughts of the men who framed the Declaration of Independence and established the State Constitutions and Governments. They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma of the deepest degradation was fixed upon the whole race.

We refer to these historical facts for the purpose of showing the fixed opinions concerning that race upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States as to the rights of man and the rights of the people was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that,

"[w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men — high in literary acquirements, high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others, and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States — that is to say, by those who were members of the different political communities in the several States — and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show conclusively that neither the description of persons therein referred to nor their descendants were embraced in any of the other provisions of the Constitution, for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true that, in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence, and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race, but because it was discovered from experience that slave labor was unsuited to the climate and productions of these States, for some of the States where it had ceased or nearly ceased to exist were actively engaged in the slave trade, procuring cargoes on the coast of Africa and transporting them for sale to those parts of the Union where their labor was found to be profitable and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form — that is, in the seizure and transportation — the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer in support of this proposition to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted and some since the Government went into operation.

We need not refer on this point particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.

And as long ago as 1822, the Court of Appeals of Kentucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States, and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meigs's Tenn.Reports, 331.

And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.

Thus, Massachusetts, in 1786, passed a law similar to the colonial one of which we have spoken. The law of 1786, like the law of 1705, forbids the marriage of any white person with any negro, Indian, or mulatto, and inflicts a penalty of fifty pounds upon anyone who shall join them in marriage, and declares all such marriage absolutely null and void, and degrades thus the unhappy issue of the marriage by fixing upon it the stain of bastardy. And this mark of degradation was renewed, and again impressed upon the race, in the careful and deliberate preparation of their revised code published in 1836. This code forbids any person from joining in marriage any white person with any Indian, negro, or mulatto, and subjects the party who shall offend in this respect to imprisonment not exceeding six months in the common jail or to hard labor, and to a fine of not less than fifty nor more than two hundred dollars, and, like the law of 1786, it declares the marriage to be absolutely null and void. It will be seen that the punishment is increased by the code upon the person who shall marry them, by adding imprisonment to a pecuniary penalty.

So, too, in Connecticut. We refer more particularly to the legislation of this State, because it was not only among the first to put an end to slavery within its own territory, but was the first to fix a mark of reprobation upon the African slave trade. The law last mentioned was passed in October, 1788, about nine months after the State had ratified and adopted the present Constitution of the United States, and, by that law, it prohibited its own citizens, under severe penalties, from engaging in the trade, and declared all policies of insurance on the vessel or cargo made in the State to be null and void. But up to the time of the adoption of the Constitution, there is nothing in the legislation of the State indicating any change of opinion as to the relative rights and position of the white and black races in this country, or indicating that it meant to place the latter, when free, upon a level with its citizens. And certainly nothing which would have led the slaveholding States to suppose that Connecticut designed to claim for them, under the new Constitution, the equal rights and privileges and rank of citizens in every other State.

The first step taken by Connecticut upon this subject was as early as 1774, wen it passed an act forbidding the further importation of slaves into the State. But the section containing the prohibition is introduced by the following preamble:

"And whereas the increase of slaves in this State is injurious to the poor, and inconvenient."

This recital would appear to have been carefully introduced in order to prevent any misunderstanding of the motive which induced the Legislature to pass the law, and places it distinctly upon the interest and convenience of the white population — excluding the inference that it might have been intended in any degree for the benefit of the other.

And in the act of 1784, by which the issue of slaves born after the time therein mentioned were to be free at a certain age, the section is again introduced by a preamble assigning a similar motive for the act. It is in these words:

"Whereas sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals, and the public safety and welfare"

— showing that the right of property in the master was to be protected, and that the measure was one of policy, and to prevent the injury and inconvenience to the whites of a slave population in the State.

And still further pursuing its legislation, we find that, in the same statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian, or mulatto servant who was found wandering out of the town or place to which he belonged without a written pass such as is therein described was made liable to be seized by anyone, and taken before the next authority to be examined and delivered up to his master — who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides that if any free negro shall travel without such pass, and shall be stopped, seized, or taken up, he shall pay all charges arising thereby. And this law was in full operation when the Constitution of the United States was adopted, and was not repealed till 1797. So that, up to that time, free negroes and mulattoes were associated with servants and slaves in the police regulations established by the laws of the State.

And again, in 1833, Connecticut passed another law which made it penal to set up or establish any school in that State for the instruction of persons of the African race not inhabitants of the State, or to instruct or teach in any such school or institution, or

board or harbor for that purpose, any such person without the previous consent in writing of the civil authority of the town in which such school or institution might be.

And it appears by the case of *Crandall v. The State*, reported in 10 Conn. Rep. 340, that upon an information filed against Prudence Crandall for a violation of this law, one of the points raised in the defence was that the law was a violation of the Constitution of the United States, and that the persons instructed, although of the African race, were citizens of other States, and therefore entitled to the rights and privileges of citizens in the State of Connecticut. But Chief Justice Dagget, before whom the case was tried, held that persons of that description were not citizens of a State, within the meaning of the word citizen in the Constitution of the United States, and were not therefore entitled to the privileges and immunities of citizens in other States.

The case was carried up to the Supreme Court of Errors of the State, and the question fully argued there. But the case went off upon another point, and no opinion was expressed on this question.

We have made this particular examination into the legislative and judicial action of Connecticut because, from the early hostility it displayed to the slave trade on the coast of Africa, we may expect to find the laws of that State as lenient and favorable to the subject race as those of any other State in the Union, and if we find that, at the time the Constitution was adopted, they were not even there raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank anywhere else.

A brief notice of the laws of two other States, and we shall pass on to other considerations.

By the laws of New Hampshire, collected and finally passed in 1815, no one was permitted to be enrolled in the militia of the State but free white citizens, and the same provision is found in a subsequent collection of the laws made in 1855. Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it.

Again, in 1822, Rhode Island, in its revised code, passed a law forbidding persons who were authorized to join persons in marriage from joining in marriage any white person with any negro, Indian, or mulatto, under the penalty of two hundred dollars, and declaring all such marriages absolutely null and void, and the same law was again reenacted in its revised code of 1844. So that, down to the last-mentioned period, the strongest mark of inferiority and degradation was fastened upon the African race in that State.

It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court the various laws, marking the condition of this race which were passed from time to time after the Revolution and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries (published in 1848, 2 vol., 258, note b) that in no part of the country except Maine did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

The legislation of the States therefore shows in a manner not to be mistaken the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards, throughout the thirteen States by which that instrument was framed, and it is hardly consistent with the respect due to these States to suppose that they regarded at that time as fellow citizens and members of the sovereignty, a class of beings whom they had thus stigmatized, whom, as we are bound out of respect to the State sovereignties to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation, or, that, when they met in convention to form the Constitution, they looked upon them as a portion of their constituents or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights and privileges and rank, in the new political body throughout the Union which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were

recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish an uniform rule of naturalization is, by the well understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen anyone born in the United States who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class. And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much more important power — that is, the power of transforming into citizens a numerous class of persons who, in that character, would be much more dangerous to the peace and safety of a large portion of the Union than the few foreigners one of the States might improperly naturalize. The Constitution upon its adoption obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States anyone, no matter where he was born or what might be his character or condition, and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.

A clause similar to the one in the Constitution in relation to the rights and immunities of citizens of one State in the other States was contained in the Articles of Confederation. But there is a difference of language which is worthy of note. The provision in the Articles of Confederation was

“that the *free inhabitants* of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States.”

It will be observed that, under this Confederation, each State had the right to decide for itself, and in its own tribunals, whom it would acknowledge as a free inhabitant of another State. The term *free inhabitant*, in the generality of its terms, would certainly include one of the African race who had been manumitted. But no example, we think, can be found of his admission to all the privileges of citizenship in any State of the Union after these Articles were formed, and while they continued in force. And, notwithstanding the generality of the words “free inhabitants,” it is very clear that, according to their accepted meaning in that day, they did not include the African race, whether free or not, for the fifth section of the ninth article provides that Congress should have the power

“to agree upon the number of land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of *white* inhabitants in such State, which requisition should be binding.”

Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject — the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words “free inhabitants,” in the preceding article, to whom privileges and immunities were so carefully secured in every State.

But although this clause of the Articles of Confederation is the same in principle with that inserted in the Constitution, yet the comprehensive word *inhabitant,*which might be construed to include an emancipated slave, is omitted, and the privilege is confined to *citizens* of the State. And this alteration in words would hardly have been made unless a different meaning was intended to be conveyed or a possible doubt removed. The just and fair inference is that as this privilege was about to be placed under the protection of the General Government, and the words expounded by its tribunals, and all power in relation to it taken from the State and its courts, it was deemed prudent to describe with precision and caution the persons to whom this high privilege was given — and the word *citizen* was on that account substituted for the words *free inhabitant.* The word citizen excluded, and no doubt intended to exclude, foreigners who had not become citizens of some one of the States when the Constitution was adopted, and also every description of persons who were not fully recognised as citizens in the several States. This, upon any fair construction of the instruments to which we have referred, was evidently the object and purpose of this change of words.

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. Three laws, two of which were passed almost immediately after the Government went into operation, will be abundantly sufficient to show this. The two first are particularly worthy of notice, because many of the men who assisted in framing the Constitution, and took an active part in procuring its adoption, were then in the halls of legislation, and certainly understood what they meant when they used the words “people of the United States” and “citizen” in that well-considered instrument.

The first of these acts is the naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens “*to aliens being free white persons.*”

Now the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another Government. But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might, as we before said, have authorized the naturalization of Indians because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery and governed at their own pleasure.

Another of the early laws of which we have spoken is the first militia law, which was passed in 1792 at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every “free able-bodied white male citizen” shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word “citizen” to exclude unnaturalized foreigners, the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free, but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, 2 Stat. 809, and it provides:

“That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States. ”

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

And even as late as 1820, chap. 104, sec. 8, in the charter to the city of Washington, the corporation is authorized "to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes," thus associating them together in its legislation, and, after prescribing the punishment that may be inflicted on the slaves, proceeds in the following words:

"And to punish such free negroes and mulattoes by penalties not exceeding twenty dollars for any one offence; and in case of the inability of any such free negro or mulatto, to pay any such penalty and cost thereon, to cause him or her to be confined to labor for any time not exceeding six calendar months."

And in a subsequent part of the same section, the act authorizes the corporation "to prescribe the terms and conditions upon which free negroes and mulattoes may reside in the city."

This law, like the laws of the States, shows that this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens. And after such an uniform course of legislation as we have stated, by the colonies, by the States, and by Congress, running through a period of more than a century, it would seem that to call persons thus marked and stigmatized "citizens" of the United States, "fellow citizens," a constituent part of the sovereignty, would be an abuse of terms, and not calculated to exalt the character of an American citizen in the eyes of other nations.

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution, and that free persons of color were not citizens within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens — as, for example, the right to vote, or to hold particular offices — and that yet, when he goes into another State, he is entitled to be recognised there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote, and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union, foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his status or condition, and place him among the class of persons who are not recognised as citizens, but belong to an inferior and subject race, and may deny him the privileges and immunities enjoyed by its citizens.

But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, will all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them, for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the

Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation, and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States.

The case of *Legrand v. Darnall,* 2 Peters 664, has been referred to for the purpose of showing that this court has decided that the descendant of a slave may sue as a citizen in a court of the United States, but the case itself shows that the question did not arise and could not have arisen in the case.

It appears from the report that Darnall was born in Maryland, and was the son of a white man by one of his slaves, and his father executed certain instruments to manumit him, and devised to him some landed property in the State. This property Darnall afterwards sold to Legrand, the appellant, who gave his notes for the purchase money. But becoming afterwards apprehensive that the appellee had not been emancipated according to the laws of Maryland, he refused to pay the notes until he could be better satisfied as to Darnall's right to convey. Darnall, in the meantime, had taken up his residence in Pennsylvania, and brought suit on the notes, and recovered judgment in the Circuit Court for the district of Maryland.

The whole proceeding, as appears by the report, was an amicable one, Legrand being perfectly willing to pay the money, if he could obtain a title, and Darnall not wishing him to pay unless he could make him a good one. In point of fact, the whole proceeding was under the direction of the counsel who argued the case for the appellee, who was the mutual friend of the parties and confided in by both of them, and whose only object was to have the rights of both parties established by judicial decision in the most speedy and least expensive manner.

Legrand, therefore, raised no objection to the jurisdiction of the court in the suit at law, because he was himself anxious to obtain the judgment of the court upon his title. Consequently, there was nothing in the record before the court to show that Darnall was of African descent, and the usual judgment and award of execution was entered. And Legrand thereupon filed his bill on the equity side of the Circuit Court, stating that Darnall was born a slave, and had not been legally emancipated, and could not therefore take the land devised to him, nor make Legrand a good title, and praying an injunction to restrain Darnall from proceeding to execution on the judgment, which was granted. Darnall answered, averring in his answer that he was a free man, and capable of conveying a good title. Testimony was taken on this point, and at the hearing, the Circuit Court was of opinion that Darnall was a free man and his title good, and dissolved the injunction and dismissed the bill; and that decree was affirmed here, upon the appeal of Legrand.

Now it is difficult to imagine how any question about the citizenship of Darnall, or his right to sue in that character, can be supposed to have arisen or been decided in that case. The fact that he was of African descent was first brought before the court upon the bill in equity. The suit at law had then passed into judgment and award of execution, and the Circuit Court, as a court of law, had no longer any authority over it. It was a valid and legal judgment, which the court that rendered it had not the power to reverse or set aside. And unless it had jurisdiction as a court of equity to restrain him from using its process as a court of law, Darnall, if he thought proper, would have been at liberty to proceed on his judgment, and compel the payment of the money, although the allegations in the bill were true and he was incapable of making a title. No other court could have enjoined him, for certainly no State equity court could interfere in that way with the judgment of a Circuit Court of the United States.

But the Circuit Court as a court of equity certainly had equity jurisdiction over its own judgment as a court of law, without regard to the character of the parties, and had not only the right, but it was its duty — no matter who were the parties in the judgment — to prevent them from proceeding to enforce it by execution if the court was satisfied that the money was not justly and equitably due. The ability of Darnall to convey did not depend upon his citizenship, but upon his title to freedom. And if he was free, he could hold and convey property, by the laws of Maryland, although he was not a citizen. But if he was by law still a slave, he could not. It was therefore the duty of the court, sitting as a court of equity in the latter case, to prevent him from using its process as a court of common law to compel the payment of the purchase money when it was evident that the purchaser must lose the land. But if he was free, and could make a title, it was equally the duty of the court not to suffer Legrand to keep the land and refuse the payment of the money upon the ground that Darnall was incapable of suing or being sued as a citizen in a court of the United States. The character or citizenship of the parties had no connection with the question of jurisdiction, and the matter in dispute had no relation to the citizenship of Darnall. Nor is such a question alluded to in the opinion of the court.

Besides, we are by no means prepared to say that there are not many cases, civil as well as criminal, in which a Circuit Court of the United States may exercise jurisdiction although one of the African race is a party; that broad question is not before the court. The question with which we are now dealing is whether a person of the African race can be a citizen of the United States, and become thereby entitled to a special privilege by virtue of his title to that character, and which, under the Constitution, no one but a citizen can claim. It is manifest that the case of Legrand and Darnall has no bearing on that question, and can have no application to the case now before the court.

This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for to a State. It would. in effect. give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognised him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States, and the State officers and tribunals would be compelled by the paramount authority of the Constitution to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety.

The only two provisions which point to them and include them treat them as property and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a Government of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

What the construction was at that time we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word “citizen” and the word “people.”

And, upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous.

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face of the bill of exception itself, taken by the plaintiff at the trial, for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and, upon their return to Missouri, became citizens of that State.

Now if the removal of which he speaks did not give them their freedom, then, by his own admission, he is still a slave, and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. If, therefore, the acts done by his owner did not make them free persons, he is still a slave, and certainly incapable of suing in the character of a citizen.

The principle of law is too well settled to be disputed that a court can give no judgment for either party where it has no jurisdiction; and if, upon the showing of Scott himself, it appeared that he was still a slave, the case ought to have been dismissed, and the judgment against him and in favor of the defendant for costs is, like that on the plea in abatement, erroneous, and the suit ought to have been dismissed by the Circuit Court for want of jurisdiction in that court.

But, before we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it, and it has been said that, as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception, and that anything it may say upon that part of the case will be extrajudicial, and mere *obiter dicta.*

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction or any other material error, and this too whether there is a plea in abatement or not.

The objection appears to have arisen from confounding writs of error to a State court with writs of error to a Circuit Court of the United States. Undoubtedly, upon a writ of error to a State court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jurisdiction in *this court.* And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a State court and to a Circuit Court of the United States are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision, and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court to examine the whole case as presented by the record; and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment and remand the case. And certainly an error in passing a judgment upon the merits in favor of either party, in a case which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit.

The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us that the Circuit Court committed an error in deciding that it had jurisdiction upon the facts in the case admitted by the pleadings. I t is the duty of the appellate tribunal to correct this error, but that could not be done by dismissing the case for want of jurisdiction here — for that would leave the erroneous judgment in full force, and the injured party without remedy. And the appellate court therefore exercises the power for which alone appellate courts are constituted, by reversing the judgment of the court below for this error. It exercises its proper and appropriate jurisdiction over the judgment and proceedings of the Circuit Court, as they appear upon the record brought up by the writ of error.

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law nor any practice nor any decision of a court which even questions this power in the appellate tribunal. On the contrary, it is the daily practice of this court, and of all appellate courts where they reverse the judgment of an inferior court for error, to correct by its opinions whatever errors may appear on the record material to the case, and they have always held it to be their duty to do so where the silence of the court might lead to misconstruction or future controversy and the point has been relied on by either side and argued before the court.

In the case before us, we have already decided that the Circuit Court erred in deciding that it had jurisdiction upon the facts admitted by the pleadings. And it appears that, in the further progress of the case, it acted upon the erroneous principle it had decided on the pleadings, and gave judgment for the defendant where, upon the facts admitted in the exception, it had no jurisdiction.

We are at a loss to understand upon what principle of law, applicable to appellate jurisdiction, it can be supposed that this court has not judicial authority to correct the last-mentioned error because they had before corrected the former, or by what process of reasoning it can be made out that the error of an inferior court in actually pronouncing judgment for one of the parties in a case in

which it had no jurisdiction cannot be looked into or corrected by this court because we have decided a similar question presented in the pleadings. The last point is distinctly presented by the facts contained in the plaintiff's own bill of exceptions, which he himself brings here by this writ of error. It was the point which chiefly occupied the attention of the counsel on both sides in the argument — and the judgment which this court must render upon both errors is precisely the same. It must, in each of them, exercise jurisdiction over the judgment, and reverse it for the errors committed by the court below; and issue a mandate to the Circuit Court to conform its judgment to the opinion pronounced by this court, by dismissing the case for want of jurisdiction in the Circuit Court. This is the constant and invariable practice of this court where it reverses a judgment for want of jurisdiction in the Circuit Court.

It can scarcely be necessary to pursue such a question further. The want of jurisdiction in the court below may appear on the record without any plea in abatement. This is familiarly the case where a court of chancery has exercised jurisdiction in a case where the plaintiff had a plain and adequate remedy at law, and it so appears by the transcript when brought here by appeal. So also where it appears that a court of admiralty has exercised jurisdiction in a case belonging exclusively to a court of common law. In these cases, there is no plea in abatement. And for the same reason, and upon the same principles, where the defect of jurisdiction is patent on the record, this court is bound to reverse the judgment although the defendant has not pleaded in abatement to the jurisdiction of the inferior court.

The cases of *Jackson v. Ashton* and of *Capron v. Van Noorden*, to which we have referred in a previous part of this opinion, are directly in point. In the last-mentioned case, Capron brought an action against Van Noorden in a Circuit Court of the United States without showing, by the usual averments of citizenship, that the court had jurisdiction. There was no plea in abatement put in, and the parties went to trial upon the merits. The court gave judgment in favor of the defendant with costs. The plaintiff thereupon brought his writ of error, and this court reversed the judgment given in favor of the defendant and remanded the case with directions to dismiss it because it did not appear by the transcript that the Circuit Court had jurisdiction.

The case before us still more strongly imposes upon this court the duty of examining whether the court below has not committed an error in taking jurisdiction and giving a judgment for costs in favor of the defendant, for in *Capron v. Van Noorden*, the judgment was reversed, because it did *not appear* that the parties were citizens of different States. They might or might not be . But in this case it *does appear* that the plaintiff was born a slave, and if the facts upon which he relies have not made him free, then it appears affirmatively on the record that he is not a citizen, and consequently his suit against Sandford was not a suit between citizens of different States, and the court had no authority to pass any judgment between the parties. The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom.

The case, as he himself states it, on the record brought here by his writ of error, is this:

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress upon which the plaintiff relies declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon anyone who is held as a slave under the have of anyone of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.

A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed will show the correctness of this proposition.

It will be remembered that, from the commencement of the Revolutionary war, serious difficulties existed between the States in relation to the disposition of large and unsettled territories which were included in the chartered limits of some of the States. And some of the other States, and more especially Maryland, which had no unsettled lands, insisted that as the unoccupied lands, if wrested from Great Britain, would owe their preservation to the common purse and the common sword, the money arising from them ought to be applied in just proportion among the several States to pay the expenses of the war, and ought not to be appropriated to the use of the State in whose chartered limits they might happen to lie, to the exclusion of the other States, by whose combined efforts and common expense the territory was defended and preserved against the claim of the British Government.

These difficulties caused much uneasiness during the war, while the issue was in some degree doubtful, and the future boundaries of the United States yet to be defined by treaty, if we achieved our independence.

The majority of the Congress of the Confederation obviously concurred in opinion with the State of Maryland, and desired to obtain from the States which claimed it a cession of this territory, in order that Congress might raise money on this security to carry on the war. This appears by the resolution passed on the 6th of September, 1780, strongly urging the States to cede these lands to the United States, both for the sake of peace and union among themselves, and to maintain the public credit; and this was followed by the resolution of October 10th, 1780, by which Congress pledged itself that if the lands were ceded, as recommended by the resolution above mentioned, they should be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which should become members of the Federal Union, and have the same rights of sovereignty and freedom and independence as other States.

But these difficulties became much more serious after peace took place, and the boundaries of the United States were established. Every State, at that time, felt severely the pressure of its war debt; but in Virginia and some other States, there were large territories of unsettled lands, the sale of which would enable them to discharge their obligations without much inconvenience, while other States which had no such resource saw before them many years of heavy and burdensome taxation, and the latter insisted, for the reasons before stated, that these unsettled lands should be treated as the common property of the States, and the proceeds applied to their common benefit.

The letters from the statesmen of that day will show how much this controversy occupied their thoughts, and the dangers that were apprehended from it. It was the disturbing element of the time, and fears were entertained that it might dissolve the Confederation by which the States were then united.

These fears and dangers were, however, at once removed, when the State of Virginia, in 1784, voluntarily ceded to the United States the immense tract of country lying northwest of the river Ohio, and which was within the acknowledged limits of the State. The only object of the State in making this cession was to put an end to the threatening and exciting controversy, and to enable the Congress of that time to dispose of the lands and appropriate the proceeds as a common fund for the common benefit of the States. It was not ceded because it was inconvenient to the State to hold and govern it, nor from any expectation that it could be better or more conveniently governed by the United States.

The example of Virginia was soon afterwards followed by other States, and, at the time of the adoption of the Constitution, all of the States, similarly situated had ceded their unappropriated lands, except North Carolina and Georgia. The main object for which these cessions were desired and made was on account of their money value, and to put an end to a dangerous controversy as to who was justly entitled to the proceeds when the lands should be sold. It is necessary to bring this part of the history of these cessions thus distinctly into view because it will enable us the better to comprehend the phraseology of the article in the Constitution so often referred to in the argument.

Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential in order to make it effectual and to accomplish its objects. But it must be remembered that, at that time, there was no Government of the United States in existence with enumerated and limited powers; what was then called the United States were thirteen separate, sovereign, independent States which had entered into a league or confederation for their mutual protection and advantage, and the Congress of the United States was composed of the representatives of these separate sovereignties, meeting together, as equals, to discuss and decide on certain measures which the States, by the Articles of Confederation, had agreed to submit to their decision. But this Confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations in matters in which they had a common concern.

It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit, which all of them assented to; and it is equally clear that as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession. There was, as we have said, no Government of the United States then in existence with special enumerated and limited powers. The territory belonged to sovereignties who, subject to the limitations above mentioned, had a right to establish any form of government they pleased by compact or treaty among themselves, and to regulate rights of person and rights of property in the territory as they might deem proper. It was by a Congress, representing the authority of these several and separate sovereignties and acting under their authority and command (but not from any authority derived from the Articles of Confederation), that the instrument usually called the Ordinance of 1787 was adopted, regulating in much detail the principles and the laws by which this territory should be governed; and, among other provisions, slavery is prohibited in it. We do not question the power of the States, by agreement among themselves, to pass this ordinance, nor its obligatory force in the territory while the confederation or league of the States in their separate sovereign character continued to exist.

This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence in order to prepare it for admission as States according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new Government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this Government was to be carefully limited in its powers, and to exercise no authority beyond those expressly

granted by the Constitution or necessarily to be implied from the language of the instrument and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new Government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new Government sufficient power to enable it to carry into effect the objects for which it was ceded, and the compacts and agreements which the States had made with each other in the exercise of their powers of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a Government and system of jurisprudence should be maintained in it to protect the citizens of the United States who should migrate to the territory, in their rights of person and of property. It was also necessary that the new Government, about to be adopted should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded but the cession of which was confidently anticipated upon some terms that would be arranged between the General Government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States, when acting in their independent characters as confederates, which neither the new Government nor anyone else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new Government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which give Congress the power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new Government the property then held in common by the States, and to give to that Government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire.

The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses when it speaks of the political power to be exercised in the government of the territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States — that is, to a territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing, in other words, making sale of the lands, or raising money from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the article. It then gives the power which was necessarily associated with the disposition and sale of the lands — that is, the power of making needful rules and regulations respecting the territory. And whatever construction may now be given to these words, everyone, we think, must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new Government might afterwards itself obtain by cession from a State, either for its seat of Government or for forts, magazines, arsenals, dockyards, and other needful buildings.

And the same power of making needful rules respecting the territory is, in precisely the same language, applied to the other property belonging to the United States — associating the power over the territory in this respect with the power over movable or personal property — that is, the ships, arms, and munitions of war, which then belonged in common to the State sovereignties. And it will hardly be said that this power, in relation to the last-mentioned objects, was deemed necessary to be thus specially given to the new Government in order to authorize it to make needful rules and regulations respecting the ships it might itself build, or arms and munitions of war it might itself manufacture or provide for the public service.

No one, it is believed, would think a moment of deriving the power of Congress to make needful rules and regulations in relation to property of this kind from this clause of the Constitution. Nor can it, upon any fair construction, be applied to any property but that which the new Government was about the receive from the confederated States. And if this be true as to this property, it must be equally true and limited as to the territory, which is so carefully and precisely coupled with it — and like it referred to as property in the power granted. The concluding words of the clause appear to render this construction irresistible, for, after the provisions we have mentioned, it proceeds to say, “that nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.”

Now, as we have before said, all of the States except North Carolina and Georgia had made the cession before the Constitution was adopted, according to the resolution of Congress of October 10, 1780. The claims of other States that the unappropriated lands in these two States should be applied to the common benefit in like manner was still insisted on, but refused by the States. And this

member of the clause in question evidently applies to them, and can apply to nothing else. It was to exclude the conclusion that either party, by adopting the Constitution, would surrender what they deemed their rights. And when the latter provision relates so obviously to the unappropriated lands not yet ceded by the States, and the first clause makes provision for those then actually ceded, it is impossible, by any just rule of construction, to make the first provision general, and extend to all territories, which the Federal Government might in any way afterwards acquire, when the latter is plainly and unequivocally confined to a particular territory; which was a part of the same controversy, and involved in the same dispute, and depended upon the same principles. The union of the two provisions in the same clause shows that they were kindred subjects, and that the whole clause is local, and relates only to lands within the limits of the United States which had been or then were claimed by a State, and that no other territory was in the mind of the framers of the Constitution or intended to be embraced in it. Upon any other construction, it would be impossible to account for the insertion of the last provision in the place where it is found, or to comprehend why or for what object it was associated with the previous provision.

This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence. It must be borne in mind that the same States that formed the Confederation also formed and adopted the new Government, to which so large a portion of their former sovereign powers were surrendered. It must also be borne in mind that all of these same States which had then ratified the new Constitution were represented in the Congress which passed the first law for the government of this territory, and many of the members of that legislative body had been deputies from the States under the Confederation — had united in adopting the Ordinance of 1787 and assisted in forming the new Government under which they were then acting, and whose powers they were then exercising. And it is obvious from the law they passed to carry into effect the principles and provisions of the ordinance that they regarded it as the act of the States done in the exercise of their legitimate powers at the time. The new Government took the territory as it found it, and in the condition in which it was transferred, and did not attempt to undo anything that had been done. And among the earliest laws passed under the new Government is one reviving the Ordinance of 1787, which had become inoperative and a nullity upon the adoption of the Constitution. This law introduces no new form or principles for its government, but recites, in the preamble, that it is passed in order that this ordinance may continue to have full effect, and proceeds to make only those rules and regulations which were needful to adapt it to the new Government, into whose hands the power had fallen. It appears, therefore, that this Congress regarded the purposes to which the land in this Territory was to be applied and the form of government and principles of jurisprudence which were to prevail there, while it remained in the Territorial state, as already determined on by the States when they had full power and right to make the decision, and that the new Government, having received it in this condition, ought to carry substantially into effect the plans and principles which had been previously adopted by the States, and which no doubt the States anticipated when they surrendered their power to the new Government. And if we regard this clause of the Constitution as pointing to this Territory, with a Territorial Government already established in it, which had been ceded to the States for the purposes hereinbefore mentioned — every word in it is perfectly appropriate and easily understood, and the provisions it contains are in perfect harmony with the objects for which it was ceded, and with the condition of its government as a Territory at the time. We can, then, easily account for the manner in which the first Congress legislated on the subject — and can also understand why this power over the territory was associated in the same clause with the other property of the United States, and subjected to the like power of making needful rules and regulations. But if the clause is construed in the expanded sense contended for, so as to embrace any territory acquired from a foreign nation by the present Government and to give it in such territory a despotic and unlimited power over persons and property such as the confederated States might exercise in their common property, it would be difficult to account for the phraseology used when compared with other grants of power — and also for its association with the other provisions in the same clause.

The Constitution has always been remarkable for the felicity of its arrangement of different subjects and the perspicuity and appropriateness of the language it uses. But if this clause is construed to extend to territory acquired by the present Government from a foreign nation, outside of the limits of any charter from the British Government to a colony, it would be difficult to say why it was deemed necessary to give the Government the power to sell any vacant lands belonging to the sovereignty which might be found within it, and, if this was necessary, why the grant of this power should precede the power to legislate over it and establish a Government there, and still more difficult to say why it was deemed necessary so specially and particularly to grant the power to make needful rules and regulations in relation to any personal or movable property it might acquire there. For the words *other property* necessarily, by every known rule of interpretation, must mean property of a different description from territory or land. And the difficulty would perhaps be insurmountable in endeavoring to account for the last member of the sentence, which provides that “nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State,” or to

say how any particular State could have claims in or to a territory ceded by a foreign Government, or to account for associating this provision with the preceding provisions of the clause, with which it would appear to have no connection.

The words “needful rules and regulations” would seem also to have been cautiously used for some definite object. They are not the words usually employed by statesmen when they mean to give the powers of sovereignty, or to establish a Government, or to authorize its establishment. Thus, in the law to renew and keep alive the Ordinance of 1787 and to reestablish the Government, the title of the law is: “An act to provide for the government of the territory northwest of the river Ohio.” And in the Constitution, when granting the power to legislate over the territory that may be selected for the seat of Government independently of a State, it does not say Congress shall have power “to make all needful rules and regulations respecting the territory,” but it declares that

“Congress shall have power to exercise exclusive legislation in all cases whatsoever over such District (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States.”

The words “rules and regulations” are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the Government, and not, as we have seen, when granting general powers of legislation. As, for example, in the particular power to Congress “to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;” “to establish an uniform *rule* of naturalization;” “to coin money and *regulate* the value thereof.” And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the Government might afterwards acquire is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. But if confined to a particular Territory, in which a Government and laws had already been established but which would require some alterations to adapt it to the new Government, the words are peculiarly applicable and appropriate for that purpose.

The necessity of this special provision in relation to property and the rights or property held in common by the confederated States is illustrated by the first clause of the sixth article. This clause provides that

“all debts, contracts, and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Government as under the Confederation.”

This provision, like the one under consideration, was indispensable if the new Constitution was adopted. The new Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new Government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution. And as the several States would cease to exist in their former confederated character upon the adoption of the Constitution, and could not, in that character, again assemble together, special provisions were indispensable to transfer to the new Government the property and rights which at that time they held in common, and at the same time to authorize it to lay taxes and appropriate money to pay the common debt which they had contracted; and this power could only be given to it by special provisions in the Constitution. The clause in relation to the territory and other property of the United States provided for the first, and the clause last quoted provided for the other. They have no connection with the general powers and rights of sovereignty delegated to the new Government, and can neither enlarge nor diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a Government.

Indeed, a similar provision was deemed necessary in relation to treaties made by the Confederation; and when, in the clause next succeeding the one of which we have last spoken, it is declared that treaties shall be the supreme law of the land, care is taken to include, by express words, the treaties made by the confederated States. The language is: “and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”

Whether, therefore, we take the particular clause in question, by itself, or in connection with the other provisions of the Constitution, we think it clear that it applies only to the particular territory of which we have spoken, and cannot, by any just rule of interpretation, be extended to territory which the new Government might afterwards obtain from a foreign nation. Consequently, the power which Congress may have lawfully exercised in this Territory, while it remained under a Territorial Government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of

power over territory afterwards acquired by the Federal Government. We put aside, therefore, any argument, drawn from precedents, showing the extent of the power which the General Government exercised over slavery in this Territory, as altogether inapplicable to the case before us.

But the case of the *American and Ocean Insurance Companies v. Canter,* 1 Pet. 511, has been quoted as establishing a different construction of this clause of the Constitution. There is, however, not the slightest conflict between the opinion now given and the one referred to, and it is only by taking a single sentence out of the latter and separating it from the context that even an appearance of conflict can be shown. We need not comment on such a mode of expounding an opinion of the court. Indeed, it most commonly misrepresents instead of expounding it. And this is fully exemplified in the case referred to, where, if one sentence is taken by itself, the opinion would appear to be in direct conflict with that now given, but the words which immediately follow that sentence show that the court did not mean to decide the point, but merely affirmed the power of Congress to establish a Government in the Territory, leaving it an open question whether that power was derived from this clause in the Constitution, or was to be necessarily inferred from a power to acquire territory by cession from a foreign Government. The opinion on this part of the case is short, and we give the whole of it to show how well the selection of a single sentence is calculated to mislead.

The passage referred to is in page 26 U. S. 542, in which the court, in speaking of the power of Congress to establish a Territorial Government in Florida until it should become a State, uses the following language:

"In the meantime, Florida continues to be a Territory of the United States, governed by that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. Perhaps the power of governing a Territory belonging to the United States which has not, by becoming a State, acquired the means of self-government may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory.*Whichever may be the source from which the power is derived, the possession of it is unquestionable.*"

It is thus clear from the whole opinion on this point that the court did not mean to decide whether the power was derived from the clause in the Constitution or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, and in this we entirely concur, and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court — that is, as "*the inevitable consequence of the right to acquire territory.*"

And what still more clearly demonstrates that the court did not mean to decide the question, but leave it open for future consideration, is the fact that the case was decided in the Circuit Court by Mr. Justice Johnson, and his decision was affirmed by the Supreme Court. His opinion at the circuit is given in full in a note to the case, and in that opinion he states, in explicit terms, that the clause of the Constitution applies only to the territory then within the limits of the United States, and not to Florida, which had been acquired by cession from Spain. This part of his opinion will be found in the note in page 517 of the report [argument of counsel — omitted]. But he does not dissent from the opinion of the Supreme Court, thereby showing that, in his judgment as well as that of the court, the case before them did not call for a decision on that particular point, and the court abstained from deciding it. And in a part of its opinion subsequent to the passage we have quoted, where the court speak of the legislative power of Congress in Florida, they still speak with the same reserve. And in page 26 U. S. 546, speaking of the power of Congress to authorize the Territorial Legislature to establish courts there, the court say:

"They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

It has been said that the construction given to this clause is new, and now for the first time brought forward. The case of which we are speaking, and which has been so much discussed, shows that the fact is otherwise. It shows that precisely the same question came before Mr. Justice Johnson, at his circuit, thirty years ago — was fully considered by him, and the same construction given to the clause in the Constitution which is now given by this court. And that upon an appeal from his decision the same question was brought before this court, but was not decided because a decision upon it was not required by the case before the court.

There is another sentence in the opinion which has been commented on, which even in a still more striking manner shows how one may mislead or be misled by taking out a single sentence from the opinion of a court, and leaving out of view what precedes and follows. It is in page 26 U. S. 546, near the close of the opinion, in which the court say: "In legislating for them," (the territories of the United States) "Congress exercises the combined powers of the General and of a State Government." And it is said that, as a

State may unquestionably prohibit slavery within its territory, this sentence decides in effect that Congress may do the same in a Territory of the United States, exercising there the powers of a State as well as the power of the General Government.

The examination of this passage in the case referred to would be more appropriate when we come to consider in another part of this opinion what power Congress can constitutionally exercise in a Territory, over the rights of person or rights of property of a citizen. But, as it is in the same case with the passage we have before commented on, we dispose of it now, as it will save the court from the necessity of referring again to the case. And it will be seen upon reading the page in which this sentence is found that it has no reference whatever to the power of Congress over rights of person or rights of property, but relates altogether to the power of establishing judicial tribunals to administer the laws constitutionally passed, and defining the jurisdiction they may exercise.

The law of Congress establishing a Territorial Government in Florida provided that the Legislature of the Territory should have legislative powers over "all rightful objects of legislation, but no law should be valid which was inconsistent with the laws and Constitution of the United States."

Under the power thus conferred, the Legislature of Florida passed an act erecting a tribunal at Key West to decide cases of salvage. And in the case of which we are speaking, the question arose whether the Territorial Legislature could be authorized by Congress to establish such a tribunal, with such powers, and one of the parties, among other objections, insisted that Congress could not under the Constitution authorize the Legislature of the Territory to establish such a tribunal with such powers, but that it must be established by Congress itself, and that a sale of cargo made under its order to pay salvors was void as made without legal authority, and passed no property to the purchaser.

It is in disposing of this objection that the sentence relied on occurs, and the court begin that part of the opinion by stating with great precision the point which they are about to decide.

They say:

"It has been contended that by the Constitution of the United States, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of the judicial power must be vested 'in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish.' Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature."

And after thus clearly stating the point before them and which they were about to decide, they proceed to show that these Territorial tribunals were not constitutional courts, but merely legislative, and that Congress might therefore delegate the power to the Territorial Government to establish the court in question, and they conclude that part of the opinion in the following words:

"Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and State Governments."

Thus it will be seen by these quotations from the opinion that the court, after stating the question it was about to decide in a manner too plain to be misunderstood, proceeded to decide it, and announced, as the opinion of the tribunal, that in organizing the judicial department of the Government in a Territory of the United States, Congress does not act under, and is not restricted by, the third article in the Constitution, and is not bound, in a Territory, to ordain and establish courts in which the judges hold their offices during good behaviour, but may exercise the discretionary power which a State exercises in establishing its judicial department and regulating the jurisdiction of its courts, and may authorize the Territorial Government to establish, or may itself establish, courts in which the judges hold their offices for a term of years only, and may vest in them judicial power upon subjects confided to the judiciary of the United States. And in doing this, Congress undoubtedly exercises the combined power of the General and a State Government. It exercises the discretionary power of a State Government in authorizing the establishment of a court in which the judges hold their appointments for a term of years only, and not during good behaviour, and it exercises the power of the General Government in investing that court with admiralty jurisdiction, over which the General Government had exclusive jurisdiction in the Territory.

No one, we presume, will question the correctness of that opinion; nor is there anything in conflict with it in the opinion now given. The point decided in the case cited has no relation to the question now before the court. That depended on the construction of the third article of the Constitution, in relation to the judiciary of the United States, and the power which Congress might exercise in a Territory in organizing the judicial department of the Government. The case before us depends upon other and different provisions

of the Constitution altogether separate and apart from the one above mentioned. The question as to what courts Congress may ordain or establish in a Territory to administer laws which the Constitution authorizes it to pass, and what laws it is or is not authorized by the Constitution to pass, are widely different — are regulated by different and separate articles of the Constitution, and stand upon different principles. And we are satisfied that no one who reads attentively the page in Peters' Reports to which we have referred can suppose that the attention of the court was drawn for a moment to the question now before this court, or that it meant in that case to say that Congress had a right to prohibit a citizen of the United States from taking any property which he lawfully held into a Territory of the United States.

This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States while it remains a Territory and until it shall be admitted as one of the States of the Union.

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character.

And indeed the power exercised by Congress to acquire territory and establish a Government there, according to its own unlimited discretion, was viewed with great jealousy by the leading statesmen of the day. And in the Federalist No. 38, written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the confederated States, by the cession from Virginia, and the establishment of a Government there, as an exercise of power not warranted by the Articles of Confederation, and dangerous to the liberties of the people. And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given, and, in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority, and, as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the Government, and not the judicial, and whatever the political department of the Government shall recognise as within the limits of the United States, the judicial department is also bound to recognise and to administer in it the laws of the United States so far as they apply, and to maintain in the Territory the authority and rights of the Government and also the personal rights and rights of property of individual citizens as secured by the Constitution. All we mean to say on this point is that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution and its distribution of powers for the rules and principles by which its decision must be governed.

Taking this rule to guide us, it may be safely assumed that citizens of the United States who migrate to a Territory belonging to the people of the United States cannot be ruled as mere colonists, dependent upon the will of the General Government and to be governed by any laws it may think proper to impose. The principle upon which our Governments rest and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it throughout the dominion of the United States. A power, therefore, in the General Government to obtain and hold colonies and dependent territories over which they might legislate without restriction would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State, and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the

United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit, for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But, until that time arrives, it is undoubtedly necessary that some Government should be established in order to organize society and to protect the inhabitants in their persons and property, and as the people of the United States could act in this matter only through the Government which represented them and the through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty, to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union. The power to acquire necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory as to the number and character of its inhabitants and their situation in the Territory. In some cases, a Government consisting of persons appointed by the Federal Government would best subserve the interests of the Territory when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society and prepare it to become a State, and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside, or for any other lawful purpose. It was acquired by the exercise of this discretion, and it must be held and governed in like manner until it is fitted to be a State.

But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it, and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out, and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.

A reference to a few of the provisions of the Constitution will illustrate this proposition.

For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble and to petition the Government for the redress of grievances.

Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel anyone to be a witness against himself in a criminal proceeding.

These powers, and others in relation to rights of person which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government, and the rights of private property have been guarded with equal care. Thus, the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a

particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

So, too, it will hardly be contended that Congress could by law quarter a soldier in a house in a Territory without the consent of the owner, in time of peace nor in time of war, but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted, nor take private property for public use without just compensation.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt under the plea of implied or incidental powers. And if Congress itself cannot do this — if it is beyond the powers conferred on the Federal Government — it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government established by its authority to violate the provisions of the Constitution.

It seems, however, to be supposed that there is a difference between property in a slave and other property and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it have been dwelt upon in the argument.

But, in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved. And if the Constitution recognises the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States in every State that might desire it for twenty years. And the Government in express terms is pledged to protect it in all future time if the slave escapes from his owner. This is done in plain words — too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property or which entitles property of that kind to less protection that property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted by the Constitution, and is therefore void, and that neither Dred Scott himself nor any of his family were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States, and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief, for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham,* reported in 10th Howard 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition as free or slave depended upon the laws of Kentucky when they were brought back into that State, and not of Ohio, and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status as free or slave depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument that, by the laws of Missouri, he was free on his return, and that this case therefore cannot be governed by the case of *Strader et al. v. Graham*, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may at one time have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant, and that the Circuit Court of the United States had no jurisdiction when, by the laws of the State, the plaintiff was a slave and not a citizen.

Moreover, the plaintiff, it appears, brought a similar action against the defendant in the State court of Missouri, claiming the freedom of himself and his family upon the same grounds and the same evidence upon which he relies in the case before the court. The case was carried before the Supreme Court of the State, was fully argued there, and that court decided that neither the plaintiff nor his family were entitled to freedom, and were still the slaves of the defendant, and reversed the judgment of the inferior State court, which had given a different decision. If the plaintiff supposed that this judgment of the Supreme Court of the State was erroneous, and that this court had jurisdiction to revise and reverse it, the only mode by which he could legally bring it before this court was by writ of error directed to the Supreme Court of the State, requiring it to transmit the record to this court. If this had been done, it is too plain for argument that the writ must have been dismissed for want of jurisdiction in this court. The case of *Strader and others v. Graham* is directly in point, and, indeed, independent of any decision, the language of the 25th section of the act of 1789 is too clear and precise to admit of controversy.

But the plaintiff did not pursue the mode prescribed by law for bringing the judgment of a State court before this court for revision, but suffered the case to be remanded to the inferior State court, where it is still continued, and is, by agreement of parties, to await the judgment of this court on the point. All of this appears on the record before us, and by the printed report of the case.

And while the case is yet open and pending in the inferior State court, the plaintiff goes into the Circuit Court of the United States, upon the same case and the same evidence and against the same party, and proceeds to judgment, and then brings here the same case from the Circuit Court, which the law would not have permitted him to bring directly from the State court. And if this court takes jurisdiction in this form, the result, so far as the rights of the respective parties are concerned, is in every respect substantially the same as if it had, in open violation of law, entertained jurisdiction over the judgment of the State court upon a writ of error, and revised and reversed its judgment upon the ground that its opinion upon the question of law was erroneous. It would ill become this court to sanction such an attempt to evade the law, or to exercise an appellate power in this circuitous way which it is forbidden to exercise in the direct and regular and invariable forms of judicial proceedings.

Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Mr. Justice WAYNE.

Concurring as I do entirely in the opinion of the court as it has been written and read by the Chief Justice — without any qualification of its reasoning or its conclusions — I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so.

The opinion of the court meets fully and decides every point which was made in the argument of the case by the counsel on either side of it. Nothing belonging to the case has been left undecided, nor has any point been discussed and decided which was not

called for by the record or which was not necessary for the judicial disposition of it in the way that it has been done, by more than a majority of the court.

In doing this, the court neither sought nor made the case. It was brought to us in the course of that administration of the laws which Congress has enacted, for the review of cases from the Circuit Courts by the Supreme Court.

In our action upon it, we have only discharged our duty as a distinct and efficient department of the Government, as the framers of the Constitution meant the judiciary to be and as the States of the Union and the people of those States intended it should be when they ratified the Constitution of the United States.

The case involves private rights of value, and constitutional principles of the highest importance about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision.

It would certainly be a subject of regret that the conclusions of the court have not been assented to by all of its members if I did not know from its history and my own experience how rarely it has happened that the judges have been unanimous upon constitutional questions of moment and if our decision in this case had not been made by as large a majority of them as has been usually had on constitutional questions of importance.

Two of the judges, Mr. Justices McLean and Curtis, dissent from the opinion of the court. A third, Mr. Justice Nelson, gives a separate opinion upon a single point in the case with which I concur, assuming that the Circuit Court had jurisdiction, but he abstains altogether from expressing any opinion upon the eighth section of the act of 1820, known commonly as the Missouri Compromise law, and six of us declare that it was unconstitutional.

But it has been assumed that this court has acted extrajudicially in giving an opinion upon the eighth section of the act of 1820 because, as it has decided that the Circuit Court had no jurisdiction of the case, this court had no jurisdiction to examine the case upon its merits.

But the error of such an assertion has arisen in part from a misapprehension of what has been heretofore decided by the Supreme Court in cases of a like kind with that before us, in part from a misapplication to the Circuit Courts of the United States of the rules of pleading concerning pleas to the jurisdiction which prevail in common law courts, and from its having been forgotten that this case was not brought to this court by appeal or writ of error from a State court, but by a writ of error to the Circuit Court of the United States.

The cases cited by the Chief Justice to show that this court has now only done what it has repeatedly done before in other cases, without any question of its correctness, speak for themselves. The differences between the rules concerning pleas to the jurisdiction in the courts of the United States and common law courts have been stated and sustained by reasoning and adjudged cases, and it has been shown that writs of error to a State court and to the Circuit Courts of the United States are to be determined by different laws and principles. In the first, it is our duty to ascertain if this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review the case from the State court, and if it shall be found that it has not, the case is at end so far as this court is concerned, for our power to review the case upon its merits has been made, by the twenty-fifth section, to depend upon its having jurisdiction, when it has not, this court cannot criticise, controvert, or give any opinion upon the merits of a case from a State court.

But in a case brought to this court, by appeal or by writ of error from *a Circuit Court of the United States*, we begin a review of it not by inquiring if this court has jurisdiction, but if that court has it. If the case has been decided by that court upon its merits, but the record shows it to be deficient in those averments which by the law of the United States must be made by the plaintiff in the action to give the court jurisdiction of his case, we send it back to the court from which it was brought with directions to be dismissed though it has been decided there upon its merits.

So, in a case containing the averments by the plaintiff which are necessary to give the Circuit Court jurisdiction, if the defendant shall file his plea in abatement denying the truth of them, and the plaintiff shall demur to it, and the court should *erroneously sustain the plaintiff's demurrer, or declare the plea to be insufficient, and by doing so require the defendant to answer over by a plea to the merits, and shall decide the case upon such pleading*, this court has the same authority to inquire into the jurisdiction of that court to do so, and to correct its error in that regard, that it had in the other case to correct its error, in trying a case in which the plaintiff had not made those averments which were necessary to give the court jurisdiction. In both cases, the record is resorted to to determine the point of jurisdiction, but, as the power of review of cases from a Federal court by this court is not limited by the law to a part of the case, this court may correct an error upon the merits, and there is the same reason for correcting an erroneous

judgment of the Circuit Court where the want of jurisdiction appears from any part of the record that there is for declaring a want of jurisdiction for a want of necessary averments. Any attempt to control the court from doing so by the technical common law rules of pleading in cases of jurisdiction, when a defendant has been denied his plea to it, would tend to enlarge the jurisdiction of the Circuit Court by limiting this court's review of its judgments in that particular. But I will not argue a point already so fully discussed. I have every confidence in the opinion of the court upon the point of jurisdiction, and do not allow myself to doubt that the error of a contrary conclusion will be fully understood by all who shall read the argument of the Chief Justice.

I have already said that the opinion of the court has my unqualified assent.

Mr. Justice NELSON.

I shall proceed to state the grounds upon which I have arrived at the conclusion that the judgment of the court below should be affirmed. The suit was brought in the court below by the plaintiff for the purpose of asserting his freedom and that of Harriet, his wife, and two children.

The defendant plead in abatement to the suit that the cause of action, if any, accrued to the plaintiff out of the jurisdiction of the court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that the said plaintiff is not a citizen of the State of Missouri, as alleged in the declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court below sustained the demurrer, holding that the plea was insufficient in law to abate the suit.

The defendant then plead over in bar of the action:

1. The general issue. 2. That the plaintiff was a negro slave, the lawful property of the defendant. And 3. That Harriet, the wife of said plaintiff, and the two children, were the lawful slaves of the said defendant. Issue was taken upon these pleas, and the cause went down to trial before the court and jury, and an agreed state of facts was presented upon which the trial proceeded and resulted in a verdict for the defendant, under the instructions of the court.

The facts agreed upon were substantially as follows:

That, in the year 1834, the plaintiff, Scott, was a negro slave of Dr. Emerson, who was a surgeon in the army of the United States, and in that year he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At this date, Dr. Emerson removed, with the plaintiff, from the Rock Island post to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory of Upper Louisiana, and north of the latitude thirty-six degrees thirty minutes, and north of the State of Missouri. That he held the plaintiff in slavery at Fort Snelling from the last-mentioned date until the year 1838.

That, in the year 1835, Harriet, mentioned in the declaration, was a negro slave of Major Taliaferro, who belonged to the army of the United States, and in that year he took her to Fort Snelling, already mentioned, and kept her there as a slave until the year 1836, and then sold and delivered her to Dr. Emerson, who held her in slavery at Fort Snelling until the year 1838. That, in the year 1836, the plaintiff and Harriet were married at Fort Snelling with the consent of their master. The two children, Eliza and Lizzie, are the fruit of this marriage. The first is about fourteen years of age, and was born on board the steamboat *Gipsey*, north of the State of Missouri, and upon the Mississippi river, the other, about seven years of age, was born in the State of Missouri at the military post called Jefferson Barracks.

In 1838, Dr. Emerson removed the plaintiff Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided. And that, before the commencement of this suit, they were sold by the Doctor to Sandford, the defendant, who has claimed and held them as slaves ever since.

The agreed case also states that the plaintiff brought a suit for his freedom, in the Circuit Court of the State of Missouri, on which a judgment was rendered in his favor, but that, on a writ of error from the Supreme Court of the State, the judgment of the court below was reversed, and the cause remanded to the circuit for a new trial.

On closing the testimony in the court below, the counsel for the plaintiff prayed the court to instruct the jury, upon the agreed state of facts, that they ought to find for the plaintiff, when the court refused, and instructed them that, upon the facts, the law was with the defendant.

With respect to the plea in abatement, which went to the citizenship of the plaintiff and his competency to bring a suit in the Federal courts, the common law rule of pleading is that, upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with his master from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free State has no such effect, but, on the contrary, that his original condition continued unchanged.

The court below, the Circuit Court of the United States for Missouri, in which this suit was afterwards brought, followed the decision of the State court, and rendered a like judgment against the plaintiff.

The argument against these decisions is that the laws of Illinois forbidding slavery within her territory had the effect to set the slave free while residing in that State, and to impress upon him the condition and status of a freeman, and that, by force of these laws, this status and condition accompanied him on his return to the slave State, and, of consequence, he could not be there held as a slave.

This question has been examined in the courts of several of the slaveholding States, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is that the question is one which belongs to each State to decide for itself, either by its Legislature or courts of justice, and hence, in respect to the case before us, to the State of Missouri — a question exclusively of Missouri law, and which, when determined by that State, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the State is supreme over the subject of slavery within its jurisdiction.

As a practical illustration of the principle, we may refer to the legislation of the free States in abolishing slavery and prohibiting its introduction into their territories. Confessedly, except as restrained by the Federal Constitution, they exercised, and rightfully, complete and absolute power over the subject. Upon what principle, then, can it be denied to the State of Missouri? The power flows from the sovereign character of the States of the Union, sovereign not merely as respects the Federal Government — except as they have consented to its limitation — but sovereign as respects each other. Whether, therefore, the State of Missouri will recognise or give effect to the laws of Illinois within her territories on the subject of slavery is a question for her to determine. Nor is there any constitutional power in this Government that can rightfully control her.

Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory, and her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held, and the condition, capacity, and state of all persons therein, and also the remedy and modes of administering justice. And it is equally true that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State therefore can enact laws to operate beyond its own dominions, and if it attempts to do so, it may be lawfully refused obedience. Such laws can have no inherent authority extraterritorially. This is the necessary result of the independence of distinct and separate sovereignties.

Now it follows from these principles that whatever force or effect the laws of one State or nation may have in the territories of another must depend solely upon the laws and municipal regulations of the latter, upon its own jurisprudence and polity, and upon its own express or tacit consent.

Judge Story observes in his Conflict of Laws, p. 24,

“that a State may prohibit the operation of all foreign laws, and the rights growing out of them, within its territories. . . . And that, when its code speaks positively on the subject, it must be obeyed by all persons who are within reach of its sovereignty; when its

customary unwritten or common law speaks directly on the subject, it is equally to be obeyed."

Nations, from convenience and comity and from mutual interest and a sort of moral necessity to do justice, recognise and administer the laws of other countries. But of the nature, extent, and utility of them respecting property or the state and condition of persons within her territories, each nation judges for itself, and is never bound, even upon the ground of comity, to recognise them if prejudicial to her own interests. The recognition is purely from comity, and not from any absolute or paramount obligation.

Judge Story again observes, p. 398,

"that the true foundation and extent of the obligation of the laws of one nation within another is the voluntary consent of the latter, and is inadmissible when they are contrary to its known interests."

And he adds,

"in the silence of any positive rule affirming or denying or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them by their own Government unless they are repugnant to its policy or prejudicial to its interests."

See also 2 Kent Com., p. 457, 38 U. S. 13 Peters 519, 38 U. S. 589.

These principles fully establish that it belongs to the sovereign State of Missouri to determine by her laws the question of slavery within her jurisdiction, subject only to such limitations as may be found in the Federal Constitution, and further that the laws of other States of the Confederacy, whether enacted by their Legislatures or expounded by their courts, can have no operation within her territory or affect rights growing out of her own laws on the subject. This is the necessary result of the independent and sovereign character of the State. The principle is not peculiar to the State of Missouri, but is equally applicable to each State belonging to the Confederacy. The laws of each have no extraterritorial operation within the jurisdiction of another except such as may be voluntarily conceded by her laws or courts of justice. To the extent of such concession upon the rule of comity of nations, the foreign law may operate, as it then becomes a part of the municipal law of the State. When determined that the foreign law shall have effect, the municipal law of the State retires and gives place to the foreign law.

In view of these principles, let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extraterritorially, and the State of Illinois refused to recognise its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws and contrary to her policy. But how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognise and enforce the law of Illinois? For unless she is the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing. Neither has any force extraterritorially except what may be voluntarily conceded to them.

It has been supposed by the counsel for the plaintiff that a rule laid down by Huberus had some bearing upon this question. Huberus observes that

"personal qualities, impressed by the laws of any place, surround and accompany the person wherever he goes, with this effect: that in every place he enjoys and is subject to the same law which other persons of his class elsewhere enjoy or are subject to."

De Confl.Leg., lib. 1, tit. 3, sec. 12, 1 Story Con.Laws, pp. 59, 60.

The application sought to be given to the rule was this: that as Dred Scott was free while residing in the State of Illinois, by the laws of that State, on his return to the State of Missouri, he carried with him the personal qualities of freedom, and that the same effect must be given to his status there as in the former State. But the difficulty in the case is in the total misapplication of the rule.

These personal qualities to which Huberus refers are those impressed upon the individual by the law of the domicil; it is this that the author claims should be permitted to accompany the person into whatever country he might go, and should supersede the law of the place where he had taken up a temporary residence.

Now as the domicil of Scott was in the State of Missouri, where he was a slave, and from whence he was taken by his master into Illinois for a temporary residence, according to the doctrine of Huberus, the law of his domicil would have accompanied him, and, during his residence there, he would remain in the same condition as in the State of Missouri. In order to have given effect to the

rule, as claimed in the argument, it should have been first shown that a domicil had been acquired in the free State, which cannot be pretended upon the agreed facts in the case. But the true answer to the doctrine of Huberus is that the rule, in any aspect in which it may be viewed, has no bearing upon either side of the question before us, even if conceded to the extent laid down by the author, for he admits that foreign Governments give effect to these laws of the domicil no further than they are consistent with their own laws and not prejudicial to their own subjects; in other words, their force and effect depend upon the law of comity of the foreign Government. We should add also that this general rule of Huberus, referred to, has not been admitted in the practice of nations, nor is it sanctioned by the most approved jurists of international law. Story Con., sec. 91, 96, 103, 104; 2 Kent. Com., p. 457, 458; 1 Burge Con.Laws, pp. 12, 127.

We come now to the decision of this court in the case of *Strader et al. v. Graham,* 10 How. 2. The case came up from the Court of Appeals, in the State of Kentucky. The question in the case was whether certain slaves of Graham, a resident of Kentucky, who had been employed temporarily at several places in the State of Ohio with their master's consent and had returned to Kentucky into his service, had thereby become entitled to their freedom. The Court of Appeals held that they had not. The case was brought to this court under the twenty-fifth section of the Judiciary Act. This court held that it had no jurisdiction, for the reason the question was one that belonged exclusively to the State of Kentucky. The Chief Justice, in delivering the opinion of the court, observed that

"every State has an undoubted right to determine the status or domestic and social condition of the persons domiciled within its territory, except insofar as the powers of the States in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States, he observes that can in any degree control the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery after their return depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for herself whether their employment in another State should or should not make them free on their return."

It has been supposed, in the argument on the part of the plaintiff that the eighth section of the act of Congress passed March 6, 1820, 3 St. at Large, p. 544, which prohibited slavery north of thirty-six degrees thirty minutes, within which the plaintiff and his wife temporarily resided at Fort Snelling, possessed some superior virtue and effect, extraterritorially and within the State of Missouri, beyond that of the laws of Illinois or those of Ohio in the case of *Strader et al. v. Graham.* A similar ground was taken and urged upon the court in the case just mentioned, under the Ordinance of 1787, which was enacted during the time of the Confederation and reenacted by Congress after the adoption of the Constitution with some amendments adapting it to the new Government. 1 St. at Large p. 50.

In answer to this ground, the Chief Justice, in delivering the opinion of the court, observed:

"The argument assumes that the six articles which that ordinance declares to be perpetual are still in force in the States since formed within the territory and admitted into the Union. If this proposition could be maintained, it would not alter the question, for the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular Territory could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories, nor in any manner interfere with their laws and institutions, nor give this court control over them. "

"The ordinance in question, he observes, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that State."

This view, thus authoritatively declared, furnishes a conclusive answer to the distinction attempted to be set up between the extraterritorial effect of a State law and the act of Congress in question.

It must be admitted that Congress possesses no power to regulate or abolish slavery within the States, and that, if this act had attempted any such legislation, it would have been a nullity. And yet the argument here, if there be any force in it, leads to the result that effect may be given to such legislation, for it is only by giving the act of Congress operation within the State of Missouri that it can have any effect upon the question between the parties. Having no such effect directly, it will be difficult to maintain upon any consistent reasoning that it can be made to operate indirectly upon the subject.

The argument, we think, in any aspect in which it may be viewed, is utterly destitute of support upon any principles of constitutional law, as, according to that, Congress has no power whatever over the subject of slavery within the State, and is also

subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one Government have no force within the limits of another or extraterritorially except from the consent of the latter.

It is perhaps not unfit to notice in this connection that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the act of Congress, even within the territory to which it relates, was not authorized by any power under the Constitution. The doctrine here contended for not only upholds its validity in the territory, but claims for it effect beyond and within the limits of a sovereign State — an effect, as insisted, that displaces the laws of the State and substitutes its own provisions in their place.

The consequences of any such construction are apparent. If Congress possesses the power under the Constitution to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject, and then, upon the process of reasoning which seeks to extend its influence beyond the Territory and within the limits of a State, if Congress should establish, instead of abolish, slavery, we do not see but that, if a slave should be removed from the Territory into a free State, his status would accompany him, and continue notwithstanding its laws against slavery. The laws of the free State, according to the argument, would be displaced, and the act of Congress, in its effect, be substituted in their place. We do not see how this conclusion could be avoided if the construction against which we are contending should prevail. We are satisfied, however, it is unsound, and that the true answer to it is that even conceding, for the purposes of the argument that this provision of the act of Congress is valid within the Territory for which it was enacted, it can have no operation or effect beyond its limits or within the jurisdiction of a State. It can neither displace its laws nor change the status or condition of its inhabitants.

Our conclusion therefore is, upon this branch of the case, that the question involved is one depending solely upon the law of Missouri, and that the Federal court sitting in the State and trying the case before us was bound to follow it.

The remaining question for consideration is what is the law of the State of Missouri on this subject? And it would be a sufficient answer to refer to the judgment of the highest court of the State in the very case were it not due to that tribunal to state somewhat at large the course of decision and the principles involved on account of some diversity of opinion in the cases. As we have already stated, this case was originally brought in the Circuit Court of the State, which resulted in a judgment for the plaintiff. The case was carried up to the Supreme Court for revision. That court reversed the judgment below and remanded the cause to the circuit for a new trial. In that state of the proceeding, a new suit was brought by the plaintiff in the Circuit Court of the United States, and tried upon the issues and agreed case before us, and a verdict and judgment for the defendant that court following the decision of the Supreme Court of the State. The judgment of the Supreme Court is reported in the 15 Misso.R. p. 576. The court placed the decision upon the temporary residence of the master with the slaves in the State and Territory to which they removed, and their return to the slave State, and upon the principles of international law that foreign laws have no extraterritorial force except such as the State within which they are sought to be enforced may see fit to extend to them, upon the doctrine of comity of nations.

This is the substance of the grounds of the decision.

The same question has been twice before that court since, and the same judgment given, 15 Misso.R. 595, 17 *Ib.* 434. It must be admitted, therefore, as the settled law of the State, and, according to the decision in the case of Strader et al. v. Graham, is conclusive of the case in this court.

It is said, however that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly it must be unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be that the courts of a State are not to change their opinions, or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so in the case before us, it is an exception to the rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence — in other words, to make that his or her domicil. And in several of the cases, this removal and permanent residence were relied on as the

ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases, the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his Government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free — in Kentucky, 2 Marsh. 476, 5 B. Munroe 176, 9 *ib.* 565 — in Virginia, 1 Rand. 15, 1 Leigh 172, 10 Grattan 495 — in Maryland, 4 Harris and McHenry 295, 322, 325. In conformity also with the law of England on this subject, *Ex parte Grace*, 2 Hagg.Adm.R. 94, and with the opinions of the most eminent jurists of the country. Story's Confl. 396a, 2 Kent Com. 258 n., 18 Pick. 193, Chief Justice Shaw. *See* Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.

Lord Stowell, in communicating his opinion in the case of the slave Grace to Judge Story, states, in his letter, what the question was before him, namely:

"Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return."

He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the *Case of Somersett*, but the practice, he observed, "has regularly been that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.

Judge Story, in his letter in reply, observes:

"I have read with great attention your judgment in the slave case, &c. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result."

Again he observes:

"In my native State (Massachusetts), the state of slavery is not recognised as legal, and yet, if a slave should come hither and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be redintegrated."

We may remark in this connection that the case before the Maryland court, already referred to, and which was decided in 1799, presented the same question as that before Lord Stowell, and received a similar decision. This was nearly thirty years before the decision in that case, which was in 1828. The Court of Appeals observed, in deciding the Maryland case, that

"however the laws of Great Britain in such instances, operating upon such persons there, might interfere so as to prevent the exercise of certain acts by the masters, not permitted, as in the case of Somersett, yet, upon the bringing Ann Joice into this State (then the province of Maryland), the relation of master and slave continued in its extent, as authorized by the laws of this State."

And Luther Martin, one of the counsel in that case, stated, on the argument that the question had been previously decided the same way in the case of slaves returning from a residence in Pennsylvania, where they had become free under her laws.

The State of Louisiana, whose courts had gone further in holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law by an act of her Legislature in conformity with the law of the court of Missouri in the case before us. Sess. Law, 1846.

The case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country, for in that case the slave returned to a colony of England over which the Imperial Government exercised supreme authority. Yet, on the return of the slave to the colony, from a temporary residence in England, he held that the original condition of the slave attached. The question presented in cases arising here is as to the effect and operation to be given to the laws of a foreign State on the return of the slave within an independent sovereignty.

Upon the whole, it must be admitted that the current of authority both in England and in this country is in accordance with the law as declared by the courts of Missouri in the case before us, and we think the court below was not only right, but bound to follow it.

Some question has been made as to the character of the residence in this case in the free State. But we regard the facts as set forth in the agreed case as decisive. The removal of Dr. Emerson from Missouri to the military posts was in the discharge of his duties as surgeon in the army, and under the orders of his Government. He was liable at any moment to be recalled, as he was in 1838, and ordered to another post. The same is also true as it respects Major Taliaferro. In such a case, the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode. The question we think too plain to require argument. The case of the *Attorney General v. Napier*, 6 Welsh, Hurtst. and Gordon Exch. Rep. 217, illustrates and applies the principle in the case of an officer of the English army.

A question has been alluded to, on the argument, namely, the right of the master with his slave of transit into or through a free State, on business or commercial pursuits, or in the exercise of a Federal right, or the discharge of a Federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles from the one in hand, and turns upon the rights and privileges secured to a common citizen of the republic under the Constitution of the United States. When that question arises, we shall be prepared to decide it.

Our conclusion is that the judgment of the court below should be affirmed.

Mr. Justice GRIER.

I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice that the act of Congress of 6th March, 1820, is unconstitutional and void and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But that the record shows a *prima facie*case of jurisdiction, requiring the court to decide all the questions properly arising in it, and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance, for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

Mr. Justice DANIEL.

It may with truth be affirmed that since the establishment of the several communities now constituting the States of this Confederacy, there never has been submitted to any tribunal within its limits questions surpassing in importance those now claiming the consideration of this court. Indeed it is difficult to imagine, in connection with the systems of polity peculiar to the United States, a conjuncture of graver import than that must be, within which it is aimed to comprise and to control not only the faculties and practical operation appropriate to the American Confederacy as such, but also the rights and powers of its separate and independent members, with reference alike to their internal and domestic authority and interests and the relations they sustain to their confederates.

To my mind it is evident that nothing less than the ambitious and far-reaching pretension to compass these objects of vital concern is either directly essayed or necessarily implied in the positions attempted in the argument for the plaintiff in error.

How far these positions have any foundation in the nature of the rights and relations of separate, equal, and independent Governments, or in the provisions of our own Federal compact, or the laws enacted under and in pursuance of the authority of that compact will be presently investigated.

In order correctly to comprehend the tendency and force of those positions, it is proper here succinctly to advert to the facts upon which the questions of law propounded in the argument have arisen.

This was an action of trespass *vi et armis* instituted in the Circuit Court of the United States for the district of Missouri, in the name of the plaintiff in error, a negro held as a slave, for the recovery of freedom for himself, his wife, and two children, also negroes.

To the declaration in this case the defendant below, who is also the defendant in error, pleaded in abatement that the court could not take cognizance of the cause because the plaintiff was not a citizen of the State of Missouri, as averred in the declaration, but was a negro of African descent, and that his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and hence it followed, from the second section of the third article of the Constitution, which creates the judicial power of the United States with respect to controversies between citizens of different States that the Circuit Court could not take cognizance of the action.

To this plea in abatement, a demurrer having been interposed on behalf of the plaintiff, it was sustained by the court. After the decision sustaining the demurrer, the defendant, in pursuance of a previous agreement between counsel, and with the leave of the court, pleaded in bar of the action: 1st, not guilty, 2dly that the plaintiff was a negro slave, the lawful property of the defendant, and as such the defendant gently laid his hands upon him, and thereby had only restrained him, as the defendant had a right to do, 3dly that with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.

Issues having been joined upon the above pleas in bar, the following statement, comprising all the evidence in the cause, was agreed upon and signed by the counsel of the respective parties, *viz:*

"In the year 1834, the plaintiff was a negro slave belonging to Doctor Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838."

"In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the said Dr. Emerson, hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838."

"In the year 1836, the plaintiff and said Harriet, at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at a military post called Jefferson barracks."

"In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet, and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided."

"Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves."

"At the times mentioned in the plaintiff's declaration, the defendant, claiming to be owner as aforesaid, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than what he might lawfully do if they were of right his slaves at such times."

"Further proof may be given on the trial for either party."

"R. M. FIELD, *for Plaintiff*"

"H. A. GARLAND, *for Defendant.*"

"It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county that there was a verdict and judgment in his favor that on a writ of error to the Supreme Court, the judgment below was reversed, and the cause remanded to the Circuit Court, where it has been continued to await the decision of this case."

"FIELD, *for Plaintiff*"

"GARLAND, *for Defendant*"

Upon the aforegoing agreed facts, the plaintiff prayed the court to instruct the jury that they ought to find for the plaintiff, and upon the refusal of the instruction thus prayed for, the plaintiff excepted to the court's opinion. The court then, upon the prayer of the defendant, instructed the jury that upon the facts of this case agreed as above, the law was with the defendant. To this opinion also the plaintiff's counsel excepted, as he did to the opinion of the court denying to the plaintiff a new trial after the verdict of the jury in favor of the defendant.

The question first in order presented by the record in this cause is that which arises upon the plea in abatement, and the demurrer to that plea, and upon this question, it is my opinion that the demurrer should have been overruled, and the plea sustained.

On behalf of the plaintiff, it has been urged that by the pleas interposed in bar of a recovery in the court below (which pleas both in fact and in law are essentially the same with the objections averred in abatement), the defence in abatement has been displaced or waived that it could therefore no longer be relied on in the Circuit Court, and cannot claim the consideration of this court in reviewing this cause. This position is regarded as wholly untenable. On the contrary, it would seem to follow conclusively from the peculiar character of the courts of the United States, as organized under the Constitution and the statutes, and as defined by numerous and unvarying adjudications from this bench, that there is not one of those courts whose jurisdiction and powers can be deduced from mere custom or tradition, not one whose jurisdiction and powers must not be traced palpably to, and invested exclusively by, the Constitution and statutes of the United States, not one that is not bound, therefore, at all times, and at all stages of its proceedings, to look to and to regard the special and declared extent and bounds of its commission and authority. There is no such tribunal of the United States as a court of general jurisdiction, in the sense in which that phrase is applied to the superior courts under the common law, and even with respect to the courts existing under that system, it is a well settled principle that *consent* can never give jurisdiction.

The principles above stated, and the consequences regularly deducible from them, have, as already remarked, been repeatedly and unvaryingly propounded from this bench. Beginning with the earliest decisions of this court, we have the cases of *Bingham v. Cabot et al.*, 3 Dallas 382, *Turner v. Eurille*, 4 Dallas 7, *Abercrombie v. Dupuis*, 1 Cranch 343 [omitted], *Wood v. Wagnon*, 2 Cranch 9, *The United States v. The brig Union et al.*, 4 Cranch 216, *Sullivan v. The Fulton Steamboat Company*, 6 Wheaton 450, *Mollan et al. v. Torrence*, 9 Wheaton 537, *Brown v. Keene*, 8 Peters 112, and *Jackson v. Ashton*, 8 Peters 148, ruling, in uniform and unbroken current, the doctrine that it is essential to the jurisdiction of the courts of the United States that the facts upon which it is founded should appear upon the record. Nay, to such an extent and so inflexibly has this requisite to the jurisdiction been enforced that in the case of *Capron v. Van Noorden*, 2 Cranch 126, it is declared that the plaintiff in this court may assign for error his own omission in the pleadings in the court below where they go to the jurisdiction. This doctrine has been, if possible, more strikingly illustrated in a later decision, the case of *The State of Rhode Island v. The State of Massachusetts*, in the 12th of Peters.

In this case, on page 37 U. S. 718 of the volume, this court, with reference to a motion to dismiss the cause for want of jurisdiction, have said:

"*However late this objection has been made, or may be made, in any cause in an inferior or appellate court of the United States*, it must be considered and decided before any court can move one farther step in the cause, as any movement is necessarily to exercise the jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit, to adjudicate or exercise any judicial power over them. The question is whether on the case before the court their action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. A motion to dismiss a cause pending in the courts of the United States is not analogous to a plea to the jurisdiction of a court of common law or equity in England; there, the superior courts have a general jurisdiction over all persons within the realm and all causes of action between them. It depends on the subject matter, whether the jurisdiction shall be exercised by a court of law or equity, but that court to which it appropriately belongs can act judicially upon the party and the subject of the suit unless it shall be made apparent to the court that the judicial determination of the case has been withdrawn from the court of general jurisdiction to an inferior and limited one. It is a necessary presumption that the court of general jurisdiction can act upon the given case when nothing to the contrary appears; hence has arisen the rule that the party claiming an exemption from its process must set out the reason by a special plea in abatement, and show that some inferior court of law or equity has the exclusive cognizance of the case; otherwise the superior court must proceed in virtue of its general jurisdiction. A motion to dismiss therefore cannot be entertained, as it does not disclose a case of exception, and, if a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. There are other classes of cases where the objection to the jurisdiction is of a different nature, as on a bill in chancery that the subject matter is cognizable only by the King in Council, or that the parties defendant cannot be brought before any municipal court on account of their sovereign character or the nature of the controversy, or to the very common cases which present the question, whether the cause belong to a court of law or equity. To such cases, a plea in abatement would not be applicable, because the plaintiff could not sue in an inferior court. The objection goes to a denial of any jurisdiction of a municipal court in the one class of cases, and to the jurisdiction of any court of equity or of law in the other, on which last the court decides according to its discretion."

"An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived by appearance and pleading to issue, but when the objection goes to the power of the court over the parties or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ. Where an inferior court can have no jurisdiction of a case of law or equity, the ground of objection is not taken by plea in abatement, as an exception of the given case from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, *or at the trial or hearing.*As a denial of jurisdiction over the subject matter of a suit between parties within the realm, over which and whom the court has power to act, cannot be successful in an English court of general jurisdiction, a motion like the present could not be sustained consistently with the principles of its constitution. *But as this court is one of limited and special original jurisdiction*, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act, any proceeding without the limits prescribed is *coram non judice*, and its action a nullity. And whether the want or excess of power is objected by a party or is apparent to the court, it must surcease its action or proceed extrajudicially."

In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know — nay, are bound to know and to be governed by.

If, on the other hand, there exist facts or circumstances by which a particular case would be withdrawn or exempted from the influence of public law or necessary historical knowledge, such facts and circumstances form an exception to the general principle, and these must be specially set forth and *established* by those who would avail themselves of such exception.

Now the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know — that the African negro race never have been acknowledged as belonging to the family of nations; that, as amongst them, there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase, as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.

In the plea in abatement, the character or capacity of citizen on the part of the plaintiff is denied, and the causes which show the absence of that character or capacity are set forth by averment. The verity of those causes, according to the settled rules of pleading, being admitted by the demurrer, it only remained for the Circuit Court to decide upon their legal sufficiency to abate the plaintiff's action. And it now becomes the province of this court to determine whether the plaintiff below (and in error here), admitted to be a *negro* of African descent, whose ancestors were of pure African blood and were brought into this country and sold as negro slaves — such being his status, and such the circumstances surrounding his position — whether he can, by correct legal induction from that status and those circumstances, be clothed with the character and capacities of a citizen of the State of Missouri?

It may be assumed as a postulate that to a slave, as such, there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly *property*, to be used in subserviency to the interests, the convenience, or the will, of his owner, and to suppose, with respect to the former, the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication, if not directly, to deny the relation of master and slave, since none can possess and enjoy as his own that which another has a paramount right and power to withhold. Hence it follows necessarily that a slave, the *peculium* or property of a master, and possessing within himself no civil nor political rights or capacities, cannot be a CITIZEN. For who, it may be asked, is a citizen? What do the character and status of citizen import? Without fear of contradiction, it does not import the condition of being private property, the subject of individual power and ownership. Upon a principle of etymology alone, the term *citizen*, as derived from *civitas*, conveys the ideas of connection or identification with the State or Government, and a participation of its functions. But beyond this, there is not, it is believed, to be found in the theories of writers on Government or in any actual experiment heretofore tried, an exposition of the term *citizen* which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.

Thus Vattel, in the preliminary chapter to his Treatise on the Law of Nations, says:

"Nations or States are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their mutual strength. Such a society has her affairs and her interests, she deliberates and takes

resolutions *in common*, thus becoming a moral person who possesses an understanding and a will peculiar to herself."

Again, in the first chapter of the first book of the Treatise just quoted, the same writer, after repeating his definition of a State, proceeds to remark that,

"from the very design that induces a number of men to form a society which has its common interests and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the *sovereignty.*"

Again, this writer remarks: "The authority of *all* over each member essentially belongs to the body politic, or the State."

By this same writer it is also said:

"The citizens are the members of the civil society, bound to this society by certain duties, and subject to its authority; they *equally* participate in its advantages. The natives or natural-born citizens are those born in the country of parents who are citizens. As society cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights."

Again:

"I say, to be *of the country*, it is necessary to be born of a person who is a *citizen*, for if he be born there of a foreigner, it will be only the place of his *birth*, and not his *country.* The inhabitants, as distinguished from citizens, are foreigners who are permitted to settle and stay in the country."

Vattel, Book 1, cap. 19, p. 101.

From the views here expressed, and they seem to be unexceptionable, it must follow that, with the *slave*, with one devoid of rights or capacities, *civil or political*,there could be no pact that one thus situated could be no party to or actor in, the association of those possessing free will, power, discretion. He could form no part of the design, no constituent ingredient or portion of a society based upon *common*, that is, upon *equal* interests and powers. He could not at the same time be the sovereign and the slave.

But it has been insisted in argument that the emancipation of a slave, effected either by the direct act and assent of the master or by causes operating in contravention of his will, produces a change in the status or capacities of the slave such as will transform him from a mere subject of property into a being possessing a social, civil, and political equality with a citizen. In other words, will make him a citizen of the State within which he was, previously to his emancipation, a slave.

It is difficult to conceive by what magic the mere *surcease* or renunciation of an interest in a subject of *property*, by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation. Can it be pretended that an individual in any State, by his single act, though voluntarily or designedly performed, yet without the co-operation or warrant of the Government, perhaps in opposition to its policy or its guaranties, can create a citizen of that State? Much more emphatically may it be asked how such a result could be accomplished by means wholly extraneous and entirely foreign to the Government of the State? The argument thus urged must lead to these extraordinary conclusions. It is regarded at once as wholly untenable, and as unsustained by the direct authority or by the analogies of history.

The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of *villanage*, as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans or from slavery at any period within the United States.

But with regard to slavery amoungst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the status or the rights of citizenship.

The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the republic, and until a late period of the eastern empire, and at last was in *effect* destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abasement incident to absolute and simple despotism.

By the learned and elegant historian of the Decline and Fall of the Roman Empire, we are told that,

"In the decline of the Roman empire, the proud distinctions of the republic were gradually abolished, and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates, and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But, in the eye of the law, all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was *degraded* to an obsolete and empty name. T he voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master, and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which the citizen alone had been once entitled to assume over the conquests of his fathers. The first Caesars had scrupulously guarded the distinction of *ingenuous* and *servile* birth, which was decided by the condition of the mother. The slaves who were liberated by a generous master immediately entered into the middle class of *libertini*, or freedmen, but they could never be enfranchised from the duties of obedience and gratitude, whatever were the fruits of their industry, their patron and his family inherited the third part, or even the whole, of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave obtained without reserve or delay the station of a citizen, and at length the dignity of an ingenuous birth *was created* or *supposed* by the omnipotence of the emperor. [Footnote 1]"

The above account of slavery and its modifications will be found in strictest conformity with the Institutes of Justinian. Thus, in book 1st, title 3d, it is said: "The first general division of persons in respect to their rights is into freemen and slaves." The same title, sec. 4th: "Slaves are born such, or become so. They are born such of bondwomen; they become so either by the *law of nations*, as by capture, or by the civil law." Section 5th: "In the condition of slaves there is no diversity, but among free persons there are many. Thus some are *ingenui* or freemen, others *libertini* or freedmen."

Tit. 4th. DE INGENUIS. "A freeman is one who is born free by being born in matrimony, of parents who both are free, or both freed, or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free."

Tit. 5th. DE LIBERTINIS. "Freedmen are those who have been manumitted from just servitude."

Section third of the same title states that "freedmen were formerly distinguished by a threefold division." But the emperor proceeds to say:

"Our *piety* leading us to reduce all things into a better state, we have amended our laws, and reestablished the ancient usage, for anciently liberty was simple and undivided — that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference that the person manumitted became only a *freed man*, although his manumittor was a *free* man."

And he further declares:

"We have made all freed men in general become citizens of Rome, regarding neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which *slaves* may become Roman citizens."

By the references above given, it is shown, from the nature and objects of civil and political associations and upon the direct authority of history, that citizenship was not conferred by the simple fact of emancipation, but that such a result was deduced therefrom in violation of the fundamental principles of free political association, by the exertion of despotic will to establish, under a false and misapplied denomination, one equal and universal slavery, and to effect this result required the exertions of absolute power — of a power both in theory and practice, being in its most plenary acceptation the SOVEREIGNTY, THE STATE ITSELF — it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a slave. The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart. There is not perhaps a community in which slavery is recognised in which the power of emancipation and the modes of its exercise are not regulated by law — that is, by the sovereign authority, and none can fail to comprehend the necessity for such regulation for the preservation of order and even of political and social existence.

By the argument for the plaintiff in error, a power equally despotic is vested in every member of the association, and the most obscure or unworthy individual it comprises may arbitrarily invade and derange its most deliberate and solemn ordinances. At assumptions anomalous as these, so fraught with mischief and ruin, the mind at once is revolted, and goes directly to the conclusions that to change or to abolish a fundamental principle of the society must be the act of the society itself — of the *sovereignty*, and that none other can admit to a participation of that high attribute. It may further expose the character of the argument urged for the plaintiff to point out some of the revolting consequences which it would authorize. If that argument possesses any integrity, it asserts the power in any citizen, or *quasi* citizen, or a resident foreigner of anyone of the States, from a motive either of corruption or caprice, not only to infract the inherent and necessary authority of such State, but also materially to interfere with the organization of the Federal Government and with the authority of the separate and independent States. He may emancipate his negro slave, by which process he first transforms that slave into a citizen of his own State; he may next, under color of article fourth, section second, of the Constitution of the United States, obtrude him, and on terms of civil and political equality, upon any and every State in this Union, in defiance of all regulations of necessity or policy, ordained by those States for their internal happiness or safety. Nay, more: this manumitted slave may, by a proceeding springing from the will or act of his master alone, be mixed up with the institutions of the Federal Government, to which he is not a party, and in opposition to the laws of that Government which, in authorizing the extension by naturalization of the rights and immunities of citizens of the United States to those not originally parties to the Federal compact, have restricted that boon to *free white aliens alone*. If the rights and immunities connected with or practiced under the institutions of the United States can by any indirection be claimed or deduced from sources or modes other than the Constitution and laws of the United States, it follows that the power of naturalization vested in Congress is not exclusive — that it has *in effect* no existence, but is repealed or abrogated.

But it has been strangely contended that the jurisdiction of the Circuit Court might be maintained upon the ground that the plaintiff was a *resident* of Missouri, and that, for the purpose of vesting the court with jurisdiction over the parties, residence within the State was sufficient.

The first, and to my mind a conclusive, reply to this singular argument is presented in the fact that the language of the Constitution restricts the jurisdiction of the courts to cases in which the parties shall be *citizens*, and is entirely silent with respect to residence. A second answer to this strange and latitudinous notion is that it so far stultifies the sages by whom the Constitution was framed as to impute to them ignorance of the material distinction existing between *citizenship*and mere *residence* or *domicil*, and of the well known facts that a person confessedly an *alien* may be permitted to reside in a country in which he can possess no civil or political rights, or of which he is neither a citizen nor subject, and that, for certain purposes, a man may have a *domicil* in different countries, in no one of which he is an actual personal resident.

The correct conclusions upon the question here considered would seem to be these:

That, in the establishment of the several communities now the States of this Union, and in the formation of the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as *property* merely, and as such was not and could not be a party or an actor, much less a *peer* in any compact or form of government established by the States or the United States. That if, since the adoption of the State Governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty — the State — exerted to that end, either in the form of legislation or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That, so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognised either by the language or purposes of the former, and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization*, these laws, as has already been remarked, being restricted to *free white aliens* exclusively.

But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of State power would be incompetent to bestow a character or status created by the Constitution or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the Federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

The States, in the exercise of their political power, might, with reference to their peculiar Government and jurisdiction, guaranty the rights of person and property, and the enjoyment of civil and political privileges, to those whom they should be disposed to make

the objects of their bounty, but they could not reclaim or exert the powers which they had vested exclusively in the Government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding.

According to the view taken of the law as applicable to the demurrer to the plea in abatement in this cause, the questions subsequently raised upon the several pleas in bar might be passed by as requiring neither a particular examination nor an adjudication directly upon them. upon them. But as these questions are intrinsically of primary interest and magnitude, and have been elaborately discussed in argument, and as with respect to them the opinions of a majority of the court, including my own, are perfectly coincident, to me it seems proper that they should here be fully considered, and, so far as it is practicable for this court to accomplish such an end, finally put to rest.

The questions then to be considered upon the several pleas in bar, and upon the agreed statement of facts between the counsel, are: 1st. Whether the admitted master and owner of the plaintiff, holding him as his slave in the State of Missouri, and in conformity with his rights guarantied to him by the laws of Missouri then and still in force, by carrying with him for his own benefit and accommodation, and as his own slave, the person of the plaintiff into the State of Illinois, within which State slavery had been prohibited by the Constitution thereof, and by retaining the plaintiff during the commorancy of the master within the State of Illinois, had, upon his return with his slave into the State of Missouri, forfeited his rights as master by reason of any supposed operation of the prohibitory provision in the Constitution of Illinois, beyond the proper territorial jurisdiction of the latter State? 2d. Whether a similar removal of the plaintiff by his master from the State of Missouri, and his retention in service at a point included within no State, but situated north of thirty-six degrees thirty minutes of north latitude, worked a forfeiture of the right of property of the master, and the manumission of the plaintiff?

In considering the first of these questions, the acts or declarations of the master, as expressive of his purpose to emancipate, may be thrown out of view, since none will deny the right of the owner to relinquish his interest in any subject of property at any time or in any place. The inquiry here bears no relation to acts or declarations of the owner as expressive of his intent or purpose to make such a relinquishment; it is simply a question whether, irrespective of such purpose and in opposition thereto, that relinquishment can be enforced against the owner of property within his own country, in defiance of every guaranty promised by its laws, and this through the instrumentality of a claim to power entirely foreign and extraneous with reference to himself, to the origin and foundation of his title, and to the independent authority of his country. A conclusive negative answer to such an inquiry is at once supplied by announcing a few familiar and settled principles and doctrines of public law.

Vattel, in his chapter the the general principles of the laws of nations, section 15th, tells us that

“nations, being free and independent of each other in the same manner that men are naturally free and independent, the second general law of their society is that each nation should be left in the peaceable enjoyment of that liberty which she inherits from nature.”

“The natural society of nations,” says this writer, “cannot subsist unless the natural rights of each be respected.” In section 16th he says,

“as a consequence of that liberty and independence, it exclusively belongs to each nation to form her own judgment of what her conscience prescribes for her — of what it is proper or improper for her to do, and of course it rests solely with her to examine and determine whether she can perform any office for another nation without neglecting the duty she owes to herself. In all cases, therefore, in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such a particular manner, for any attempt at such compulsion would be an infringement on the liberty of nations.”

Again, in section 18th of the same chapter,

“nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not produce any difference. A small republic is no less a sovereign state than the most powerful kingdom.”

So, in section 20:

“A nation, then, is mistress of her own actions, so long as they do not affect the proper and *perfect rights* of any other nation — so long as she is only *internally*bound, and does not lie under any *external* and *perfect* obligation. If she makes an ill use of her liberty,

she is guilty of a breach of duty, but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her. Since nations are *free*, *independent*, and *equal*, and since each possesses the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfill her duties, the effect of the whole is to produce, at least externally, in the eyes of mankind, a perfect equality of rights between nations in the administration of their affairs and in the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definitive judgment."

Chancellor Kent, in the 1st volume of his Commentaries, lecture 2d, after collating the opinions of Grotius, Heineccius, Vattel, and Rutherford, enunciates the following positions as sanctioned by these and other learned publicists, *viz:* that

"nations are equal in respect to each other, and entitled to claim equal consideration for their rights, whatever may be their relative dimensions or strength, or however greatly they may differ in government, religion, or manners. This perfect equality and entire independence of all distinct States is a fundamental principle of public law. It is a necessary consequence of this equality that each nation has a right to govern itself as it may think proper, and no one nation is entitled to dictate a form of government or religion, or a course of internal policy, to another. This writer gives some instances of the violation of this great national immunity, and amongst them the constant interference by the ancient Romans, under the pretext of settling disputes between their neighbors, but with the real purpose of reducing those neighbors to bondage, the interference of Russia, Prussia, and Austria for the dismemberment of Poland, the more recent invasion of Naples by Austria in 1821, and of Spain by the French Government in 1823, under the excuse of suppressing a dangerous spirit of internal revolution and reform."

With reference to this right of self-government in independent sovereign States, an opinion has been expressed which, whilst it concedes this right as inseparable from and as a necessary attribute of sovereignty and independence, asserts nevertheless some implied and paramount authority of a supposed international law, to which this right of self-government must be regarded and exerted as subordinate, and from which independent and sovereign States can be exempted only by a protest, or by some public and formal rejection of that authority. With all respect for those by whom this opinion has been professed, I am constrained to regard it as utterly untenable, as palpably inconsistent, and as presenting in argument a complete *felo de se.*

Sovereignty, independence, and a perfect right of self-government, can signify nothing less than a superiority to and an exemption from all claims by any extraneous power, however expressly they may be asserted, and render all attempts to enforce such claims merely attempts at usurpation. Again, could such claims from extraneous sources be regarded as legitimate, the effort to resist or evade them, by protest or denial, would be as irregular and unmeaning as it would be futile. It could in no wise affect the question of superior right. For the position here combatted, no respectable authority has been, and none it is thought can be, adduced. It is certainly irreconcilable with the doctrines already cited from the writers upon public law.

Neither the *Case of Lewis Somersett*, Howell's State Trials, vol. 20, so often vaunted as the proud evidence of devotion to freedom under a Government which has done as much perhaps to extend the reign of slavery as all the world besides, nor does any decision founded upon the authority of *Somersett's Case*, when correctly expounded, assail or impair the principle of national equality enunciated by each and all of the publicists already referred to. In the case of *Somersett*, although the applicant for the habeas corpus and the individual claiming property in that applicant were both subjects and residents within the British empire, yet the decision cannot be correctly understood as ruling absolutely and under all circumstances against the right of property in the claimant. That decision goes no farther than to determine that, *within the realm of England*, there was no authority to justify the detention of an individual in private bondage. If the decision in *Somersett's Case* had gone beyond this point, it would have presented the anomaly of a repeal by laws enacted for and limited in their operation to the realm alone, of other laws and institutions established for places and subjects without the limits of the realm of England, laws and institutions at that very time, and long subsequently, sanctioned and maintained under the authority of the British Government, and which the full and combined action of the King and Parliament was required to abrogate.

But could the decision in *Somersett's Case* be correctly interpreted as ruling the doctrine which it has been attempted to deduce from it, still that doctrine must be considered as having been overruled by the lucid and able opinion of Lord Stowell in the more recent case of the slave Grace, reported in the second volume of Haggard, p. 94, in which opinion, whilst it is conceded by the learned judge that there existed no power to coerce the slave whilst in England that yet, upon her return to the island of Antigua, her status as a slave was revived, or, rather, that the title of the owner to the slave as property had never been extinguished, but had always existed in that island. If the principle of this decision be applicable as between different portions of one and the same empire, with how much more force does it apply as between nations or Governments entirely separate, and absolutely independent

of each other? For in this precise attitude the States of this Union stand with reference to this subject, and with reference to the tenure of every description of property vested under their laws and held within their territorial jurisdiction.

A strong illustration of the principle ruled by Lord Stowell, and of the effect of that principle even in a case of express contract, is seen in the case of *Lewis v. Fullerton,*decided by the Supreme Court of Virginia and reported in the first volume of Randolph, p. 15. The case was this: a female slave, the property of a citizen of Virginia, whilst with her master in the State of Ohio, was taken from his possession under a writ of habeas corpus, and set at liberty. Soon, or immediately after, by agreement between this slave and her master, a deed was executed in Ohio by the latter containing a stipulation that this slave should return to Virginia, and after a service of two years in that State, should there be free. The law of Virginia regulating emancipation required that deeds of emancipation should, within a given time from their date, be recorded in the court of the county in which the grantor resided, and declared that deeds with regard to which this requisite was not complied with should be void. Lewis, an infant son of this female, under the rules prescribed in such cases, brought an action *in forma pauperis* in one of the courts of Virginia for the recovery of his freedom, claimed in virtue of the transactions above mentioned. Upon an appeal to the Supreme Court from a judgment against the plaintiff, Roane, Justice, in delivering the opinion of the court, after disposing of other questions discussed in that case, remarks:

"As to the deed of emancipation contained in the record that deed, taken in connection with the evidence offered in support of it, shows that it had a reference to the State of Virginia, and the testimony shows that it formed a part of this contract, whereby the slave Milly was to be brought back (as she was brought back) into the State of Virginia. Her object was therefore to secure her freedom by the deed within the State of Virginia after the time should have expired for which she had indented herself and when she should be found abiding within the State of Virginia."

"If, then, this contract had an eye to the State of Virginia for its operation and effect, the *lex loci* ceases to operate. In that case, it must, to have its effect, conform to the laws of Virginia. It is insufficient under those laws to effectuate an emancipation, for what of a due recording in the county court, as was decided in the case of *Givens v. Mann* in this court. It is also ineffectual within the Commonwealth of Virginia for another reason. The *lex loci* is also to be taken subject to the exception that it is not to be enforced in another country when it violates some moral duty or the policy of that country or is not consistent with a positive right secured to a third person or party by the laws of that country in which it is sought to be enforced. In such a case, we are told, '*magis jus nostrum, quam jus alienum servemus.*' Huberus, tom. 2, lib. 1, tit. 3, 2 Fontblanque, p. 444."

"That third party in this instance is the Commonwealth of Virginia, and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance."

The second or last-mentioned position assumed for the plaintiff under the pleas in bar, as it rests mainly if not solely upon the provision of the act of Congress of March 6, 1820, prohibiting slavery in Upper Louisiana north of thirty-six degrees thirty minutes north latitude, popularly called the *Missouri Compromise*, that assumption renews the question, formerly so zealously debated, as to the validity of the provision in the act of Congress, and upon the constitutional competency of Congress to establish it.

Before proceeding, however, to examine the validity of the prohibitory provision of the law, it may, so far as the rights involved in this cause are concerned, be remarked that conceding to that provision the validity of a legitimate exercise of power, still this concession could by no rational interpretation imply the slightest authority for its operation beyond the territorial limits comprised within its terms, much less could there be inferred from it a power to destroy or in any degree to control rights, either of person or property, entirely within the bounds of a distinct and independent sovereignty — rights invested and fortified by the guaranty of that sovereignty. These surely would remain in all their integrity, whatever effect might be ascribed to the prohibition within the limits defined by its language.

But, beyond and in defiance of this conclusion, inevitable and undeniable as it appears, upon every principle of justice or sound induction, it has been attempted to convert this prohibitory provision of the act of 1820 not only into a weapon with which to assail the inherent — the necessarily inherent — powers of independent sovereign Governments, but into a mean of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt, there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all — the power, in fine, of confiscation, in retribution for no offence, or, if for an offence, for that of accidental locality only.

It may be that, with respect to future cases, like the one now before the court, there is felt an assurance of the impotence of such a pretension; still, the fullest conviction of that result can impart to it no claim to forbearance, nor dispense with the duty of antipathy and disgust at its sinister aspect, whenever it may be seen to scowl upon the justice, the order, the tranquillity, and fraternal feeling which are the surest, nay, the only, means of promoting or preserving the happiness and prosperity of the nation, and which were the great and efficient incentives to the formation of this Government.

The power of Congress to impose the prohibition in the eighth section of the act of 1820 has been advocated upon an attempted construction of the second clause of the third section of the fourth article of the Constitution, which declares that

"Congress shall have power to dispose of and to make all needful rules and regulations respecting the *territory* and *other property belonging* to the United States."

In the discussions in both houses of Congress at the time of adopting this eighth section of the act of 1820, great weight was given to the peculiar language of this clause, *viz: territory* and *other property belonging* to the United States, as going to show that the power of disposing of and regulating thereby vested in Congress was restricted to a *proprietary interest in the territory or land* comprised therein, and did not extend to the personal or political rights of citizens or settlers, inasmuch as this phrase in the Constitution, "*territory or other property,*" identified *territory* with *property,* and inasmuch as *citizens* or *persons* could not be property, and especially were not property *belonging* to the United States. And upon every principle of reason or necessity, this power to dispose of and to regulate the *territory* of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, *viz.*, the nation. Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes by degrading them from the position they previously occupied.

There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the Territories; on the contrary, there is an absolute incongruity between them.

But whatever the power vested in Congress, and whatever the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the *United States*, and one to be disposed of and regulated for the benefit and under the authority of the *United States.* Congress was made simply the agent or *trustee* for the United States, and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people, to the exclusion of others, politically and constitutionally equals, but every citizen would, if any *one*

could claim it, have the like rights of purchase, settlement, occupation, or any other right, in the national territory.

Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument which imparts to Congress its very existence and its every function guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation, and farther that the only private property which the Constitution has *specifically recognised*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were *uno flatu*, to another to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.

A conclusion in favor of the prohibitory power in Congress, as asserted in the eighth section of the act of 1820, has been attempted, as deducible from the precedent of the ordinance of the convention of 1787, concerning the cession by Virginia of the territory

northwest of the Ohio, the provision in which ordinance, relative to slavery, it has been attempted to impose upon other and subsequently acquired territory.

The first circumstance which, in the consideration of this provision, impresses itself upon my mind is its utter futility and want of authority. This court has, in repeated instances, ruled that whatever may have been the force accorded to this Ordinance of 1787 at the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the Constitution, from the period of the adoption of the latter. Such is the principle ruled in the cases of *Pollard's Lessee v. Hagan,* 3 How. 212, *Parmoli v. The First Municipality of*

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New Orleans, 3 How. 589, *Strader v. Graham,* 16 How. 82. But apart from the superior control of the Constitution, and anterior to the adoption of that instrument, it is obvious that the inhibition in question never had and never could have any legitimate and binding force. We may seek in vain for any power in the convention either to require or to accept a condition or restriction upon the cession like that insisted on, a condition inconsistent with, and destructive of, the object of the grant. The cession was, as recommended by the old Congress in 1780, made originally and completed *in terms to the United States*, and for the benefit of the United States, *i.e.*, for *the people, all the people*, of the United States. The condition subsequently sought to be annexed in 1787 (declared, too, to be perpetual and immutable), being contradictory to the terms and destructive of the purposes of the cession, and after the cession was consummated, and the powers of the ceding party terminated, and the rights of the grantees, *the people of the United States*, vested, must necessarily so far have been *ab initio void.* With respect to the power of the convention to impose this inhibition, it seems to be pertinent in this place to recur to the opinion of one contemporary with the establishment of the Government, and whose distinguished services in the formation and adoption of our national charter point him out as the *artifex maximus* of our Federal system. James Madison, in the year 1819, speaking with reference to the prohibitory power claimed by Congress, then threatening the very existence of the Union, remarks of the language of the second clause of the third section of article fourth of the Constitution

"that it cannot be well extended beyond a power over the territory *as property,* and the power to make provisions really needful or necessary for the government of settlers, until ripe for admission into the Union."

Again, he says,

"with respect to what has taken place in the Northwest territory, it may be observed that the ordinance giving it is distinctive character on the subject of slaveholding proceeded from the old Congress, acting with the best intentions, but under a charter which contains no shadow of the authority exercised, and it remains to be decided how far the States formed within that territory, and admitted into the Union, are on a different footing from its other members as to their legislative sovereignty. As to the power of admitting new States into the Federal compact, the questions offering themselves are whether Congress can attach conditions, or the new States concur in conditions, which after admission would *abridge* or *enlarge* the constitutional rights of legislation common to other States; whether Congress can, by a compact

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with a new State, take power either to or from itself, or place the new member above or below the equal rank and rights possessed by the others; whether all such stipulations expressed or implied would not be nullities, and be so pronounced when brought to a practical test. It falls within the scope of your inquiry to state the fact that there was a proposition in the convention to discriminate between the old and the new States by an article in the Constitution. The proposition, happily, was rejected. The effect of such a discrimination is sufficiently evident. [Footnote 2]"

In support of the Ordinance of 1787, there may be adduced the semblance at least of obligation deductible from *compact*, the *form* of assent or agreement between the grantor and grantee, but this form or similitude, as is justly remarked by Mr. Madison, is rendered null by the absence of power or authority in the contracting parties and by the more intrinsic and essential defect of incompatibility with the rights and avowed purposes of those parties, and with their relative duties and obligations to others. If, then, with the attendant *formalities* of assent or compact, the restrictive power claimed was void as to the immediate subject of the ordinance, how much more unfounded must be the pretension to such a power as derived from that source (*viz.*, the Ordinance of 1787) with respect to territory acquired by purchase or conquest under the supreme authority of the Constitution — territory not the

subject of *mere donation*, but obtained *in the name of all, by the combined efforts and resources of all*, and with no condition annexed or pretended.

In conclusion, my opinion is that the decision of the Circuit Court upon the law arising upon the several pleas in bar is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that, for this error, the decision of the Circuit Court should be reversed, and the cause remanded to that court with instructions to abate the action for the reason set forth and pleaded in the plea in abatement.

In the aforegoing examination of this cause, the circumstance that the questions involved therein had been previously adjudged between these parties by the court of the State of Missouri has not been adverted to, for although it has been ruled by this court that in instances of concurrent jurisdiction, the court first obtaining possession or cognizance of the controversy should retain and decide it, yet, as in this case there had

been no plea, either of a former judgment or of *autre action pendent*, it was thought that the fact of a prior decision, however conclusive it might have been if regularly pleaded, could not be incidentally taken into view.

[Footnote 1]

Vide Gibbons's Decline and Fall of the Roman Empire. London edition of 1825, vol. 3d, chap. 44, p. 183.

[Footnote 2]

Letter from James Madison to Robert Walsh, November 27th, 1819, on the subject of the Missouri Compromise.

Mr. Justice CAMPBELL.

I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion.

The case shows that the plaintiff, in the year 1834, was a negro slave in Missouri, the property of Dr. Emerson, a surgeon in the army of the United States. In 1834, his master took him to the military station at Rock Island, on the border of Illinois, and in 1836 to Fort Snelling, in the present Minnesota, then Wisconsin, Territory. While at Fort Snelling, the plaintiff married a slave who was there with her master, and two children have been born of this connection, one during the journey of the family in returning to Missouri, and the other after their return to that State.

Since 1838, the plaintiff and the members of his family have been in Missouri in the condition of slaves. The object of this suit is to establish their freedom. The defendant, who claims the plaintiff and his family, under the title of Dr. Emerson, denied the jurisdiction of the Circuit Court by the plea that the plaintiff was a negro of African blood, the descendant of Africans who had been imported and sold in this country as slaves, and thus he had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, a trial was then had upon the general issue, and special pleas to the effect that the plaintiff and his family were slaves belonging to the defendant.

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass complained of was committed upon one claiming to be a freeman and a citizen, in that State, and who had been living for years under the dominion of its laws. And the rule is that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried. 20 How.St.Tri., 234, Cowp.S.C. 161.

The Constitution of Missouri recognises slavery as a legal condition, extends guaranties to the masters of slaves, and invites

immigrants to introduce them, as property, by a promise of protection. The laws of the State charge the master with the custody of the slave, and provide for the maintenance and security of their relation.

The Federal Constitution and the acts of Congress provide for the return of escaping slaves within the limits of the Union. No removal of the slave beyond the limits of the State, against the consent of the master, nor residence there in another condition, would be regarded as an effective manumission by the courts of Missouri, upon his return to the State. "*Sicut liberis captis status*

restituitur sic servus domino." Nor can the master emancipate the slave within the State except through the agency of a public authority. The inquiry arises whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case? Similar inquiries have arisen in a great number of suits, and the discussions in the State courts have relieved the subject of much of its difficulty. 12 B.M.Ky.R. 545, *Foster v. Foster*, 10 Gratt.Va.R. 485, 4 Har. and McH.Md.R. 295, *Scott v. Emerson*, 15 Misso. 576, 4 Rich.S.C.R., 186, 17 Misso. 434, 15 Misso. 596, 5 B.M. 173, 8 B.M. 540, 633, 9 B.M. 565, 5 Leigh 614, 1 Raud. 15, 18 Pick. 193.

The result of these discussions is that, in general, the status or civil and political capacity of a person is determined in the first instance by the law of the domicil where he is born; that the legal effect on persons arising from the operation of the law of that domicil is not indelible, but that a new capacity or status may be acquired by a change of domicil. That questions of status are closely connected with considerations arising out of the social and political organization of the State where they originate, and each sovereign power must determine them within its own territories.

A large class of cases has been decided upon the second of the propositions above stated in the Southern and Western courts — cases in which the law of the actual domicil was adjudged to have altered the native condition and status of the slave although he had never actually possessed the status of freedom in that domicil.*Rankin v. Lydia*, 2 A.K.M., *Herny v. Decker*, Walk. 36, 4 Mart. 385, 1 Misso. 472, *Hunter v. Fulcher*, 1 Leigh.

I do not impugn the authority of these cases. No evidence is found in the record to establish the existence of a domicil

acquired by the master and slave either in Illinois or Minnesota. The master is described as an officer of the army who was transferred from one station to another along the Western frontier in the line of his duty and who, after performing the usual tours of service, returned to Missouri; these slaves returned to Missouri with him, and had been there for near fifteen years in that condition when this suit was instituted. But absence in the performance of military duty, without more, is a fact of no importance in determining a question of a change of domicil. Questions of that kind depend upon acts and intentions, and are ascertained from motives, pursuits, the condition of the family and fortune of the party, and no change will be inferred unless evidence shows that one domicil was abandoned and there was an intention to acquire another. 11 L. and Eq. 6, 6 Exch. 217, 6 M. and W. 511, 2 Curt.Ecc.R. 368.

The cases first cited deny the authority of a foreign law to dissolve relations which have been legally contracted in the State where the parties are and have their actual domicil — relations which were never questioned during their absence from that State — relations which are consistent with the native capacity and condition of the respective parties, and with the policy of the State where they reside, but which relations were inconsistent with the policy or laws of the State or Territory within which they had been for a time, and from which they had returned, with these relations undisturbed. It is upon the assumption that the law of Illinois or Minnesota was indelibly impressed upon the slave and its consequences carried into Missouri that the claim of the plaintiff depends. The importance of the case entitles the doctrine on which it rests to a careful examination.

It will be conceded that, in countries where no law or regulation prevails opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign State would not be liberated by the accident of their introgression. The relation of domestic slavery is recognised in the law of nations, and the interference of the authorities of one State with the rights of a master belonging to another, without a valid cause, is a violation of that law. Wheat. Law of Na., 724, 5 Stats. at Large 601, Calh.Sp., 378, Reports of the Com. U.S. and G.B. 187, 238, 241.

The public law of Europe formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him, and one of the capitularies of Charlemagne abolishes the rule of prescription. He directs,

"that wheresoever, within the bounds of Italy, either the runaway slave of the king, or of

the church, or of any other man shall be found by his master, he shall be restored without any bar or prescription of years, yet upon the provision that the master be a Frank or German, or of any other nation (foreign,) but if he be a Lombard or a Roman, he shall acquire or receive his slaves by that law which has been established from ancient times among them."

Without referring for precedents abroad or to the colonial history for similar instances, the history of the Confederation and Union affords evidence to attest the existence of this ancient law. In 1783, Congress directed General Washington to continue his remonstrances to the commander of the British forces respecting the permitting negroes belonging to the citizens of these States to leave New York, and to insist upon the discontinuance of that measure. In 1788, the resident minister of the United States at Madrid was instructed to obtain from the Spanish Crown orders to its Governors in Louisiana and Florida

"to permit and facilitate the apprehension of fugitive slaves from the States, promising that the States would observe the like conduct respecting fugitives from Spanish subjects."

The committee that made the report of this resolution consisted of Hamilton, Madison, and Sedgwick, 2 Hamilton's Works, 473, and the clause in the Federal Constitution providing for the restoration of fugitive slaves is a recognition of this ancient right, and of the principle that a change of place does not effect a change of condition. The diminution of the power of a master to reclaim his escaping bondsman in Europe commenced in the enactment of laws of prescription in favor of privileged communes. Bremen, Spire, Worms, Vienna, and Ratisbon, in Germany, Carcassonne, Beziers, Toulouse, and Paris, in France, acquired privileges on this subject at an early period. The ordinance of William the Conqueror that a residence of any of the servile population of England, for a year and a day, without being claimed, in any city, burgh, walled town, or castle of the King, should entitle them to perpetual liberty is a specimen of these laws.

The earliest publicist who has discussed this subject is Bodin, a jurist of the sixteenth century whose work was quoted in the early discussions of the courts in France and England on this subject. He says:

"In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy anyone of others, insomuch as the slaves of strangers, so soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France."

He states another case, which arose in the city of Toulouse, of a Genoese merchant, who had

carried a slave into that city on his voyage from Spain, and when the matter was brought before the magistrates, the

"procureur of the city, out of the records, showed certain ancient privileges given unto them of Tholouse, wherein it was granted that slaves, so soon as they should come into Tholouse, should be free."

These cases were cited with much approbation in the discussion of the claims of the West India slaves of Verdelin for freedom, in 1738, before the judges in admiralty, 15 Causes Celebres p. 1, 2 Masse Droit Com., sec. 58, and were reproduced before Lord Mansfield, in the cause of Somersett, in 1772. Of the cases cited by Bodin, it is to be observed that Charles V of France exempted all the inhabitants of Paris from serfdom or other feudal incapacities in 1371, and this was confirmed by several of his successors, 3 Dulaire Hist. de Par. 546, Broud. Court. de Par. 21, and the ordinance of Toulouse is preserved as follows:

"*Civitas Tholosana fuit et erit sine fine libera, adeo ut servi et ancillae, sclavi et sclavae, dominos sive dominas habentes, cum rebus vel sine rebus suis, ad Tholosam vel infra terminos extra urbem terminatos accedentes acquirant libertatem.*"

Hist. de Langue, tome 3, p. 69; *ibid.* 6, p. 8, Loysel Inst. b. 1, sec. 6.

The decisions were made upon special ordinances, or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege, and the history of Paris furnishes but little support for the boast that she was a "*sacro sancta civitas,*" where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates in the case of Verdelin, which amused the grave lawyers who argued the case of Somersett. The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master.

The *Case of Somersett* was that of a Virginia slave carried to England by his master in 1770, and who remained there two years. For some cause, he was confined on a vessel destined to Jamaica, where he was to be sold. Lord Mansfield, upon a return to a habeas corpus, states the question involved. "Here, the person of the slave himself," he says, "is the immediate subject of inquiry, can any dominion, authority, or coercion be exercised in this country, according to the American laws?" He answers:

"The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England."

Again, he says:

"The return states that the slave departed, and refused to serve, whereupon he was kept to be sold abroad. . . . So high

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an act of dominion must be recognised by the law of the country where it is used. The power of the master over his slave has been extremely different in different countries. . . . The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created are erased from the memory. It is so odious that nothing can be suffered to support it but positive law."

That there is a difference in the systems of States which recognise and which do not recognise the institution of slavery cannot be disguised. Constitutional law, punitive law, police, domestic economy, industrial pursuits, and amusements, the modes of thinking and of belief of the population of the respective communities all show the profound influence exerted upon society by this single arrangement. This influence was discovered in the Federal Convention, in the deliberations on the plan of the Constitution. Mr. Madison observed

"that the States were divided into different interests not by their difference of size, but by other different interests, not by their difference of size, but by other circumstances, the most material of which resulted from climate, but principally from the effects of their having or not having slaves. These two causes concur in forming the great division of interests in the United States."

The question to be raised with the opinion of Lord Mansfield, therefore, is not in respect to the incongruity of the two systems, but whether slavery was absolutely contrary to the law of England, for if it was so, clearly, the American laws could not operate there. Historical research ascertains that, at the date of the Conquest, the rural population of England were generally in a servile condition, and under various names denoting noting slight variances in condition, they were sold with the land like cattle, and were a part of its living money. Traces of the existence of African slaves are to be found in the early chronicles. Parliament in the time of Richard II, and also of Henry VIII, refused to adopt a general law of emancipation. Acts of emancipation by the last-named monarch and by Elizabeth are preserved.

The African slave trade had been carried on, under the unbounded protection of the Crown, for near two centuries when the case of Somersett was heard, and no motion for its suppression had ever been submitted to Parliament, while it was forced upon and maintained in unwilling colonies by the Parliament and Crown of England at that moment. Fifteen thousand negro slaves were then living in that island, where they had been introduced under the counsel of the most illustrious jurists of the realm, and such slaves had been publicly

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sold for near a century in the markets of London. In the northern part of the kingdom of Great Britain, there existed a class of from 30,000 to 40,000 persons, of whom the Parliament said, in 1775, 15 George III, chap. 28,

"many colliers, coal-heavers, and salters are in a state of slavery or bondage, bound to the collieries and salt works where they work for life, transferable with the collieries and salt works when their original masters have no use for them, and whereas the emancipating or setting free the colliers, coal-heavers, and salters in Scotland, who are now in a state of servitude, gradually and upon reasonable conditions, would be the means of increasing the number of colliers, coal-heavers, and salters, to the great benefit of the public, without doing any injury to the present masters, and would remove the reproach of allowing such a state of servitude to exist in a free country,"

&c., and again, in 1799, "they declare that many colliers and coal-heavers still continue in a state of bondage" No statute, from the Conquest till the 15 George III, had been passed upon the subject of personal slavery. These facts have led the most eminent civilian of England to question the accuracy of this judgment, and to insinuate that, in this judgment, the offence of *ampliare jurisdictionem* by private authority was committed by the eminent magistrate who pronounced it.

This sentence is distinguishable from those cited from the French courts in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law, whereas here the consequences of slavery merely — that is the public policy — were found to be contrary to the law of slavery. The case of the slave Grace, 2 Hagg., with four others, came before Lord Stowell in 1827, by appeals from the West India vice admiralty courts. They were cases of slaves

who had returned to those islands, after a residence in Great Britain, and where the claim to freedom was first presented in the colonial forum. The learned judge in that case said:

"This suit fails in its foundation. She (Grace) was not a free person, no injury is done her by her continuance in slavery, and she has no pretensions to any other station than that which was enjoyed by every slave of a family. If she depends upon such freedom conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased, and she was imported into Antigua."

The decision of Lord Mansfield was, "that so high an act of dominion" as the master exercises over his slave, in sending him abroad for sale, could not be exercised in England

under the American laws, and contrary to the spirit of their own.

The decision of Lord Stowell is that the authority of the English laws terminated when the slave departed from England. That the laws of England were not imported into Antigua with the slave upon her return, and that the colonial forum had no warrant for applying a foreign code to dissolve relations which had existed between persons belonging to that island, and which were legal according to its own system. There is no distinguishable difference between the case before us and that determined in the admiralty of Great Britain.

The complaint here, in my opinion, amounts to this: that the judicial tribunals of Missouri have not denounced as odious the Constitution and laws under which they are organized, and have not superseded them on their own private authority for the purpose of applying the laws of Illinois, or those passed by Congress for Minnesota, in their stead. The eighth section of the act of Congress of the 6th of March, 1820, 3 Statutes at Large 545, entitled, "An act to authorize the people of Missouri to form a State Government," &c., is referred to as affording the authority to this court to pronounce the sentence which the Supreme Court of Missouri felt themselves constrained to refuse. That section of the act prohibits slavery in the district of country west of the Mississippi, north of thirty-six degrees thirty minutes north latitude, which belonged to the ancient province of Louisiana, not included in Missouri.

It is a settled doctrine of this court that the Federal Government can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States. Nor can that Government affect the duration of slavery within the States, other than by a legislation over the foreign slave trade. The power of Congress to adopt the section of the act above cited must therefore depend upon some condition of the Territories which distinguishes them from States, and subjects them to a control more extended. The third section of the fourth article of the Constitution is referred to as the only and all-sufficient grant to support this claim. It is that

"new States may be admitted by the Congress to this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of State, without the consent of the Legislatures of the States concerned, as well as of the Congress. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property

belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

It is conceded in the decisions of this court that Congress may secure the rights of the United States in the public domain, provide for the sale or lease of any part of it, and establish the validity of the titles of the purchasers, and may organize Territorial Governments, with powers of legislation. 44 U. S. 3 How. 212, 53 U. S. 12How. 1, 26 U. S. 1 Pet. 511, 38 U. S. 13 P. 436, 57 U. S. 16 H. 164.

But the recognition of a plenary power in Congress to dispose of the public domain or to organize a Government over it does not imply a corresponding authority to determine the internal polity or to adjust the domestic relations or the persons who may lawfully inhabit the territory in which it is situated. A supreme power to make needful rules respecting the public domain, and a similar power of framing laws to operate upon persons and things within the territorial limits where it lies, are distinguished by broad lines of demarcation in American history. This court has assisted us to define them. In *Johnson v. McIntosh,* 8 Wheat. 595-543, they say:

"According to the theory of the British Constitution, all vacant lands are vested in the Crown, and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative."

"All the lands we hold were originally granted by the Crown, and the establishment of a royal Government has never been considered as impairing its right to grant lands within the chartered limits of such colony."

And the British Parliament did claim a supremacy of legislation coextensive with the absoluteness of the dominion of the sovereign over the Crown lands. The American doctrine, to the contrary, is embodied in two brief resolutions of the people of Pennsylvania in 1774: 1st.

"That the inhabitants of these colonies are entitled to the same rights and liberties, within the colonies that the subjects born in England are entitled within the realm."

2d.

"That the power assumed by Parliament to bind the people of these colonies by statutes, in all cases whatever, is unconstitutional, and therefore the source of these unhappy difficulties."

The Congress of 1774, in their statement of rights and grievances, affirm "a free and exclusive power of legislation" in their several Provincial Legislatures,

"in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed."

1 Jour.Cong. 32.

The unanimous consent of the people of the colonies, then,

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to the power of their sovereign, "to dispose of and make all needful rules and regulations respecting the territory" of the Crown, in 1774, was deemed by them as entirely consistent with opposition, remonstrance, the renunciation of allegiance, and proclamation of civil war, in preference to submission to his claim of supreme power in the territories.

I pass now to the evidence afforded during the Revolution and Confederation. The American Revolution was not a social revolution. It did not alter the domestic condition or capacity of persons within the colonies, nor was it designed to disturb the domestic relations existing among them. It was a political revolution, by which thirteen dependent colonies became thirteen independent States. "The Declaration of Independence was not," says Justice Chase,

"a declaration that the United Colonies jointly, in a collective capacity, were independent States, &c., but that each of them was a sovereign and independent State — that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power on earth."

3 U. S. 3 Dall. 199, 4 Cr. 212.

These sovereign and independent States, being united as a Confederation, by various public acts of cession became jointly interested in territory and concerned to dispose of and make all needful rules and regulations respecting it. It is a conclusion not open to discussion in this court

"that there was no territory within the (original) United States that was claimed by them in any other right than that of some of the confederate States."

Harcourt v. Gaillord, 12 Wh. 523. "The question whether the vacant lands within the United States," says Chief Justice Marshall,

"became joint property or belonged to the separate States was a momentous question which threatened to shake the American Confederacy to its foundations. This important and dangerous question has been compromised, and the compromise is not now to be contested."

6 C.R. 87.

The cessions of the States to the Confederation were made on the condition that the territory ceded should be laid out and formed into distinct republican States, which should be admitted as members to the Federal Union having the same rights of sovereignty,

freedom, and independence as the other States. The first effort to fulfil this trust was made in 1785 by the offer of a charter or compact to the inhabitants who might come to occupy the land.

Those inhabitants were to form for themselves temporary State Governments, founded on the Constitutions of any of the States but to be alterable at the will of their Legislature, and

permanent Governments were to succeed these whenever the population became sufficiently numerous to authorize the State to enter the Confederacy, and Congress assumed to obtain powers from the States to facilitate this object. Neither in the deeds of cession of the States nor in this compact was a sovereign power for Congress to govern the Territories asserted. Congress retained power, by this act, "to dispose of and to make rules and regulations respecting the public domain," but submitted to the people to organize a Government harmonious with those of the confederate States.

The next stage in the progress of colonial government was the adoption of the Ordinance of 1787 by eight States, in which the plan of a Territorial Government, established by act of Congress, is first seen. This was adopted while the Federal Convention to form the Constitution was sitting. The plan placed the Government in that hands of a Governor, Secretary, and Judges, appointed by Congress, and conferred power on them to select suitable laws from the codes of the States until the population should equal 5,000. A Legislative Council, elected by the people, was then to be admitted to a share of the legislative authority, under the supervision of Congress, and States were to be formed whenever the number of the population should authorize the measure.

This ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their Constitution and laws. These conditions were designed to fulfill the trust in the agreements of cession that the States to be formed of the ceded Territories should be "distinct republican States." This ordinance was submitted to Virginia in 1788, and the 5th article, embodying as it does a summary of the entire act, was specifically ratified and confirmed by that State. This was an incorporation of the ordinance into her act of cession. It was conceded in the argument that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. To a part of the engagements, the assent of nine States was required, and for another portion no provision had been made in those articles. Mr. Madison said, in a writing nearly contemporary, but before the confirmatory act of Virginia,

"Congress have proceeded to form new States, to erect temporary Governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy; all this has been done, and done without the least color of constitutional authority."

Federalist No. 38. Richard Henry Lee, one of the committee who reported the ordinance to Congress,

transmitted it to General Washington (15th July, 1787), saying,

"It seemed necessary, for the security of property among uninformed and perhaps licentious people, as the greater part of those who go there are, that a strong-toned Government should exist, and the rights of property be clearly defined."

The consent of all the States represented in Congress, the consent of the Legislature of Virginia, the consent of the inhabitants of the Territory, all concur to support the authority of this enactment. It is apparent in the frame of the Constitution that the Convention recognised its validity, and adjusted parts of their work with reference to it. The authority to admit new States into the Union, the omission to provide distinctly for Territorial Governments, and the clause limiting the foreign slave trade to States then existing, which might not prohibit it, show that they regarded this Territory as provided with Government and organized permanently with a restriction on the subject of slavery. Justice Chase, in the opinion already cited, says of the Government before, and it is in some measure true during the Confederation that

"the powers of Congress originated from necessity, and arose out of and were only limited by events, or, in other words, they were revolutionary in their very nature. Their extent depended upon the exigencies and necessities of public affairs,"

and there is only one rule of construction, in regard to the acts done, which will fully support them, *viz.*, that the powers actually exercised were rightfully exercised wherever they were supported by the implied sanction of the State Legislatures and by the ratifications of the people.

The clauses in the 3d section of the 4th article of the Constitution, relative to the admission of new States and the disposal and regulation of the territory of the United States, were adopted without debate in the Convention.

There was a warm discussion on the clauses that relate to the subdivision of the States, and the reservation of the claims of the United States and each of the States from any prejudice. The Maryland members revived the controversy in regard to the Crown lands of the Southwest. There was nothing to indicate any reference to a government of Territories not included within the limits of the Union, and the whole discussion demonstrates that the Convention was consciously dealing with a Territory whose condition, as to government, had been arranged by a fundamental and unalterable compact.

An examination of this clause of the Constitution, by the light of the circumstances in which the Convention was placed, will aid us to determine its significance. The first clause is "that new States may be admitted by the Congress to this

Union." The condition of Kentucky, Vermont, Rhode Island, and the new States to be formed in the Northwest suggested this as a necessary addition to the powers of Congress. The next clause, providing for the subdivision of States and the parties to consent to such an alteration, was required by the plans on foot for changes in Massachusetts, New York, Pennsylvania, North Carolina, and Georgia. The clause which enables Congress to dispose of and make regulations respecting the public domain was demanded by the exigencies of an exhausted treasury and a disordered finance, for relief by sales, and the preparation for sales, of the public lands, and the last clause that nothing in the Constitution should prejudice the claims of the United States or a particular State was to quiet the jealousy and irritation of those who had claimed for the United States all the unappropriated lands. I look in vain among the discussions of the time for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive previsions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry, and in respect to dangers from power vested in a central Government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them to warn their countrymen that here was a power to threaten the landmarks of this federative Union, and, with them, the safeguards of popular and constitutional liberty, or that, under this article, there might be introduced, on our soil, a single Government over a vast extent of country — a Government foreign to the persons over whom it might be exercised and capable of binding those not represented, by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents — expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal Government, which this Constitution was not designed to supersede, but merely to modify as to its conditions.

The compacts of cession by North Carolina and Georgia are subsequent to the Constitution. They adopt the Ordinance of 1787, except the clause respecting slavery. But the precautionary repudiation of that article forms an argument quite as satisfactory to the advocates for Federal power, as its introduction

would have done. The refusal of a power to Congress to legislate in one place seems to justify the seizure of the same power when another place for its exercise is found.

This proceeds from a radical error which lies at the foundation of much of this discussion. It is that the Federal Government may lawfully do whatever is not directly prohibited by the Constitution. This would have been a fundamental error if no amendments to the Constitution had been made. But the final expression of the will of the people of the States, in the 10th amendment, is that the powers of the Federal Government are limited to the grants of the Constitution.

Before the cession of Georgia was made, Congress asserted rights, in respect to a part of her territory, which require a passing notice. In 1798 and 1800, acts for the settlement of limits with Georgia, and to establish a Government in the Mississippi Territory, were adopted. A Territorial Government was organized between the Chattahoochee and Mississippi rivers. This was within the limits of Georgia. These acts dismembered Georgia. They established a separate Government upon her soil, while they rather derisively professed

"that the establishment of that Government shall in no respects impair the rights of the State of Georgia, either to the jurisdiction or soil of the Territory."

The Constitution provided that the importation of such persons as any of the existing States shall think proper to admit shall not be prohibited by Congress before 1808. By these enactments, a prohibition was placed upon the importation of salves into Georgia, although her Legislature had made none.

This court have repeatedly affirmed the paramount claim of Georgia to this Territory. They have denied the existence of any title in the United States. 6 C.R. 87,25 U. S. 12 Wh. 523, 44 U. S. 3 How. 212, 54 U. S. 13 How. 381. Yet these acts were cited in the argument as precedents to show the power of Congress in the Territories. These statutes were the occasion of earnest expostulation and bitter remonstrance on the part of the authorities of the State, and the memory of their injustice and wrong remained long after the legal settlement of the controversy by the compact of 1802. A reference to these acts terminates what I have to say upon the Constitutions of the Territory within the original limits of the United States. These Constitutions were framed by the concurrence of the States making the cessions and Congress, and were tendered to immigrants who might be attracted to the vacant territory. The legislative powers of the officers of this Government were limited to the selection of laws from the States, and provision was made for the introduction of popular institutions, and their emancipation

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from Federal control whenever a suitable opportunity occurred. The limited reservation of legislative power to the officers of the Federal Government was excused on the plea of *necessity*, and the probability is that the clauses respecting slavery embody some compromise among the statesmen of that time; beyond these, the distinguishing features of the system which the patriots of the Revolution had claimed as their birthright from Great Britain predominated in them.

The acquisition of Louisiana in 1803 introduced another system into the United States. This vast province was ceded or Spain. To establish a Government constituted on similar principles, and with like conditions, was not an unnatural proceeding.

But there was great difficulty in finding constitutional authority for the measure. The third section of the fourth article of the Constitution was introduced into the Constitution on the motion of Mr. Gouverneur Morris. In 1803, he was appealed to for information in regard to its meaning. He answers:

“I am very certain I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. . . . I knew then as well as I do now that all North America must at length be annexed to us. Happy indeed, if the lust of dominion stop here. It would therefore have been perfectly utopian to oppose a paper restriction to the violence of popular sentiment in a popular Government.”

3 Mor.Writ. 185. A few days later, he makes another reply to his correspondent. “I perceive,” he says,

“I mistook the drift of your inquiry, which substantially is whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to GOVERN THEM AS PROVINCES, AND ALLOW THEM NO VOICE *in our councils. In wording the third SECTION OF THE fourth article, I went as far as circumstances would permit to establish the exclusion.* CANDOR OBLIGES ME TO ADD MY BELIEF THAT HAD IT BEEN MORE POINTEDLY EXPRESSED, A STRONG OPPOSITION WOULD HAVE BEEN MADE.”

3 Mor.Writ. 192. The first Territorial Government of Louisiana was an Imperial one, founded upon a French or Spanish model. For a time, the Governor, Judges, Legislative Council, Marshal, Secretary, and officers of the militia were appointed by the President. [Footnote 2/1]

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Besides these anomalous arrangements, the acquisition gave rise to jealous inquiries as to the influence it would exert in determining the men and States that were to be “the arbiters and rulers” of the destinies of the Union, and unconstitutional opinions, having for their aim to promote sectional divisions, were announced and developed. “Something,” said an eminent statesman,

“something has suggested to the members of Congress the policy of acquiring geographical majorities. This is a very direct step towards disunion, for it must foster the geographical enmities by which alone it can be effected. This something must be a contemplation of particular advantages to be derived from such majorities, and is it not notorious that they consist of nothing else

but usurpations over persons and property, by which they can regulate the internal *wealth and prosperity of States and individuals?*"

The most dangerous of the efforts to employ a geographical political power to perpetuate a geographical preponderance in the Union is to be found in the deliberations upon the act of the 6th of March, 1820, before cited. The attempt consisted of a proposal to exclude Missouri from a place in the Union unless her people would adopt a Constitution containing a prohibition upon the subject of slavery according to a prescription of Congress. The sentiment is now general, if not universal, that Congress had no constitutional power to impose the restriction. This was frankly admitted at the bar in the course of this argument. The principles which this court have pronounced condemn the pretension then made on behalf of the legislative department. In *Groves v. Slaughter,* 15 Pet., the Chief Justice said:

"The power over this subject is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits."

Justice McLean said:

"The Constitution of the United States operates alike in all the States, and one State has the same power over the subject of slavery as every other State."

In *Pollard's Lessee v. Hagan,* 3 How. 212, the court said:

"The United States have no constitutional capacity to exercise municipal

jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere except in cases where it is delegated, and the court denies the faculty of the Federal Government to add to its powers by treaty or compact."

This is a necessary consequence resulting from the nature of the Federal Constitution, which is a federal compact among the States establishing a limited Government, with powers delegated by the people of distinct and independent communities, who reserved to their State Governments, and to themselves, the powers they did not grant. This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people, to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to "this Union." Their sovereignty would have been restricted by Congress, as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy and aroused such animosities among the people that patriots whose confidence had not failed during the Revolution began to despair for the Constitution. [Footnote 2/2] Amid the utmost violence of this extraordinary contest, the expedient contained in the eighth section of this act was proposed to moderate it, and to avert the catastrophe it menaced. It was not seriously debated, nor were its constitutional aspects severely scrutinized by Congress. For the first time in the history of the country has its operation been embodied in a case at law and been presented to this court for their judgment. The inquiry is whether there are conditions in the Constitutions of the Territories which subject the capacity and status of persons within their limits to the direct action of Congress. Can Congress determine the condition and status of persons who inhabit the Territories?

The Constitution permits Congress to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. This power applies as well to territory belonging to the United States within the States as beyond them. It comprehends all the public domain, wherever it may be. The argument is that

the power to make "ALL needful rules and regulations" "is a power of legislation," "a full legislative power," "that it includes all subjects of legislation in the territory," and is without any limitations, except the positive prohibitions which affect all the powers of Congress. Congress may then regulate or prohibit slavery upon the public domain within the new States, and such a prohibition would permanently affect the capacity of a slave whose master might carry him to it. And why not? Because no power has been conferred on Congress. This is a conclusion universally admitted. But the power to "make rules and regulations respecting the territory" is not restrained by State lines, nor are there any constitutional prohibitions upon its exercise in the domain of the United

States within the States, and whatever rules and regulations respecting territory Congress may constitutionally make are supreme, and are not dependent on the situs of "the territory."

The author of the Farmer's Letters, so famous in the ante-revolutionary history, thus states the argument made by the American loyalists in favor of the claim of the British Parliament to legislate in all cases whatever over the colonies: "It has been urged with great vehemence against us," he says,

"and it seems to be thought their FORT by our adversaries that a power of regulation is a power of legislation, and a power of legislation, if constitutional, must be universal and supreme, in the utmost sense of the word. It is therefore concluded that the colonies, by acknowledging the power of regulation, acknowledged every other power."

This sophism imposed upon a portion of the patriots of that day. Chief Justice Marshall, in his life of Washington, says

"that many of the best-informed men in Massachusetts had perhaps adopted the opinion of the parliamentary right of internal government over the colonies; . . . that the English statute book furnishes many instances of its exercise; . . . that in no case recollected was their authority openly controverted;"

and "that the General Court of Massachusetts, on a late occasion, openly recognised the principle." Marsh.Wash., v. 2, p. 75, 76.

But the more eminent men of Massachusetts rejected it, and another patriot of the time employs the instance to warn us of "the stealth with which oppression approaches," and "the enormities towards which precedents travel." And the people of the United States, as we have seen, appealed to the last argument, rather than acquiesce in their authority. Could it have been the purpose of Washington and his illustrious associates, by the use of ambiguous, equivocal, and expansive

words, such as "rules," "regulations," "territory," to reestablish in the Constitution of their country that fort which had been prostrated amid the toils and with the sufferings and sacrifices of seven years of war? Are these words to be understood as the Norths, the Grenvilles, Hillsboroughs, Hutchinsons, and Dunmores — in a word, as George III would have understood them — or are we to look for their interpretation to Patrick Henry or Samuel Adams, to Jefferson, and Jay, and Dickinson, to the sage Franklin, or to Hamilton, who, from his early manhood, was engaged in combating British constructions of such words? We know that the resolution of Congress of 1780 contemplated that the new States to be formed under their recommendation were to have the same rights of sovereignty, freedom, and independence, as the old. That every resolution, cession, compact, and ordinance of the States observed the same liberal principle. That the Union of the Constitution is a union formed of equal States, and that new States, when admitted, were to enter "this Union." Had another union been proposed in "any pointed manner," it would have encountered not only "strong," but successful, opposition. The disunion between Great Britain and her colonies originated in the antipathy of the latter to "rules and regulations" made by a remote power respecting their internal policy. In forming the Constitution, this fact was ever present in the minds of its authors. The people were assured by their most trusted statesmen "that the jurisdiction of the Federal Government is limited to certain enumerated objects, which concern all members of the republic," and

"that the local or municipal authorities form distinct portions of supremacy, no more subject within their respective spheres to the general authority than the general authority is subject to them within its own sphere."

Still this did not content them. Under the lead of Hancock and Samuel Adams, of Patrick Henry and George Mason, they demanded an explicit declaration that no more power was to be exercised than they had delegated. And the Ninth and Tenth Amendments to the Constitution were designed to include the reserved rights of the States, and the people, within all the sanctions of that instrument, and to bind the authorities, State and Federal, by the judicial oath it prescribes, to their recognition and observance. Is it probable, therefore that the supreme and irresponsible power, which is now claimed for Congress over boundless territories, the use of which cannot fail to react upon the political system of the States, to its subversion, was ever within the contemplation of the statesmen who conducted the counsels of the people in the formation of this Constitution? When

the questions that came to the surface upon the acquisition of Louisiana were presented to the mind of Jefferson, he wrote:

"I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If

it is, then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the Federal Government, and gives the powers necessary to carry them into execution."

The publication of the journals of the Federal Convention in 1819, of the debates reported by Mr. Madison in 1840, and the mass of private correspondence of the early statesmen before and since, enable us to approach the discussion of the aims of those who made the Constitution with some insight and confidence.

I have endeavored, with the assistance of these, to find a solution for the grave and difficult question involved in this inquiry. My opinion is that the claim for Congress of supreme power in the Territories, under the grant to "dispose of and make all needful rules and regulations respecting territory," is not supported by the historical evidence drawn from the Revolution, the Confederation, or the deliberations which preceded the ratification of the Federal Constitution. The Ordinance of 1787 depended upon the action of the Congress of the Confederation, the assent of the State of Virginia, and the acquiescence of the people who recognised the validity of that plea of necessity which supported so many of the acts of the Governments of that time, and the Federal Government accepted the ordinance as a recognised and valid engagement of the Confederation.

In referring to the precedents of 1798 and 1800, I find the Constitution was plainly violated by the invasion of the rights of a sovereign State, both of soil and jurisdiction, and in reference to that of 1804, the wisest statesmen protested against it, and the President more than doubted its policy and the power of the Government.

Mr. John Quincy Adams, at a later period, says of the last act

"that the President found Congress mounted to the pitch of passing those acts without inquiring where they acquired the authority, and he conquered his own scruples as they had done theirs."

But this court cannot undertake for themselves the same conquest. They acknowledge that our peculiar security

is in the possession of a written Constitution, and they cannot make it blank paper by construction.

They look to its delineation of the operations of the Federal Government, and they must not exceed the limits it marks out, in their administration. The court have said

"that Congress cannot exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, beyond what has been delegated."

We are then to find the authority for supreme power in the Territories in the Constitution. What are the limits upon the operations of a Government invested with legislative, executive, and judiciary powers, and charged with the power to dispose of and to make all needful rules and regulations respecting a vast public domain? The feudal system would have recognised the claim made on behalf of the Federal Government for supreme power over persons and things in the Territories as an incident to this title — that is the title to dispose of and make rules and regulations respecting it.

The Norman lawyers of William the Conqueror would have yielded an implicit assent to the doctrine that a supreme sovereignty is an inseparable incident to a grant to dispose of and to make all needful rules and regulations respecting the public domain. But an American patriot, in contrasting the European and American systems, may affirm

"that European sovereigns give lands to their colonists, but reserve to themselves a power to control their property, liberty, and privileges, but the American Government sells the lands belonging to the people of the several States (*i.e.*,United States) to their citizens, who are already in the possession of personal and political rights which the Government did not give and cannot take away."

And the advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of of the several departments of the Federal Government. Nor are the States or people restrained by any enumeration or definition of their rights or liberties.

To impair or diminish either, the department must produce an authority from the people themselves, in their Constitution, and, as we have seen, a power to make rules and regulations respecting the public domain does not confer a municipal sovereignty over

persons and things upon it. But as this is “thought their fort” by our adversaries, I propose a more definite examination of it. We have seen, Congress does not

dispose of or make rules and regulations respecting domain belonging to themselves, but belonging to the United States.

These conferred on their mandatory, Congress, authority to dispose of the territory which belonged to them in common, and to accomplish that object beneficially and effectually, they gave an authority to make suitable rules and regulations respecting it. When the power of disposition is fulfilled, the authority to make rules and regulations terminates, for it attaches only upon territory “belonging to the United States.”

Consequently, the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain and its preparation for sale or disposition. The system of land surveys, the reservations for schools, internal improvements, military sites, and public buildings, the preemption claims of settlers, the establishment of land offices and boards of inquiry to determine the validity of land titles, the modes of entry and sale, and of conferring titles, the protection of the lands from trespass and waste, the partition of the public domain into municipal subdivisions, having reference to the erection of Territorial Governments and States, and perhaps the selection, under their authority, of suitable laws for the protection of the settlers until there may be a sufficient number of them to form a self-sustaining municipal Government — these important rules and regulations will sufficiently illustrate the scope and operation of the 3d section of the 4th article of the Constitution. But this clause in the Constitution does not exhaust the powers of Congress within the territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of Government which belong to them as the Legislature of the United States, of which these Territories make a part. *Loughborough v. Blake*, 5 Wheat. 317. Thus, the laws of taxation, for the regulation of foreign, Federal, and Indian commerce, and so for the abolition of the slave trade, for the protection of copyrights and inventions, for the establishment of postal communication and courts of justice, and for the punishment of crimes are as operative there as within the States. I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and in a great measure is beyond the cognizance of the judiciary department of that Government. How much municipal power may be exercised by the people of the Territory before their admission to the Union, the courts of justice cannot decide. This must depend, for

the most part, on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the 8th section of the act of 6th March, 1820, I have cited, insofar as it concerns the capacity and status of persons in the condition and circumstances of the plaintiff and his family.

These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of municipal law, which, though derived from a common source and recognising in the main similar principles, yet in some respects had become unlike, and, on a particular subject, promised to be antagonistic.

Their systems provided protection for life, liberty, and property among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value, to regulate foreign and Federal commerce, to secure, for a limited period, to authors and inventors a property in their writings and discoveries, and to make rules concerning captures in war, and, within the limits of these powers, it has exercised, rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

But the great powers of war and negotiation, finance, postal communication, and commerce, in general, when employed in respect to the property of a citizen, refer to and depend upon the municipal laws of the States to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognise to be property.

And this principle follows from the structure of the respective Governments, State and Federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose acts, within the scope of their respective jurisdictions, are mutually obligatory. They are, respectively, the depositories of such powers of legislation as the people were willing to surrender, and their duty is to cooperate within their several jurisdictions to maintain the rights of the same citizens under both Governments unimpaired.

A proscription, therefore, of the Constitution and laws of one or more States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all of these powers are sometimes required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the rights which were not surrendered to the Federal Government. The provident care of the statesmen who projected the Constitution was signalized by such a distribution of the powers of Government as to exclude many of the motives and opportunities for promoting provocations and spreading discord among the States, and for guarding against those partial combinations, so destructive of the community of interest, sentiment, and feeling, which are so essential to the support of the Union. The distinguishing features of their system consist in the exclusion of the Federal Government from the local and internal concerns of, and in the establishment of an independent internal Government within, the States. And it is a significant fact in the history of the United States that those controversies which have been productive of the greatest animosity, and have occasioned most peril to the peace of the Union, have had their origin in the well sustained opinion of a minority among the people that the Federal Government had overstepped its constitutional limits to grant some exclusive privilege, or to disturb the legitimate distribution of property or power among the States or individuals. Nor can a more signal instance of this be found than is furnished by the act before us. No candid or rational man can hesitate to believe that if the subject of the eighth section of the act of March, 1820, had never been introduced into Congress and made the basis of legislation, no interest common to the Union would have been seriously affected. And certainly the creation within this Union of large confederacies of unfriendly and frowning States, which has been the tendency and, to an alarming extent, the result produced by the agitation arising from it does not commend it to the patriot or statesman. This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of Congress. Wherever a master is entitled to go within the United States, his slave may accompany him without any impediment from or fear of Congressional

legislation or interference. The question then arises whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognise and respect the rights and relations that validly exist under the Constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations, within the Territories.

And the citation of State statutes prohibiting the immigration of slaves, and of the decisions of State courts enforcing the forfeiture of the master’s title in accordance with their rule, only darkens the discussion. For the question is have Congress the municipal sovereignty in the Territories which the State Legislatures have derived from the authority of the people, and exercise in the States?

And this depends upon the construction of the article in the Constitution before referred to.

And, in my opinion that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States.

The eighth section of the act of Congress of the 6th of March, 1820, did not, in my opinion, operate to determine the domestic condition and status of the plaintiff and his family during their sojourn in Minnesota Territory, or after their return to Missouri.

The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition when this suit was brought. Nor does it appear that he at any time possessed another state or condition *de facto*. His claim to freedom depends upon his temporary relocation, from the domicil of his origin, in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case as it was submitted upon uncontested evidence, upon appropriate issues to the jury, and upon

the instructions given and refused by the court upon that evidence. My opinion is that the opinion of the Circuit Court was correct upon all the claims involved in those issues, and that the verdict of the jury was justified by the evidence and instructions.

The jury have returned that the plaintiff and his family are slaves.

Upon this record, it is apparent that this is not a controversy between citizens of different States, and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had a capacity to maintain a suit in the courts

of the United States. And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family in any of the conditions or circumstances of their lives as presented in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed, on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded that the suit may be dismissed.

[Footnote 2/1]

Mr. Varnum said: “The bill provided such a Government as had never been known in the United States.” Mr. Eustis: “The Government laid down in this bill is certainly a new thing in the United States.” Mr. Lucas: “It has been remarked that this bill establishes elementary principles never previously introduced in the Government of any Territory of the United States. Granting the truth of this observation,” &c. Mr. Macon: “My first objection to the principle contained in this section is that it establishes a species of government unknown to the United States.” Mr. Boyle: “Were the President an angel instead of a man, I would not clothe him with this power.” Mr. G. W. Campbell: “On examining the section, it will appear that it really establishes a complete despotism.” Mr. Sloan: “Can anything be more repugnant to the principles of just government? Can anything be more despotic?” — Annals of Congress, 1803-1804

[Footnote 2/2]

Mr. Jefferson wrote:

“The Missouri question is the most portentous one that ever threatened our Union. In the gloomiest moments of the revolutionary war, I never had any apprehension equal to that I feel from this source.”

Mr. Justice CATRON.

The defendant pleaded to the jurisdiction of the Circuit Court that the plaintiff was a negro of African blood, the descendant of Africans, who had been imported and sold in this country as slaves, and thus had no capacity as a citizen of Missouri to maintain a suit in the Circuit Court. The court sustained a demurrer to this plea, and a trial was had upon the pleas, of the general issue, and also that the plaintiff and his family were slaves, belonging to the defendant. In this trial, a verdict was given for the defendant.

The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff’s writ.

The judgment was given for him conformably to the prayer of his demurrer. He cannot assign an error in such a judgment. Tidd’s Pr. 1163, 2 Williams’s Saund. 46a, 2 Iredell N.C. 87, 2 W. and S. 391. Nor does the fact that the judgment was given on a plea to the jurisdiction avoid the application of this rule. *Capron v. Van Noorden*, 2 Cr. 126, 6 Wend. 465, 7 Met. 598, 5 Pike 1005.

The declaration discloses a case within the jurisdiction of the court — a controversy between citizens of different States. The plea in abatement, impugning these jurisdictional averments, was waived when the defendant answered to the declaration by pleas to the merits. The proceedings on that plea remain a part of the technical record, to show the history of the case, but are not open to the review of this court by a writ

of error. The authorities are very conclusive on this point. *Shepherd v. Graves,* 14 How. 505, *Bailey v. Dozier,* 6 How. 23, 1 Stewart (Alabama) 46, 10 Ben. Monroe (Kentucky) 555, 2 Stewart (Alabama) 370, 443, 2 Scammon (Illinois) 78. Nor can the court assume as admitted facts the averments of the plea from the confession of the demurrer. That confession was for a single object, and cannot be used for any other purpose than to test the validity of the plea. *Tompkins v. Ashley,* 1 Moody and Mackin 32, 33 Maine 96, 100.

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy, of Illinois are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that State, the slaves he takes there do not acquire their freedom, and if they return with their master to the slave State of his domicil, they cannot assert their freedom after their return. For the reasons and authorities on this point, I refer to the opinion of my brother Nelson, with which I not only concur, but think his opinion is the most conclusive argument on the subject within my knowledge.

It is next insisted for the plaintiff that his freedom (and that of his wife and eldest child) was obtained by force of the act of Congress of 1820, usually known as the Missouri Compromise Act, which declares:

"That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, *forever prohibited.*"

From this prohibition, the territory now constituting the State of Missouri was excepted, which exception to the stipulation gave it the designation of a compromise.

The first question presented on this act is whether Congress had power to make such compromise. For if power was wanting, then no freedom could be acquired by the defendant under the act.

That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution is not open to controversy. But it is insisted that, by the Constitution, Congress has power to legislate for and govern the Territories of the United States, and that, by force of the power to govern, laws could be enacted prohibiting slavery in any portion of the Louisiana Territory, and, of course, to abolish slavery *in all* parts of it whilst it was or is governed as a Territory.

My opinion is that Congress is vested with power to govern

the Territories of the United States by force of the third section of the fourth article of the Constitution. And I will state my reasons for this opinion.

Almost every provision in that instrument has a history that must be understood before the brief and sententious language employed can be comprehended in the relations its authors intended. We must bring before us the state of things presented to the Convention, and in regard to which it acted, when the compound provision was made, declaring: 1st. That "new States may be admitted by the Congress into this Union." 2d.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State."

Having ascertained the historical facts giving rise to these provisions, the difficulty of arriving at the true meaning of the language employed will be greatly lessened.

The history of these facts is substantially as follows:

The King of Great Britain, by his proclamation of 1763, virtually claimed that the country west of the mountains had been conquered from France, and ceded to the Crown of Great Britain by the treaty of Paris of that year, and he says: "We reserve it under our sovereignty, protection, and dominion, for the use of the Indians."

This country was conquered from the Crown of Great Britain, and surrendered to the United States by the treaty of peace of 1783. The colonial charters of Virginia, North Carolina, and Georgia included it. Other States set up pretensions of claim to some portions of the territory north of the Ohio, but they were of no value, as I suppose. 18 U. S. 5 Wheat. 375.

As this vacant country had been won by the blood and treasure of all the States, those whose charters did not reach it insisted that the country belonged to the States united, and that the lands should be disposed of for the benefit of the whole, and to which end the western territory should be ceded to the States united. The contest was stringent and angry long before the Convention convened, and deeply agitated that body. As a matter of justice, and to quiet the controversy, Virginia consented to cede the country north of the Ohio as early as 1783, and, in 1784, the deed of cession was executed by her delegates in the Congress of the Confederation conveying to the United States in Congress assembled, for the benefit of said States,

"all right, title, and claim, as well of soil as of jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia

charter, situate, lying, and being to the northwest of the river Ohio."

In 1787 (July 13), the ordinance was passed by the old Congress to govern the Territory.

Massachusetts had ceded her pretension of claim to western territory in 1785, Connecticut hers in 1786, and New York had ceded hers. In August, 1787, South Carolina ceded to the Confederation her pretension of claim to territory west of that State. And North Carolina was expected to cede hers, which she did do in April, 1790. And so Georgia was confidently expected to cede her large domain, now constituting the territory of the States of Alabama and Mississippi.

At the time the Constitution was under consideration, there had been ceded to the United States, or was shortly expected to be ceded, all the western country from the British Canada line to Florida and from the head of the Mississippi almost to its mouth, except that portion which now constitutes the State of Kentucky.

Although Virginia had conferred on the Congress of the Confederation power to govern the Territory north of the Ohio, still it cannot be denied, as I think, that power was wanting to admit a new State under the Articles of Confederation.

With these facts prominently before the Convention, they proposed to accomplish these ends:

1st. To give power to admit new States.

2d. To dispose of the public lands in the Territories, and such as might remain undisposed of in the new States after they were admitted.

And, thirdly, to give power to govern the different Territories as incipient States not of the Union, and fit them for admission. No one in the Convention seems to have doubted that these powers were necessary. As early as the third day of its session (May 29th), Edmund Randolph brought forward a set of resolutions containing nearly all the germs of the Constitution, the tenth of which is as follows:

"Resolved, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

August 18th, Mr. Madison submitted, in order to be referred to the committee of detail, the following powers as proper to be added to those of the General Legislature:

"To dispose of the unappropriated lands of the United States. . . . To institute temporary Governments for new States arising therein."

3 Madison Papers 1353.

These, with the resolution that a district for the location of the seat of Government should be provided, and some others, were referred, without a dissent, to the committee of detail to arrange and put them into satisfactory language.

Gouverneur Morris constructed the clauses, and combined the views of a majority on the two provisions, to admit new States, and secondly, to dispose of the public lands and to govern the Territories in the meantime, between the cessions of the States and the admission into the Union of new States arising in the ceded territory. 3 Madison Papers 1456 to 1466.

It was hardly possible to separate the power "to make all needful rules and regulations" respecting the government of the territory and the disposition of the public lands.

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original States, before the Constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper that the King of England had to grant the Virginia colonial charter of 1609, or to grant the charter of Pennsylvania to William Penn. The thirteen States, through their representatives and deputed ministers in the old Congress, had the same right to govern that Virginia had before the cession. Baldwin's Constitutional Views 90. And the sixth article of the Constitution adopted all engagements entered into by the Congress of the Confederation as valid against the United States, and that the laws made in pursuance of the new Constitution to carry out this engagement should be the supreme law of the land, and the judges bound thereby. To give the compact and the ordinance which was part of it full effect under the new Government, the Act of August 7th, 1789, was passed, which declares,

"Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the Territory northwest of the river Ohio, may have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States."

It is then provided that the Governor and other officers should be appointed by the President, with the consent of the Senate, and be subject to removal, &c., in like manner that they were by the old Congress, whose functions had ceased.

By the powers to govern given by the Constitution, those amendments to the ordinance could be made, but Congress guardedly abstained from touching the compact of Virginia further than to adapt it to the new Constitution.

It is due to myself to say that it is asking much of a judge

who has for nearly twenty years been exercising jurisdiction from the western Missouri line to the Rocky Mountains and, on this understanding of the Constitution, inflicting the extreme penalty of death for crimes committed where the direct legislation of Congress was the only rule, to agree that he had been all the while acting in mistake, and as an usurper.

More than sixty years have passed away since Congress has exercised power to govern the Territories by its legislation directly or by Territorial charters, subject to repeal at all times, and it is now too late to call that power into question, if this court could disregard its own decisions, which it cannot do, as I think. It was held in the case of *Cross v. Harrison,* 16 How. 193-194, that the sovereignty of California was in the United States in virtue of the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power to admit new States into the Union. That decision followed preceding ones, there cited. The question was then presented, how it was possible for the judicial mind to conceive that the United States Government, created solely by the Constitution, could, by a lawful treaty, acquire territory over which the acquiring power had no jurisdiction to hold and govern it, by force of the instrument under whose authority the country was acquired, and the foregoing was the conclusion of this court on the proposition. What was there announced was most deliberately done, and with a purpose. The only question here is, as I think, how far the power of Congress is limited.

As to the Northwest Territory, Virginia had the right to abolish slavery there, and she did so agree in 1787, with the other States in the Congress of the Confederation, by assenting to and adopting the Ordinance of 1787 for the government of the Northwest Territory. She did this also by an act of her Legislature, passed afterwards, which was a treaty in fact.

Before the new Constitution was adopted, she had as much right to treat and agree as any European Government had. And, having excluded slavery, the new Government was bound by that engagement by article six of the new Constitution. This only meant that slavery should not exist whilst the United States exercised the power of government, in the Territorial form, for, when a new State came in, it might do so with or without slavery.

My opinion is that Congress had no power, in face of the compact between Virginia and the twelve other States, to force slavery into the Northwest Territory, because there it was bound to that "engagement," and could not break it.

In 1790, North Carolina ceded her western territory, now the State of Tennessee, and stipulated that the inhabitants thereof should enjoy all the privileges and advantages of the ordinance for governing the territory north of the Ohio river, and that Congress should assume the government, and accept the cession, under the express conditions contained in the ordinance: *Provided*, "That no regulation made, or to be made, by Congress, shall tend to emancipate slaves."

In 1802, Georgia ceded her western territory to the United States, with the provision that the Ordinance of 1787 should in all its parts extend to the territory ceded, "that article only excepted which forbids slavery." Congress had no more power to legislate slavery out from the North Carolina and Georgia cessions than it had power to legislate slavery in, north of the Ohio. No power existed in Congress to legislate at all, affecting slavery, in either case. The inhabitants, as respected this description of property, stood protected whilst they were governed by Congress, in like manner that they were protected before the cession was made, and when they were, respectively, parts of North Carolina and Georgia.

And how does the power of Congress stand west of the Mississippi river? The country there was acquired from France by treaty in 1803. It declares that the First Consul, in the name of the French Republic, doth hereby cede to the United States, in full sovereignty, the colony or province of Louisiana, with all the rights and appurtenances of the said territory. And, by article third, that

"the inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States, and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was, to a great extent, a vacant country, having in it few civilized inhabitants. No one portion of the colony of a proper size for a State of the Union had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfil the treaty, additional population was indispensable, and obviously desired with anxiety by both sides so that the whole country should, as soon as possible, become States of the Union. And for this

contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected "*in the meantime*," that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State.

At the date of the treaty, each inhabitant had the right to the free enjoyment of his property, alike with his liberty and his religion, in every part of Louisiana; the province then being one country, he might go everywhere in it and carry his liberty, property, and religion with him, and in which he was to be maintained and protected until he became a citizen of a State of the Union of the United States. This cannot be denied to the original inhabitants and their descendants. And, if it be true that immigrants were equally protected, it must follow that they can also stand on the treaty.

The settled doctrine in the State courts of Louisiana is that a French subject coming to the Orleans Territory, after the treaty of 1803 was made and before Louisiana was admitted into the Union, and being an inhabitant at the time of the admission, became a citizen of the United States by that act that he was one of the inhabitants contemplated by the third article of the treaty, which referred to all the inhabitants embraced within the new State on its admission.

That this is the true construction I have no doubt.

If power existed to draw a line at thirty-six degrees thirty minutes north, so Congress had equal power to draw the line on the thirtieth degree — that is due west from the city of New Orleans — and to declare that, north of that line, slavery should never exist. Suppose this had been done before 1812, when Louisiana came into the Union, and the question of infraction of the treaty had then been presented on the present assumption of power to prohibit slavery; who doubts what the decision of this court would have been on such an act of Congress, yet the difference between the supposed line and that on thirty-six degrees thirty minutes north is only in the degree of grossness presented by the lower line.

The Missouri Compromise line of 1820 was very aggressive; it declared that slavery was abolished forever throughout a country reaching from the Mississippi river to the Pacific ocean, stretching over thirty-two degrees of longitude and twelve and a half

degrees of latitude on its eastern side, sweeping over four-fifths, to say no more, of the original province of Louisiana.

That the United States Government stipulated in favor of

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the inhabitants to the extent here contended for has not been seriously denied, as far as I know, but the argument is that Congress had authority to *repeal* the third article of the treaty of 1803, insofar as it secured the right to hold slave property in a portion of the ceded territory, leaving the right to exist in other parts. In other words, that Congress could repeal the third article entirely, at its pleasure. This I deny.

The compacts with North Carolina and Georgia were treaties also, and stood on the same footing of the Louisiana treaty, on the assumption of power to repeal the one, it must have extended to all, and Congress could have excluded the slaveholder of North Carolina from the enjoyment of his lands in the Territory now the State of Tennessee, where the citizens of the mother State were the principal proprietors.

And so in the case of Georgia. Her citizens could have been refused the right to emigrate to the Mississippi or Alabama Territory unless they left their most valuable and cherished property behind them.

The Constitution was framed in reference to facts then existing or likely to arise; the instrument looked to no theories of Government. In the vigorous debates in the Convention, as reported by Mr. Madison and others, surrounding facts and the condition and necessities of the country gave rise to almost every provision; and among those facts, it was prominently true that Congress dare not be intrusted with power to provide that, if North Carolina or Georgia ceded her western territory, the citizens of the State (in either case) could be prohibited, at the pleasure of Congress, from removing to their lands, then granted to a large extent, in the country likely to be ceded unless they left their slaves behind. That such an attempt, in the face of a population fresh from the war of the Revolution and then engaged in war with the great confederacy of Indians extending from the mouth of the Ohio to the Gulf of Mexico, would end in open revolt all intelligent men knew.

In view of these facts, let us inquire how the question stands by the terms of the Constitution, aside from the treaty? How it stood in public opinion when the Georgia cession was made, in 1802, is apparent from the fact that no guaranty was required by Georgia of the United States for the protection of slave property. The Federal Constitution was relied on to secure the rights of Georgia and her citizens during the Territorial condition of the country. She relied on the indisputable truths that the States were by the Constitution made equals in political rights, and equals in the right to participate in the common property of all the States united, and held in trust for

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them. The Constitution having provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States, respectively. The cited clause is not that citizens of the United States shall have equal privileges in the Territories, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State by virtue of that great fundamental condition of the Union — the equality of the States.

Congress cannot do indirectly what the Constitution prohibits directly. If the slaveholder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact, it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousand of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves were left behind.

Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle or horses, as the country is already overstocked, nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as the slaveholder was for thirty years, by the Missouri restriction.

If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.

The case before us will illustrate the construction contended for. Dr. Emerson was a citizen of Missouri; he had an equal right to go to the Territory with every citizen of other States. This is undeniable, as I suppose. Scott was Dr. Emerson's lawful property in Missouri; he carried his Missouri title with him, and the precise question here is whether Congress had the power to annul that title. It is idle to say that, if Congress could not defeat the title *directly*, that it might be done

indirectly, by drawing a narrow circle around the slave population of Upper Louisiana and declaring that, if the slave went beyond it, he should be free. Such assumption is mere evasion, and entitled to no consideration. And it is equally idle to contend that, because Congress has express power to regulate commerce among the Indian tribes and to prohibit intercourse with the Indians, that therefore Dr. Emerson's title might be defeated within the country ceded by the Indians to the United States as early as 1805, and which embraces Fort Snelling. Am.State Papers, vol. 1, p. 734. We *must* meet the question whether Congress had the power to declare that a citizen of a State, carrying with him his equal rights secured to him through his State, could be stripped of his goods and slaves and be deprived of any participation in the common property? If this be the true meaning of the Constitution, equality of rights to enjoy a common country (equal to a thousand miles square) may be cut off by a geographical line, and a great portion of our citizens excluded from it.

Ingenious indirect evasions of the Constitution have been attempted and defeated heretofore. In the *Passenger Cases*, 7 How.R., the attempt was made to impose a tax on the masters, crews, and passengers of vessels, the Constitution having prohibited a tax on the vessel itself, but this Court held the attempt to be a mere evasion, and pronounced the tax illegal.

I admit that Virginia could, and lawfully did, prohibit slavery northwest of the Ohio by her charter of cession, and that the territory was taken by the United States with this condition imposed. I also admit that France could, by the treaty of 1803, have prohibited slavery in any part of the ceded territory, and imposed it on the United States as a fundamental condition of the cession, in the meantime, till new States were admitted in the Union.

I concur with Judge Baldwin that Federal power is exercised over all the territory within the United States, pursuant to the Constitution *and* the conditions of the cession, whether it was a part of the original territory of a State of the Union or of a foreign State, ceded by deed or treaty, the right of the United States in or over it depends on the contract of cession, which operates to incorporate as well the Territory as its inhabitants into the Union. Baldwin's Constitutional Views 84.

My opinion is that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

And, secondly that the Act of 1820, known as the Missouri

Compromise, violates the most leading feature of the Constitution — a feature on which the Union depends and which secures to the respective States and their citizens and entire EQUALITY of rights, privileges, and immunities.

On these grounds, I hold the compromise act to have been void, and consequently that the plaintiff, Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff Scott is a slave, and was so when this suit was brought.

Mr. Justice McLEAN and Mr. Justice CURTIS dissented.

Mr. Justice McLEAN dissenting.

This case is before us on a writ of error from the Circuit Court for the district of Missouri.

An action of trespass was brought which charges the defendant with an assault and imprisonment of the plaintiff, and also of Harriet Scott, his wife, Eliza and Lizzie, his two children, on the ground that they were his slaves, which was without right on his part and against law.

The defendant filed a plea in abatement,

"that said causes of action, and each and every of them, if any such accrued to the said Dred Scott, accrued out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit, said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify, wherefore he prays judgment whether the court can or will take further cognizance of the action aforesaid."

To this a demurrer was filed which, on argument, was sustained by the court, the plea in abatement being held insufficient; the defendant was ruled to plead over. Under this rule, he pleaded: 1. Not guilty, 2. That Dred Scott was a negro slave, the property of the defendant, and 3. That Harriet, the wife, and Eliza and Lizzie, the daughters of the plaintiff, were the lawful slaves of the defendant.

Issue was joined on the first plea, and replications of *de injuria* were filed to the other pleas.

The parties agreed to the following facts: In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, Dr. Emerson took the plaintiff from the State of Missouri to

the post of Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, Dr. Emerson removed the plaintiff from Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the territory Known as Upper Louisiana, acquired by the United States of France, and situate north of latitude thirty-six degrees thirty minutes north, and north of the State of Missouri. Dr. Emerson held the plaintiff in slavery, at Fort Snelling from the last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, Major Taliaferro took Harriet to Fort Snelling, a military post situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at Fort Snelling, unto Dr. Emerson, who held her in slavery at that place until the year 1838.

In the year 1836, the plaintiff and Harriet were married at Fort Snelling, with the consent of Dr. Emerson, who claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey*, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri at the military post called Jefferson Barracks.

In the year 1838, Dr. Emerson removed the plaintiff and said Harriet and their daughter Eliza from Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of the suit, Dr. Emerson sold and conveyed the plaintiff, Harriet, Eliza, and Lizzie, to the defendant as slaves, and he has ever since claimed to hold them as slaves.

At the times mentioned in the plaintiff's declaration, the defendant, claiming to be the owner, laid his hands upon said plaintiff, Harriet, Eliza, and Lizzie, and imprisoned them, doing in this respect, however, no more than he might lawfully do if they were of right his slaves at such times.

In the first place, the plea to the jurisdiction is not before us on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff, and, as the plaintiff prosecutes this writ of error, he does not complain of the decision on the demurrer. The defendant

might have complained of this decision, as against him, and have prosecuted a writ of error to reverse it. But as the case, under the instruction of the court to the jury, was decided in his favor, of course he had no ground of complaint.

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for the dismissal of the case. This may be characterized as rather a sharp practice, and one which seldom, if ever, occurs. No case was cited in the argument as authority, and not a single case precisely in point is recollected in our reports. The pleadings do not show a

want of jurisdiction. This want of jurisdiction can only be ascertained by a judgment on the demurrer to the special plea. No such case, it is believed, can be cited. But if this rule of practice is to be applied in this case, and the plaintiff in error is required to answer and maintain as well the points ruled in his favor, as to show the error of those ruled against him, he has more than an ordinary duty to perform. Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this:

"That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country and sold as negro slaves."

There is no averment in this plea which shows or conduces to show an inability in the plaintiff to sue in the Circuit Court. It does not allege that the plaintiff had his domicil in any other State, nor that he is not a free man in Missouri. He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri within the meaning of the act of Congress authorizing him to sue in the Circuit Court. It has never been held necessary, to constitute a citizen within the act, that he should have the qualifications of an elector. Females and minors may sue in the Federal courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance.

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.

It has often been held that the jurisdiction, as regards parties, can only be exercised between citizens of different States,

and that a mere residence is not sufficient, but this has been said to distinguish a temporary from a permanent residence.

To constitute a good plea to the jurisdiction, it must negative those qualities and rights which enable an individual to sue in the Federal courts. This has not been done, and on this ground the plea was defective, and the demurrer was properly sustained. No implication can aid a plea in abatement or in bar; it must be complete in itself; the facts stated, if true, must abate or bar the right of the plaintiff to sue. This is not the character of the above plea. The facts stated, if admitted, are not inconsistent with other facts which may be presumed and which bring the plaintiff within the act of Congress.

The pleader has not the boldness to allege that the plaintiff is a slave, as that would assume against him the matter in controversy, and embrace the entire merits of the case in a plea to the jurisdiction. But beyond the facts set out in the plea, the court, to sustain it, must assume the plaintiff to be a slave, which is decisive on the merits. This is a short and an effectual mode of deciding the cause, but I am yet to learn that it is sanctioned by any known rule of pleading.

The defendant's counsel complain that, if the court take jurisdiction on the ground that the plaintiff is free, the assumption is against the right of the master. This argument is easily answered. In the first place, the plea does not show him to be a slave; it does not follow that a man is not free whose ancestors were slaves. The reports of the Supreme Court of Missouri show that this assumption has many exceptions, and there is no averment in the plea that the plaintiff is not within them.

By all the rules of pleading, this is a fatal defect in the plea. If there be doubt, what rule of construction has been established in the slave States? In *Jacob v. Sharp,*Meigs's Rep., Tennessee 114, the court held, when there was doubt as to the construction of a will which emancipated a slave, "it must be construed to be subordinate to the higher and more important right of freedom."

No injustice can result to the master from an exercise of jurisdiction in this cause. Such a decision does not in any degree affect the merits of the case; it only enables the plaintiff to assert his claims to freedom before this tribunal. If the jurisdiction be ruled against him on the ground that he is a slave, it is decisive of his fate.

It has been argued that, if a colored person be made a citizen of a State, he cannot sue in the Federal court. The Constitution declares that Federal jurisdiction "may be exercised between citizens of different States," and the same is provided

in the act of 1789. The above argument is properly met by saying that the Constitution was intended to be a practical instrument, and where its language is too plain to be misunderstood, the argument ends.

In *Chirae v. Chirae,* 2 Wheat. 261, 4 Curtis 99, this court says: “That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted.” No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress. Congress has power “to establish a uniform rule of naturalization.”

It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the acts of Congress on the subject of naturalization, and subversive of the Federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.

In the argument, it was said that a colored citizen would not be an agreeable member of society. This is more a matter of taste than of law. Several of the States have admitted persons of color to the right of suffrage, and, in this view, have recognised them as citizens, and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious. Under the late treaty with Mexico, we have made citizens of all grades, combinations, and colors. The same was done in the admission of Louisiana and Florida. No one ever doubted, and no court ever held that the people of these Territories did not become citizens under the treaty. They have exercised all the rights of citizens, without being naturalized under the acts of Congress.

There are several important principles involved in this case which have been argued, and which may be considered under the following heads:

1. The locality of slavery, as settled by this court and the courts of the States.

2. The relation which the Federal Government bears to slavery in the States.

3. The power of Congress to establish Territorial Governments and to prohibit the introduction of slavery therein.

4. The effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited.

5. Whether the return of a slave under the control of his

master, after being entitled to his freedom, reduces him to his former condition.

6. Are the decisions of the Supreme Court of Missouri on the questions before us binding on this court within the rule adopted.

In the course of my judicial duties, I have had occasion to consider and decide several of the above points.

1. As to the locality of slavery. The civil law throughout the Continent of Europe, it is believed, without an exception, is that slavery can exist only within the territory where it is established, and that, if a slave escapes or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation. Grotius, lib. 2, chap. 15, 5, 1, lib. 10, chap. 10, 2, 1, Wicqueposts Ambassador, lib. 1, p. 418, 4 Martin 385, Case of the Creole in the House of Lords, 1842, 1 Phillimore on International Law 316, 335.

There is no nation in Europe which considers itself bound to return to his master a fugitive slave under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The Roman law did now allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane; by the King’s Bench, they were held to be free. 2 Barn. and Cres. 440.

In the great and leading case of *Prigg v. The State of Pennsylvania,* 16 Pet. 539, 14 Curtis 421, this court said that, by the general law of nations, no nation is bound to recognise the state of slavery, as found within its territorial dominions, where it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is organized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somersett’s Case*, Lafft’s Rep. 1, 20 Howell’s State Trials, 79, which was decided before the American Revolution.

There was some contrariety of opinion among the judges on certain points ruled in *Prigg's Case*, but there was none in regard to the great principle that slavery is limited to the range of the laws under which it is sanctioned.

No case in England appears to have been more thoroughly examined than that of *Somersett.* The judgment pronounced

by Lord Mansfield was the judgment of the Court of King's Bench. The cause was argued at great length, and with great ability, by Hargrave and others, who stood among the most eminent counsel in England. It was held under advisement from term to term, and a due sense of its importance was felt and expressed by the Bench.

In giving the opinion of the court, Lord Mansfield said:

"The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law."

He referred to the contrary opinion of Lord Hardwicke, in October, 1749, as Chancellor: "That he and Lord Talbot, when Attorney and Solicitor General, were of opinion that no such claim as here presented, for freedom, was valid."

The weight of this decision is sought to be impaired from the terms in which it was described by the exuberant imagination of Curran. The words of Lord Mansfield, in giving the opinion of the court, were such as were fit to be used by a great judge in a most important case. It is a sufficient answer to all objections to that judgment that it was pronounced before the Revolution, and that it was considered by this court as the highest authority. For near a century, the decision in *Somersett's Case*has remained the law of England. The *Case of the Slave Grace*, decided by Lord Stowell in 1827, does not, as has been supposed, overrule the judgment of Lord Mansfield. Lord Stowell held that, during the residence of the slave in England, "No dominion, authority, or coercion, can be exercised over him." Under another head, I shall have occasion to examine the opinion in the *Case of Grace.*

To the position that slavery can only exist except under the authority of law, it is objected that in few if in any instances has it been established by statutory enactment. This is no answer to the doctrine laid down by the court. Almost all the principles of the common law had their foundation in usage. Slavery was introduced into the colonies of this country by Great Britain at an early period of their history, and it was protected and cherished until it became incorporated into the colonial policy. It is immaterial whether a system of slavery was introduced by express law or otherwise, if it have the authority of law. There is no slave State where the institution is not recognised and protected by statutory enactments and judicial decisions. Slaves are made property by the laws of the slave States, and as such are liable to the claims of creditors;

they descend to heirs, are taxed, and, in the South, they are a subject of commerce.

In the case of *Rankin v. Lydia*, 2 A. K. Marshall's Rep., Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"In deciding the question [of slavery], we disclaim the influence of the general principles of liberty which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this State, and the right to hold slaves under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten and common law."

I will now consider the relation which the Federal Government bears to slavery in the States:

Slavery is emphatically a State institution. In the ninth section of the first article of the Constitution, it is provided

"that the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

In the Convention, it was proposed by a committee of eleven to limit the importation of slaves to the year 1800, when Mr. Pinckney moved to extend the time to the year 1808. This motion was carried — New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, and Georgia, voting in the affirmative, and New Jersey, Pennsylvania, and Virginia, in the negative. In opposition to the motion, Mr. Madison said:

"Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves, so long a term will be more dishonorable to the American character than to say nothing about it in the Constitution."

Madison Papers.

The provision in regard to the slave trade shows clearly that Congress considered slavery a State institution, to be continued and regulated by its individual sovereignty; and to conciliate that interest, the slave trade was continued twenty years not as a general measure, but for the "benefit of such States as shall think proper to encourage it."

In the case of *Groves v. Slaughter,* 15 Peters 499, 14 Curtis 137, Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States, but the court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among

them. If this trade were subject to the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union.

The only connection which the Federal Government holds with slaves in a State arises from that provision of the Constitution which declares that

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

This being a fundamental law of the Federal Government, it rests mainly for its execution, as has been held, on the judicial power of the Union, and so far as the rendition of fugitives from labor has become a subject of judicial action, the Federal obligation has been faithfully discharged.

In the formation of the Federal Constitution, care was taken to confer no power on the Federal Government to interfere with this institution in the States. In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.

We need not refer to the mercenary spirit which introduced the infamous traffic in slaves to show the degradation of negro slavery in our country. This system was imposed upon our colonial settlements by the mother country, and it is due to truth to say that the commercial colonies and States were chiefly engaged in the traffic. But we know as a historical fact that James Madison, that great and good man, a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man.

I prefer the lights of Madison, Hamilton, and Jay as a means of construing the Constitution in all its bearings, rather than to look behind that period into a traffic which is now declared to be piracy, and punished with death by Christian nations. I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom, and while I admit the Government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.

Many of the States, on the adoption of the Constitution, or

shortly afterward, took measures to abolish slavery within their respective jurisdictions, and it is a well known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline until it would become extinct. The increased value of slave labor, in the culture of cotton and sugar, prevented the realization of this expectation. Like all other communities and States, the South were influenced by what they considered to be their own interests.

But if we are to turn our attention to the dark ages of the world, why confine our view to colored slavery? On the same principles, white men were made slaves. All slavery has its origin in power, and is against right.

The power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein, is the next point to be considered.

After the cession of western territory by Virginia and other States to the United States, the public attention was directed to the best mode of disposing of it for the general benefit. While in attendance on the Federal Convention, Mr. Madison, in a letter to Edmund Randolph dated the 22d April, 1787, says:

"Congress are deliberating on the plan most eligible for disposing of the western territory not yet surveyed. Some alteration will probably be made in the ordinance on that subject."

And in the same letter he says:

"The inhabitants of the Illinois complain of the land jobbers, &c., who are purchasing titles among them. Those of St. Vincent's complain of the defective criminal and civil justice among them, as well as of military protection."

And on the next day, he writes to Mr. Jefferson:

"The government of the settlements on the Illinois and Wabash is a subject very perplexing in itself, and rendered more so by our ignorance of the many circumstances on which a right judgment depends. The inhabitants at those places claim protection against the savages, and some provision for both civil and criminal justice."

In May, 1787, Mr. Edmund Randolph submitted to the Federal Convention certain propositions as the basis of a Federal Government, among which was the following:

"*Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the National Legislature less than the whole."

Afterward, Mr. Madison submitted to the Convention, in order to be referred to the committee of detail, the following powers, as proper to be added to those of general legislation:

"To dispose of the unappropriated lands of the United States. To institute temporary Governments for new States arising therein. To regulate affairs with the Indians, as well within as without the limits of the United States."

Other propositions were made in reference to the same subjects, which it would be tedious to enumerate. Mr. Gouverneur Morris proposed the following:

"The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution contained shall be so construed as to prejudice any claims either of the United States or of any particular State."

This was adopted as a part of the Constitution, with two verbal alterations — Congress was substituted for Legislature, and the word either was stricken out.

In the organization of the new Government, but little revenue for a series of years was expected from commerce. The public lands were considered as the principal resource of the country for the payment of the Revolutionary debt. Direct taxation was the means relied on to pay the current expenses of the Government. The short period that occurred between the cession of western lands to the Federal Government by Virginia and other States, and the adoption of the Constitution, was sufficient to show the necessity of a proper land system and a temporary Government. This was clearly seen by propositions and remarks in the Federal Convention, some of which are above cited, by the passage of the Ordinance of 1787, and the adoption of that instrument by Congress, under the Constitution, which gave to it validity.

It will be recollected that the deed of cession of western territory was made to the United States by Virginia in 1784, and that it required the territory ceded to be laid out into States that the land should be disposed of for the common benefit of the States, and that all right, title, and claim, as well of soil as of jurisdiction, were ceded, and this was the form of cession from other States.

On the 13th of July, the Ordinance of 1787 was passed, "for the government of the United States territory northwest of the river Ohio," with but one dissenting vote. This instrument provided there should be organized in the territory not less than three nor more than five States, designating their boundaries. It passed while the Federal Convention was in session, about two months before the

Constitution was adopted by the Convention. The members of the Convention must therefore have been well acquainted with the provisions of the

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Ordinance. It provided for a temporary Government, as initiatory to the formation of State Governments. Slavery was prohibited in the territory.

Can anyone suppose that the eminent men of the Federal Convention could have overlooked or neglected a matter so vitally important to the country in the organization of temporary Governments for the vast territory northwest of the river Ohio? In the 3d section of the 4th article of the Constitution, they did make provision for the admission of new States, the sale of the public lands, and the temporary Government of the territory. Without a temporary Government, new States could not have been formed, nor could the public lands have been sold.

If the third section were before us now for consideration for the first time, under the facts stated, I could not hesitate to say there was adequate legislative power given in it. The power to make all needful rules and regulations is a power to legislate. This no one will controvert, as Congress cannot make "rules and regulations," except by legislation. But it is argued that the word "territory" is used as synonymous with the word "land," and that the rules and regulations of Congress are limited to the disposition of lands and other property belonging to the United States. That this is not the true construction of the section appears from the fact that, in the first line of the section, "the power to dispose of the public lands" is given expressly, and, in addition, to make all needful rules and regulations. The power to dispose of is complete in itself, and requires nothing more. It authorizes Congress to use the proper means within its discretion, and any further provision for this purpose would be a useless verbiage. As a composition, the Constitution is remarkably free from such a charge.

In the discussion of the power of Congress to govern a Territory, in the case of the *Atlantic Insurance Company v. Canter,* 1 Peters 511, 7 Curtis 685, Chief Justice Marshall, speaking for the court, said, in regard to the people of Florida,

"they do not, however, participate in political power, they do not share in the Government till Florida shall become a State; in the meantime, Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

And he adds,

"perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result

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necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory, whichever may be the source whence the power is derived, the possession of it is unquestioned."

And, in the close of the opinion, the court says, "in legislating for them [the Territories], Congress exercises the combined powers of the General and State Governments."

Some consider the opinion to be loose and inconclusive, others that it is *obiter dicta*, and the last sentence is objected to as recognising absolute power in Congress over Territories. The learned and eloquent Wirt, who, in the argument of a cause before the court, had occasion to cite a few sentences from an opinion of the Chief Justice, observed, "no one can mistake the style, the words so completely match the thought."

I can see no want of precision in the language of the Chief Justice; his meaning cannot be mistaken. He states, first, the third section as giving power to Congress to govern the Territories, and two other grounds from which the power may also be implied. The objection seems to be that the Chief Justice did not say which of the grounds stated he considered the source of the power. He did not specifically state this, but he did say, "whichever may be the source whence the power is derived, the possession of it is unquestioned." No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticise the opinion consider it without authority because the Chief Justice did not

designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised.

The opinion clearly was not *obiter dicta*. The turning point in the case was whether Congress had power to authorize the Territorial Legislature of Florida to pass the law under which the Territorial court was established, whose decree was brought before this court for revision. The power of Congress, therefore, was the point in issue.

The word "territory," according to Worcester, "means land, country, a district of country under a temporary Government." The words "territory or other property," as used, do imply, from the use of the pronoun "other" that territory was used as descriptive of land, but does it follow that it was not used also as descriptive of a district of country? In both of these senses, it belonged to the United States — as land for the purpose of sale, as territory for the purpose of government.

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But if it be admitted that the word territory, as used, means land, and nothing but land, the power of Congress to organize a temporary Government is clear. It has power to make all needful regulations respecting the public lands, and the extent of those "needful regulations" depends upon the direction of Congress, where the means are appropriate to the end, and do not conflict with any of the prohibitions of the Constitution. If a temporary Government be deemed needful, necessary, requisite, or is wanted, Congress has power to establish it. This court says, in *McCulloch v. The State of Maryland,* 4 Wheat. 316,

"If a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance."

The power to establish post offices and post roads gives power to Congress to make contracts for the transportation of the mail, and to punish all who commit depredations upon it in its transit or at its places of distribution. Congress has power to regulate commerce, and, in the exercise of its discretion, to lay an embargo, which suspends commerce; so, under the same power, harbors, lighthouses, breakwaters, &c., are constructed.

Did Chief Justice Marshall, in saying that Congress governed a Territory by exercising the combined powers of the Federal and State Governments, refer to unlimited discretion? A Government which can make white men slaves? Surely such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution or which are contrary to its spirit, so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers.

But Congress has no power to regulate the internal concerns of a State, as of a Territory; consequently, in providing for the Government of a Territory, to some extent the combined powers of the Federal and State Governments are necessarily exercised.

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If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States, and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But not only so; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

This remark is made in answer to the argument urged that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a Territorial Government is established in a slave Territory, it has uniformly remained in that condition until the people form a State Constitution; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.

The sovereignty of the Federal Government extends to the entire limits of our territory. Should any foreign power invade our jurisdiction, it would be repelled. There is a law of Congress to punish our citizens for crimes committed in districts of country where there is no organized Government. Criminals are brought to certain Territories or States, designated in the law, for punishment. Death has been inflicted in Arkansas and in Missouri on individuals, for murders committed beyond the limit of any organized Territory or State, and no one doubts that such a jurisdiction was rightfully exercised. If there be a right to acquire territory, there necessarily must be an implied power to govern it. When the military force of the Union shall conquer a country, may not Congress provide for the government of such country? This would be an implied power essential to the acquisition of new territory.

This power has been exercised, without doubt of its constitutionality, over territory acquired by conquest and purchase.

And when there is a large district of country within the United States, and not within any State Government, if it be necessary to establish a temporary Government to carry out a power expressly vested in Congress — as the disposition of the public lands — may not such Government be instituted by Congress? How do we read the Constitution? Is it not a practical instrument?

In such cases, no implication of a power can arise which is inhibited by the Constitution, or which may be against the theory of its construction. As my opinion rests on the third section, these remarks are made as an intimation that the power to establish a temporary Government may arise, also, on the other two grounds stated in the opinion of the court in the insurance case, without weakening the third section.

I would here simply remark that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law. When we consider the men who laid the foundation of our Government and carried it into operation, the men who occupied the bench, who filled the halls of legislation and the Chief Magistracy, it would seem, if any question could be settled clear of all doubt, it was the power of Congress to establish Territorial Governments. Slavery was prohibited in the entire Northwestern Territory, with the approbation of leading men, South and North, but this prohibition was not retained when this ordinance was adopted for the government of Southern Territories, where slavery existed. In a late republication of a letter of Mr. Madison, dated November 27, 1819, speaking of this power of Congress to prohibit slavery in a Territory, he infers there is no such power from the fact that it has not been exercised. This is not a very satisfactory argument against any power, as there are but few, if any, subjects on which the constitutional powers of Congress are exhausted. It is true, as Mr. Madison states that Congress, in the act to establish a Government in the Mississippi Territory, prohibited the importation of slaves into it from foreign parts, but it is equally true that, in the act erecting Louisiana into two Territories, Congress declared,

“it shall not be lawful for any person to bring into Orleans Territory, from any port or place within the limits of the United States, any slave which shall have been imported since 1798, or which may hereafter be imported, except by a citizen of the United States who settles in the Territory, under the penalty of the freedom of such slave.”

The inference of Mr. Madison, therefore, against the power of

Congress, is of no force, as it was founded on a fact supposed, which did not exist.

It is refreshing to turn to the early incidents of our history and learn wisdom from the acts of the great men who have gone to their account. I refer to a report in the House of Representatives, by John Randolph, of Roanoke, as chairman of a committee, in March, 1803 — fifty-four years ago. From the Convention held at Vincennes, in Indiana, by their President, and from the people of the Territory, a petition was presented to Congress praying the suspension of the provision which prohibited slavery in that Territory. The report stated

“that the rapid population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only

be employed to advantage in the cultivation of products more valuable than any known to that quarter of the United States; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration."

1 vol. State Papers, Public Lands 160.

The judicial mind of this country, State and Federal, has agreed on no subject within its legitimate action with equal unanimity as on the power of Congress to establish Territorial Governments. No court, State or Federal, no judge or statesman, is known to have had any doubts on this question for nearly sixty years after the power was exercised. Such Governments have been established from the sources of the Ohio to the Gulf of Mexico, extending to the Lakes on the north and the Pacific Ocean on the west, and from the lines of Georgia to Texas.

Great interests have grown up under the Territorial laws over a country more than five times greater in extent than the original thirteen States, and these interests, corporate or otherwise, have been cherished and consolidated by a benign policy without anyone supposing the law-making power had united with the Judiciary, under the universal sanction of the whole country, to usurp a jurisdiction which did not belong to them. Such a discovery at this late date is more extraordinary than anything which has occurred in the judicial history of this or any other country. Texas, under a previous organization,

was admitted as a State, but no State can be admitted into the Union which has not been organized under some form of government. Without temporary Governments, our public lands could not have been sold, nor our wildernesses reduced to cultivation and the population protected, nor could our flourishing States, West and South, have been formed.

What do the lessons of wisdom and experience teach under such circumstances if the new light, which has so suddenly and unexpectedly burst upon us, be true? Acquiescence; acquiescence under a settled construction of the Constitution for sixty years, though it may be erroneous, which has secured to the country an advancement and prosperity beyond the power of computation.

An act of James Madison, when President, forcibly illustrates this policy. He had made up his opinion that Congress had no power under the Constitution to establish a National Bank. In 1815, Congress passed a bill to establish a bank. He vetoed the bill on objections other than constitutional. In his message, he speaks as a wise statesman and Chief Magistrate, as follows:

"Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded, in my judgment, by the repeated recognitions under varied circumstances of the validity of such an institution in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."

Has this impressive lesson of practical wisdom become lost to the present generation?

If the great and fundamental principles of our Government are never to be settled, there can be no lasting prosperity. The Constitution will become a floating waif on the billows of popular excitement.

The prohibition of slavery north of thirty-six degrees thirty minutes, and of the State of Missouri, contained in the act admitting that State into the Union, was passed by a vote of 134 in the House of Representatives to 42. Before Mr. Monroe signed the act, it was submitted by him to his Cabinet, and they held the restriction of slavery in a Territory to be within the constitutional powers of Congress. It would be singular if, in 1804, Congress had power to prohibit the introduction of slaves in Orleans Territory from any other part of the Union, under the penalty of freedom to the slave, if the same power, embodied in the Missouri Compromise, could not be exercised in 1820.

But this law of Congress, which prohibits slavery north of

Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. And this opinion is founded mainly, as I understand, on the distinction drawn between the Ordinance of 1787 and the Missouri Compromise line. In what does the distinction consist? The ordinance, it is said, was a compact entered into by the confederated States before the adoption of the Constitution, and that, in the cession of territory, authority was given to establish a Territorial Government.

It is clear that the ordinance did not go into operation by virtue of the authority of the Confederation, but by reason of its modification and adoption by Congress under the Constitution. It seems to be supposed in the opinion of the Court that the articles of cession placed it on a different footing from territories subsequently acquired. I am unable to perceive the force of this distinction. That the ordinance was intended for the government of the Northwestern Territory, and was limited to such Territory, is admitted. It was extended to Southern Territories, with modifications, by acts of Congress, and to some Northern Territories. But the ordinance was made valid by the act of Congress, and, without such act, could have been of no force. It rested for its validity on the act of Congress, the same, in my opinion, as the Missouri Compromise line.

If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery, in doing which it followed the Ordinance of 1787.

I will now consider the fourth head, which is: "The effect of taking slaves into a State or Territory, and so holding them where slavery is prohibited."

If the principle laid down in the case of *Prigg v. The State of Pennsylvania* is to be maintained, and it is certainly to be maintained until overruled, as the law of this Court, there can be no difficulty on this point. In that case, the court says: "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws." If this be so, slavery can exist nowhere except under the authority of law, founded on usage having the force of law, or by statutory recognition. And the court further says:

"It is manifest from this consideration that, if the Constitution had not contained the clause requiring the rendition of fugitives from labor, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves

coming within its limits, and to have given them entire immunity and protection against the claims of their masters."

Now if a slave abscond, he may be reclaimed, but if he accompany his master into a State or Territory where slavery is prohibited, such slave cannot be said to have left the service of his master where his services were legalized. And if slavery be limited to the range of the territorial laws, how can the slave be coerced to serve in a State or Territory not only without the authority of law, but against its express provisions? What gives the master the right to control the will of his slave? The local law, which exists in some form. But where there is no such law, can the master control the will of the slave by force? Where no slavery exists, the presumption, without regard to color, is in favor of freedom. Under such a jurisdiction, may the colored man be levied on as the property of his master by a creditor? On the decease of the master, does the slave descend to his heirs as property? Can the master sell him? Any one or all of these acts may be done to the slave where he is legally held to service. But where the law does not confer this power, it cannot be exercised.

Lord Mansfield held that a slave brought into England was free. Lord Stowell agreed with Lord Mansfield in this respect, and that the slave could not be coerced in England, but on her voluntary return to Antigua, the place of her slave domicil, her former status attached. The law of England did not prohibit slavery, but did not authorize it. The jurisdiction which prohibits slavery is much stronger in behalf of the slave within it than where it only does not authorize it.

By virtue of what law is it that a master may take his slave into free territory and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer that colored persons are made property by the law of the State, and no such power has been given to Congress. Does the master carry with him the law of the State from which he removes into the Territory?, and does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be

denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty which every person carries with him from his late domicil? One thing is certain — that its origin has been very recent, and it is unknown to the laws of any civilized

country.

A slave is brought to England from one of its islands, where slavery was introduced and maintained by the mother country. Although there is no law prohibiting slavery in England, yet there is no law authorizing it, and for near a century, its courts have declared that the slave there is free from the coercion of the master. Lords Mansfield and Stowell agree upon this point, and there is no dissenting authority.

There is no other description of property which was not protected in England, brought from one of its slave islands. Does not this show that property in a human being does not arise from nature or from the common law, but, in the language of this court, "it is a mere municipal regulation, founded upon and limited to the range of the territorial laws?" This decision is not a mere argument, but it is the end of the law, in regard to the extent of slavery. Until it shall be overturned, it is not a point for argument, it is obligatory on myself and my brethren, and on all judicial tribunals over which this court exercises an appellate power.

It is said the Territories are common property of the States, and that every man has a right to go there with his property. This is not controverted. But the court says a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man. Suppose a master of a slave in a British island owned a million of property in England, would that authorize him to take his slaves with him to England? The Constitution, in express terms, recognises the status of slavery as founded on the municipal law: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall," &c. Now unless the fugitive escape from a place where, by the municipal law, he is held to labor, this provision affords no remedy to the master. What can be more conclusive than this? Suppose a slave escape from a Territory where slavery is not authorized by law, can he be reclaimed?

In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States the same as a horse, or any other kind of property. It is true this was said by the court, as also many other things which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they decided, can be considered as

authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man, and he is destined to an endless existence.

Under this head I shall chiefly rely on the decisions of the Supreme Courts of the Southern States, and especially of the State of Missouri.

In the first and second sections of the sixth article of the Constitution of Illinois, it is declared that neither slavery nor involuntary servitude shall hereafter be introduced into this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted, and in the second section it is declared that any violation of this article shall effect the emancipation of such person from his obligation to service. In Illinois, a right of transit through the State is given the master with his slaves. This is a matter which, as I suppose, belongs exclusively to the State.

The Supreme Court of Illinois, in the case of *Jarrot v. Jarrot*, 2 Gilmer 7, said:

"After the conquest of this Territory by Virginia, she ceded it to the United States and stipulated that the titles and possessions, rights and liberties of the French settlers should be guarantied to them. This, it has been contended, secured them in the possession of those negroes as slaves which they held before that time, and that neither Congress nor the Convention had power to deprive them of it, or, in other words, that the ordinance and Constitution should not be so interpreted and understood as applying to such slaves when it is therein declared that there shall be neither slavery nor involuntary servitude in the Northwest Territory, nor in the State of Illinois, otherwise than in the punishment of crimes. But it was held that those rights could not be thus protected, but must yield to the ordinance and Constitution."

The first slave case decided by the Supreme Court of Missouri contained in the reports was *Winny v. Whitesides*, 1 Missouri Rep. 473, at October term, 1824. It appeared that, more than twenty-five years before, the defendant, with her husband, had removed from Carolina to Illinois, and brought with them the plaintiff; that they continued to reside in Illinois three or four years, retaining the plaintiff as a slave, after which, they removed to Missouri, taking her with them.

The court held that if a slave be detained in Illinois until he be entitled to freedom, the right of the owner does not revive when he finds the negro in a slave State.

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That when a slave is taken to Illinois by his owner, who takes up his residence there, the slave is entitled to freedom.

In the case of *Lagrange v. Chouteau*, 2 Missouri Rep. 20, at May Term, 1828, it was decided that the Ordinance of 1787 was intended as a fundamental law for those who may choose to live under it, rather than as a penal statute.

That any sort of residence contrived or permitted by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance, and thereby introduce slavery *de facto*, would entitle such slave to freedom.

In *Julia v. McKinney*, 3 Missouri Rep. 279, it was held, where a slave was settled in the State of Illinois, but with an intention on the part of the owner to be removed at some future day, that hiring said slave to a person to labor for one or two days, and receiving the pay for the hire, the slave is entitled to her freedom, under the second section of the sixth article of the Constitution of Illinois.

Rachel v. Walker, 4 Missouri Rep. 350, June Term, 1836, is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom, and it appeared that she had been bought as a slave in Missouri by Stockton, an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year, and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her three years, and then he took her to the State of Missouri, and sold her as a slave.

"Fort Snelling was admitted to be on the west side of the Mississippi river, and north of the State of Missouri, in the territory of the United States. That Prairie du Chien was in the Michigan Territory, on the east side of the Mississippi river. Walker, the defendant, held Rachel under Stockton."

The court said, in this case:

"The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slaveholding country and procured her; this was his voluntary act, done without any other reason than that of his convenience, and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom."

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the Government compelled him to keep the plaintiff there as a slave.

"Shall it be said that, because an officer of the army owns

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slaves in Virginia, that when, as officer and soldier, he is required to take the command of a fort in the non-slaveholding States or Territories, he thereby has a right to take with him as many slaves as will suit his interests or convenience? It surely cannot be law. If this be true, the court say, then it is also true that the convenience or supposed convenience of the officer repeals, as to him and others who have the same character, the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibition of the several laws and Constitutions of the non-slaveholding States."

In *Wilson v. Melvin*, 4 Missouri R. 592, it appeared the defendant left Tennessee with an intention of residing in Illinois, taking his negroes with him. After a month's stay in Illinois, he took his negroes to St. Louis, and hired them, then returned to Illinois. On these facts, the inferior court instructed the jury that the defendant was a sojourner in Illinois. This the Supreme Court held was error, and the judgment was reversed.

The case of *Dred Scott v. Emerson*, 15 Missouri R. 682, March Term, 1852, will now be stated. This case involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. It cannot be improper to state the grounds of the opinion of the court and of the dissent.

The court say:

"Cases of this kind are not strangers in our court. Persons have been frequently here adjudged to be entitled to their freedom on the ground that their masters held them in slavery in Territories or States in which that institution is prohibited. From the first case decided in our court, it might be inferred that this result was brought about by a presumed assent of the master, from the fact of having voluntarily taken his slave to a place where the relation of master and slave did not exist. But subsequent cases base the right to 'exact the forfeiture of emancipation,' as they term it, on the ground, it would seem, that it was the duty of the courts of this State to carry into effect the Constitution and laws of other States and Territories, regardless of the rights, the policy, or the institutions, of the people of this State."

And the court say that the States of the Union, in their municipal concerns, are regarded as foreign to each other; that the courts of one State do not take notice of the laws of other States, unless proved as facts; and that every State has the right to determine how far its comity to other States shall extend; and it is laid down that when there is no act of manumission decreed to the free State, the courts of the slave States

cannot be called to give effect to the law of the free State. Comity, it alleges, between States depends upon the discretion of both, which may be varied by circumstances. And it is declared by the court "that times are not as they were when the former decisions on this subject were made." Since then, not only individuals but States have been possession with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable consequence must be the overthrow and destruction of our Government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others.

Chief Justice Gamble dissented from the other two judges. He says:

"In every slaveholding State in the Union, the subject of emancipation is regulated by statute, and the forms are prescribed in which it shall be effected. Whenever the forms required by the laws of the State in which the master and slave are resident are complied with, the emancipation is complete, and the slave is free. If the right of the person thus emancipated is subsequently drawn in question in another State, it will be ascertained and determined by the law of the State in which the slave and his former master resided, and when it appears that such law has been complied with, the right to freedom will be fully sustained in the courts of all the slaveholding States, although the act of emancipation may not be in the form required by law in which the court sits."

"In all such cases, courts continually administer the law of the country where the right was acquired, and when that law becomes known to the court, it is just as much a matter of course to decide the rights of the parties according to its requirements as it is to settle the title of real estate situated in our State by its own laws."

This appears to me a most satisfactory answer to the argument of the court. Chief Justice continues:

"The perfect equality of the different States lies at the foundation of the Union. As the institution of slavery in the States is one over which the Constitution of the United States gives no power to the General Government, it is left to be adopted or rejected by the several States, as they think best, nor can any one State, or number of States, claim the right to interfere with any other State upon the question of admitting or excluding this institution."

"A citizen of Missouri who removes with his slave to Illinois

has no right to complain that the fundamental law of that State to which he removes, and in which he makes his residence, dissolves the relation between him and his slave. It is as much his own voluntary act as if he had executed a deed of emancipation. No one can pretend ignorance of this constitutional provision, and,"

he says,

"the decisions which have heretofore been made in this State and in many other slaveholding States give effect to this and other similar provisions on the ground that the master, by making the free State the residence of his slave, has submitted his right to the operation of the law of such State, and this,"

he says, "is the same in law as a regular deed of emancipation."

He adds:

"I regard the question as conclusively settled by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them than I would any other series of decisions by which the law of any other question was settled. There is with me,"

he says,

"nothing in the law relating to slavery which distinguishes it from the law on any other subject or allows any more accommodation to the temporary public excitements which are gathered around it."

"In this State," he says,

"it has been recognised from the beginning of the Government as a correct position in law that a master who takes his slave to reside in a State or Territory where slavery is prohibited thereby emancipates his slave."

These decisions, which come down to the year 1837, seemed to have so fully settled the question that, since that time, there has been no case bringing it before the court for any reconsideration until the present. In the case of *Winny v. Whitesides*, the question was made in the argument "whether one nation would execute the penal laws of another," and the court replied in this language, Huberus, quoted in 4 Dallas, which says,

"personal rights or disabilities obtained or communicated by the laws of any particular place are of a nature which accompany the person wherever he goes,"

and the Chief Justice observed, in the case of *Rachel v. Walker*, the act of Congress called the Missouri Compromise was held as operative as the Ordinance of 1787.

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri in 1838, they were free, as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. Prior to this, for nearly thirty years, as Chief Justice Gamble declares, the residence of a master with his slave in the State of Illinois, or in the Territory north of Missouri, where slavery was prohibited

by the act called the Missouri Compromise, would manumit the slave as effectually as if he had executed a deed of emancipation, and that an officer of the army who takes his slave into that State or Territory and holds him there as a slave liberates him the same as any other citizen — and, down to the above time, it was settled by numerous and uniform decisions; and that, on the return of the slave to Missouri, his former condition of slavery did not attach. Such was the settled law of Missouri until the decision of *Scott and Emerson.*

In the case of *Sylvia v. Kirby,* 17 Misso.Rep. 434, the court followed the above decision, observing it was similar in all respects to the case of *Scott and Emerson.*

This court follows the established construction of the statutes of a State by its Supreme Court. Such a construction is considered as a part of the statute, and we follow it to avoid two rules of property in the same State. But we do not follow the decisions of the Supreme Court of a State beyond a statutory construction as a rule of decision for this court. State decisions are always viewed with respect and treated as authority, but we follow the settled construction of the statutes not because it is of binding authority, but in pursuance of a rule of judicial policy.

But there is no pretence that the case of *Dred Scott v. Emerson* turned upon the construction of a Missouri statute, nor was there any established rule of property which could have rightfully influenced the decision. On the contrary, the decision overruled the settled law for near thirty years.

This is said by my brethren to be a Missouri question, but there is nothing which gives it this character except that it involves the right to persons claimed as slaves who reside in Missouri, and the decision was made by the Supreme Court of that State. It involves a right claimed under an act of Congress and the Constitution of Illinois, and which cannot be decided without the consideration and construction of those laws. But the Supreme Court of Missouri held, in this case that it will not regard either of those laws, without which there was no case before it, and Dred Scott, having been a slave, remains a slave. In this respect, it is

admitted this is a Missouri question — a case which has but one side if the act of Congress and the Constitution of Illinois are not recognised.

And does such a case constitute a rule of decision for this court — a case to be followed by this court? The course of decision so long and so uniformly maintained established a comity or law between Missouri and the free States and Territories where slavery was prohibited, which must be somewhat regarded in this case. Rights sanctioned for twenty-eight years

ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against slavery in the free States.

The courts of Louisiana having held for a series of years that, where a master took his slave to France, or any free State, he was entitled to freedom, and that, on bringing him back, the status of slavery did not attach, the Legislature of Louisiana declared by an act that the slave should not be made free under such circumstances. This regulated the rights of the master from the time the act took effect. But the decision of the Missouri court, reversing a former decision, affects all previous decisions, technically, made on the same principles, unless such decisions are protected by the lapse of time or the statute of limitations. Dred Scott and his family, beyond all controversy, were free under the decisions made for twenty-eight years, before the case of *Scott v. Emerson.* This was the undoubted law of Missouri for fourteen years after Scott and his family were brought back to that State. And the grave question arises whether this law may be so disregarded as to enslave free persons. I am strongly inclined to think that a rule of decision so well settled as not to be questioned cannot be annulled by a single decision of the court. Such rights may be inoperative under the decision in future, but I cannot well perceive how it can have the same effect in prior cases.

It is admitted that, when a former decision is reversed, the technical effect of the judgment is to make all previous adjudications on the same question erroneous. But the case before us was not that the law had been erroneously construed, but that, under the circumstances which then existed, that law would not be recognised, and the reason for this is declared to be the excitement against the institution of slavery in the free States. While I lament this excitement as much as anyone, I cannot assent that it shall be made a basis of judicial action.

In 1816, the common law, by statute, was made a part of the law of Missouri, and that includes the great principles of international law. These principles cannot be abrogated by judicial decisions. It will require the same exercise of power to abolish the common law as to introduce it. International law is founded in the opinions generally received and acted on by civilized nations, and enforced by moral sanctions. It becomes a more authoritative system when it results from special compacts, founded on modified rules, adapted to the exigencies of human society; it is, in fact, an international morality, adapted to the best interests of nations. And in regard to the States

of this Union, on the subject of slavery, it is eminently fitted for a rule of action subject to the Federal Constitution. “The laws of nations are but the natural rights of man applied to nations.” Vattel.

If the common law have the force of a statutory enactment in Missouri, it is clear, as it seems to me, that a slave who, by a residence in Illinois in the service of his master, becomes entitled to his freedom, cannot again be reduced to slavery by returning to his former domicil in a slave State. It is unnecessary to say what legislative power might do by a general act in such a case, but it would be singular if a freeman could be made a slave by the exercise of a judicial discretion. And it would be still more extraordinary if this could be done not only in the absence of special legislation, but in a State where the common law is in force.

It is supposed by some that the third article in the treaty of cession of Louisiana to this country by France in 1803 may have some bearing on this question. The article referred to provides

“that the inhabitants of the ceded territory shall be incorporated into the Union, and enjoy all the advantages of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess.”

As slavery existed in Louisiana at the time of the cession, it is supposed this is a guaranty that there should be no change in its condition.

The answer to this is, in the first place, that such a subject does not belong to the treaty-making power, and any such arrangement would have been nugatory. And, in the second place, by no admissible construction can the guaranty be carried further than the protection of property in slaves at that time in the ceded territory. And this has been complied with. The organization of the slave States of Louisiana, Missouri, and Arkansas embraced every slave in Louisiana at the time of the cession. This removes every ground of objection under the treaty. There is therefore no pretence growing out of the treaty that any part of the territory of Louisiana, as ceded, beyond the organized States, is slave territory.

Under the fifth head, we were to consider whether the status of slavery attached to the plaintiff and wife on their return to Missouri.

This doctrine is not asserted in the late opinion of the Supreme Court of Missouri, and, up to 1852, the contrary doctrine was uniformly maintained by that court.

In its late decision, the court say that it will not give effect in Missouri to the laws of Illinois, or the law of Congress

called the Missouri Compromise. This was the effect of the decision, though its terms were that the court would not take notice, judicially, of those laws.

In 1851, the Court of Appeals of South Carolina recognised the principle that a slave, being taken to a free State, became free. *Commonwealth v. Pleasants*, 10 Leigh Rep. 697. In *Betty v. Horton*, the Court of Appeals held that the freedom of the slave was acquired by the action of the laws of Massachusetts by the said slave's being taken there. 5 Leigh Rep. 615.

The slave States have generally adopted the rule that, where the master, by a residence with his slave in a State or Territory where slavery is prohibited, the slave was entitled to his freedom everywhere. This was the settled doctrine of the Supreme Court of Missouri. It has been so held in Mississippi, in Virginia, in Louisiana, formerly in Kentucky, Maryland, and in other States.

The law where a contract is made and is to be executed governs it. This does not depend upon comity, but upon the law of the contract. And if, in the language of the Supreme Court of Missouri, the master, by taking his slave to Illinois and employing him there as a slave, emancipates him as effectually as by a deed of emancipation, is it possible that such an act is not matter for adjudication in any slave State where the master may take him? Does not the master assent to the law when he places himself under it in a free State?

The States of Missouri and Illinois are bounded by a common line. The one prohibits slavery; the other admits it. This has been done by the exercise of that sovereign power which appertains to each. We are bound to respect the institutions of each, as emanating from the voluntary action of the people. Have the people of either any right to disturb the relations of the other? Each State rests upon the basis of its own sovereignty, protected by the Constitution. Our Union has been the foundation of our prosperity and national glory. Shall we not cherish and maintain it? This can only be done by respecting the legal rights of each State.

If a citizen of a free State shall entice or enable a slave to escape from the service of his master, the law holds him responsible not only for the loss of the slave, but he is liable to be indicted and fined for the misdemeanor. And I am bound here to say that I have never found a jury in the four States which constitute my circuit which have not sustained this law where the evidence required them to sustain it. And it is proper that I should also say that more cases have arisen in my circuit, by reason of its extent and locality, than in all

other parts of the Union. This has been done to vindicate the sovereign rights of the Southern States and protect the legal interests of our brethren of the South.

Let these facts be contrasted with the case now before the court. Illinois has declared in the most solemn and impressive form that there shall be neither slavery nor involuntary servitude in that State, and that any slave brought into it with a view of becoming a resident shall be emancipated. And effect has been given to this provision of the Constitution by the decision of the Supreme Court of that State. With a full knowledge of these facts, a slave is brought from Missouri to Rock Island, in the State of Illinois, and is retained there as a slave for two years, and then taken to Fort Snelling, where slavery is prohibited by the Missouri Compromise Act, and there he is detained two years longer in a state of slavery. Harriet, his wife, was also kept at the same place four years as a slave, having been purchased in Missouri. They were then removed to the State of Missouri, and sold as slaves, and, in the action

before us, they are not only claimed as slaves, but a majority of my brethren have held that, on their being returned to Missouri, the status of slavery attached to them.

I am not able to reconcile this result with the respect due to the State of Illinois. Having the same rights of sovereignty as the State of Missouri in adopting a Constitution, I can perceive no reason why the institutions of Illinois should not receive the same consideration as those of Missouri. Allowing to my brethren the same right of judgment that I exercise myself, I must be permitted to say that it seems to me the principle laid down will enable the people of a slave State to introduce slavery into a free State, for a longer or shorter time, as may suit their convenience, and by returning the slave to the State whence he was brought, by force or otherwise, the status of slavery attaches, and protects the rights of the master, and defies the sovereignty of the free State. There is no evidence before us that Dred Scott and his family returned to Missouri voluntarily. The contrary is inferable from the agreed case:

"In the year 1838, Dr. Emerson removed the plaintiff and said Harriet, and their daughter Eliza, from Fort Snelling to the State of Missouri, where they have ever since resided."

This is the agreed case, and can it be inferred from this that Scott and family returned to Missouri voluntarily? He was "removed," which shows that he was passive, as a slave, having exercised no volition on the subject. He did not resist the master by absconding or force. But that was not sufficient to bring him within Lord Stowell's decision; he must have acted voluntarily. It would be a

mockery of law and an outrage on his rights to coerce his return and then claim that it was voluntary, and, on that ground, that his former status of slavery attached.

If the decision be placed on this ground, it is a fact for a jury to decide whether the return was voluntary, or else the fact should be distinctly admitted. A presumption against the plaintiff in this respect, I say with confidence, is not authorized from the facts admitted.

In coming to the conclusion that a voluntary return by Grace to her former domicil, slavery attached, Lord Stowell took great pains to show that England forced slavery upon her colonies, and that it was maintained by numerous acts of Parliament and public policy, and, in short, that the system of slavery was not only established by Great Britain in her West Indian colonies, but that it was popular and profitable to many of the wealthy and influential people of England who were engaged in trade, or owned and cultivated plantations in the colonies. No one can read his elaborate views and not be struck with the great difference between England and her colonies and the free and slave States of this Union. While slavery in the colonies of England is subject to the power of the mother country, our States, especially in regard to slavery, are independent, resting upon their own sovereignties and subject only to international laws, which apply to independent States.

In the case of Williams, who was a slave in Granada, having run away, came to England, Lord Stowell said:

"The four judges all concur in this — that he was a slave in Granada, though a free man in England, and he would have continued a free man in all other parts of the world except Granada."

Strader v. Graham, 10 Howard 82 and 18 Curtis 305, has been cited as having a direct bearing in the case before us. In that case, the court say:

"It was exclusively in the power of Kentucky to determine for itself whether the employment of slaves in another State should or should not make them free on their return."

No question was before the court in that case except that of jurisdiction. And any opinion given on any other point is *obiter dictum*, and of no authority. In the conclusion of his opinion, the Chief Justice said: "In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed."

In the case of *Spencer v. Negro Dennis*, 8 Gill's Rep. 321, the court say:

"Once free, and always free, is the maxim of Maryland law upon the subject. Freedom having once vested, by no compact between the master and the the liberated slave,

nor by any condition subsequent attached by the master to the gift of freedom can a state of slavery be reproduced."

In *Hunter v. Bulcher*, 1 Leigh 172:

"By a statute of Maryland of 1796, all slaves brought into that State to reside are declared free; a Virginian-born slave is carried by his master to Maryland; the master settled there, and keeps the slave there in bondage for twelve years; the statute in force all the time; then he brings him as a slave to Virginia, and sells him there. Adjudged, in an action brought by the man against the purchaser, that he is free."

Judge Kerr, in the case, says:

"Agreeing, as I do, with the general view taken in this case by my brother Green, I would not add a word but to mark the exact extent to which I mean to go. The law of Maryland having enacted that slaves carried into that State for sale or to reside shall be free, and the owner of the slave here having carried him to Maryland, and voluntarily submitting himself and the slave to that law, it governs the case."

In every decision of a slave case prior to that of *Dred Scott v. Emerson*, the Supreme Court of Missouri considered it as turning upon the Constitution of Illinois, the Ordinance of 1787, or the Missouri Compromise Act of 1820. The court treated these acts as in force, and held itself bound to execute them by declaring the slave to be free who had acquired a domicil under them with the consent of his master.

The late decision reversed this whole line of adjudication, and held that neither the Constitution and laws of the States nor acts of Congress in relation to Territories could be judicially noticed by the Supreme Court of Missouri. This is believed to be in conflict with the decisions of all the courts in the Southern States, with some exceptions of recent cases.

In *Marie Louise v. Morat et al.*, 9 Louisiana Rep. 475, it was held, where a slave having been taken to the kingdom of France or other country by the owner, where slavery is not tolerated, operates on the condition of the slave, and produces immediate emancipation, and that, where a slave thus becomes free, the master cannot reduce him again to slavery.

Josephine v. Poultney, Louisiana Annual Rep. 329,

"where the owner removes with a slave into a State in which slavery is prohibited, with the intention of residing there, the slave will be thereby emancipated, and their subsequent return to the State of Louisiana cannot restore the relation of master and slave."

To the same import are the cases of *Smith v. Smith*, 13 Louisiana Rep. 441, *Thomas v. Generis*, Louisiana Rep. 483, *Harry et al. v. Decker and Hopkins*, Walker's Mississippi Rep. 36. It was held that

"slaves within the jurisdiction

of the Northwestern Territory became freemen by virtue of the Ordinance of 1787, and can assert their claim to freedom in the courts of Mississippi."

Griffith v. Fanny, 1 Virginia Rep. 143. It was decided that a negro held in servitude in Ohio, under a deed executed in Virginia, is entitled to freedom by the Constitution of Ohio.

The case of *Rhodes v. Bell*, 2 How. 397, 15 Curtis 152, involved the main principle in the case before us. A person residing in Washington city purchased a slave in Alexandria, and brought him to Washington. Washington continued under the law of Maryland, Alexandria under the law of Virginia. The act of Maryland of November, 1796, 2 Maxcy's Laws 351, declared anyone who shall bring any negro, mulatto, or other slave, into Maryland, such slave should be free. The above slave, by reason of his being brought into Washington city, was declared by this court to be free. This, it appears to me, is a much stronger case against the slave than the facts in the case of Scott.

In *Bush v. White*, 3 Monroe 104, the court say:

"That the ordinance was paramount to the Territorial laws, and restrained the legislative power there as effectually as a Constitution in an organized State. It was a public act of the Legislature of the Union, and a part of the supreme law of the land, and, as such, this court is as much bound to take notice of it as it can be of any other law."

In the case of *Rankin v. Lydia*, before cited, Judge Mills, speaking for the Court of Appeals of Kentucky, says:

"If, by the positive provision in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slave, when he can point out in the statute the clause which secures his freedom."

And he further said:

"Free people of color in all the States are, it is believed, *quasi* citizens, or, at least, denizens. Although none of the States may allow them the privilege of office and suffrage, yet all other civil and conventional rights are secured to them, at least such rights were evidently secured to them by the ordinance in question for the government of Indiana. If these rights are vested in that or any other portion of the United States, can it be compatible with the spirit of our confederated Government to deny their existence in any other part? Is there less comity existing between State and State, or State

and Territory, than exists between the despotic Governments of Europe?"

These are the words of a learned and great judge, born and educated in a slave State.

I now come to inquire, under the sixth and last head, "whether the decisions of the Supreme Court of Missouri on the question before us are binding on this court."

While we respect the learning and high intelligence of the State courts, and consider their decisions, with others, as authority, we follow them only where they give a construction to the State statutes. On this head, I consider myself fortunate in being able to turn to the decision of this court, given by Mr. Justice Grier, in *Pease v. Peck,* a case from the State of Michigan, 18 Howard, 589, decided in December Term, 1855. Speaking for the court, Judge Grier said:

"We entertain the highest respect for that learned court (the Supreme Court of Michigan), and, in any question affecting the construction of their own laws where we entertain any doubt, would be glad to be relieved from doubt and responsibility by reposing on their decision. There are, it is true, many dicta to be found in our decisions averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But although this may be correct, yet a rather strong expression of a general rule, it cannot be received as the annunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of the a State by its highest judicature established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. When the decisions of the State court are not consistent, we do not feel bound to follow the last if it is contrary to our own convictions, and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent."

These words, it appears to me, have a stronger application to the case before us than they had to the cause in which they were spoken as the opinion of this court, and I regret that they do not seem to be as fresh in the recollection of some of my brethren as in my own. For twenty-eight years, the decisions of the Supreme Court of Missouri were consistent on all the points made in this case. But this consistent course was suddenly terminated, whether by some new light suddenly springing up, or an excited public opinion, or both, it is not

necessary to say. In the case of *Scott v. Emerson*, in 1852, they were overturned and repudiated.

This, then, is the very case in which seven of my brethren declared they would not follow the last decision. On this authority I may well repose. I can desire no other or better basis.

But there is another ground which I deem conclusive, and which I will restate.

The Supreme Court of Missouri refused to notice the act of Congress or the Constitution of Illinois under which Dred Scott, his wife, and children claimed that they are entitled to freedom.

This being rejected by the Missouri court, there was no case before it, or least it was a case with only one side. And this is the case which, in the opinion of this court, we are bound to follow. The Missouri court disregards the express provisions of an act of

Congress and the Constitution of a sovereign State, both of which laws for twenty-eight years it had not only regarded, but carried into effect.

If a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford? So far from this being a Missouri question, it is a question, as it would seem, within the twenty-fifth section of the Judiciary Act, where a right to freedom being set up under the act of Congress, and the decision being against such right, it may be brought for revision before this court, from the Supreme Court of Missouri.

I think the judgment of the court below should be reversed.

Mr. Justice CURTIS dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. The plaintiff alleged in his declaration that he was a citizen of the State of Missouri, and that the defendant was a citizen of the State of New York. It is not doubted that it was necessary to make each of these allegations to sustain the jurisdiction of the Circuit Court. The defendant denied, by a plea to the jurisdiction either sufficient or insufficient, that the plaintiff was a citizen of the State of Missouri. The plaintiff demurred to that plea. The Circuit Court adjudged the plea insufficient, and the first question for our consideration is whether the sufficiency of that plea is before this court for judgment upon this writ of error. The part of the judicial power of the United States, conferred by Congress on the Circuit Courts, being limited to certain described cases and controversies, the question whether a particular

case is within the cognizance of a Circuit Court may be raised by a plea to the jurisdiction of such court. When that question has been raised, the Circuit Court must, in the first instance, pass upon and determine it. Whether its determination be final or subject to review by this appellate court must depend upon the will of Congress, upon which body the Constitution has conferred the power, with certain restrictions, to establish inferior courts, to determine their jurisdiction, and to regulate the appellate power of this court. The twenty-second section of the Judiciary Act of 1789, which allows a writ of error from final judgments of Circuit Courts, provides that there shall be no reversal in this court, on such writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court. Accordingly it has been held from the origin of the court to the present day that Circuit Courts have not been made by Congress the final judges of their own jurisdiction in civil cases. And that when a record comes here upon a writ of error or appeal, and on its inspection, it appears to this court that the Circuit Court had not jurisdiction, its judgment must be reversed and the cause remanded to be dismissed for want of jurisdiction.

It is alleged by the defendant in error in this case that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that, upon this record, it must appear to this court that the case was not within the judicial power of the United States as defined and granted by the Constitution, because it was not a suit by a citizen of one State against a citizen of another State.

To this it is answered first that the defendant, by pleading over after the plea to the jurisdiction was adjudged insufficient, finally waived all benefit of that plea.

When that plea was adjudged insufficient, the defendant was obliged to answer over. He held no alternative. He could not stop the further progress of the case in the Circuit Court by a writ of error, on which the sufficiency of his plea to the jurisdiction could be tried in this court, because the judgment on that plea was not final, and no writ of error would lie. He was forced to plead to the merits. It cannot be true, then, that he waived the benefit of his plea to the jurisdiction by answering over. Waiver includes consent. Here, there was no consent. And if the benefit of the plea was finally lost, it must be not by any waiver, but because the laws of the United States have not provided any mode of reviewing the decision of the Circuit Court on such a plea when that decision is against the defendant. This is not the

law. Whether the decision of the Circuit Court on a plea to the jurisdiction be against the plaintiff or against the defendant, the losing party may have any alleged error in law, in ruling such a plea, examined in this court on a writ of error when the matter in controversy exceeds the sum or value of two thousand dollars. If the decision be against the plaintiff, and his suit dismissed for want of jurisdiction, the judgment is technically final, and he may at once sue out his writ of error. *Mollan v. Torrance,* 9 Wheat. 537. If the decision be against the defendant, though he must answer over and wait for a final judgment in the cause, he may then

have his writ of error, and upon it obtain the judgment of this court on any question of law apparent on the record touching the jurisdiction. The fact that he pleaded over to the merits, under compulsion, can have no effect on his right to object to the jurisdiction. If this were not so, the condition of the two parties would be grossly unequal. For if a plea to the jurisdiction were ruled against the plaintiff, he could at once take his writ of error and have the ruling reviewed here, while, if the same plea were ruled against the defendant, he must not only wait for a final judgment, but could in no event have the ruling of the Circuit Court upon the plea reviewed by this court. I know of no ground for saying that the laws of the United States have thus discriminated between the parties to a suit in its courts.

It is further objected that, as the judgment of the Circuit Court was in favor of the defendant and the writ of error in this cause was sued out by the plaintiff, the defendant is not in a condition to assign any error in the record, and therefore this court is precluded from considering the question whether the Circuit Court had jurisdiction.

The practice of this court does not require a technical assignment of errors. *See* the rule. Upon a writ of error, the whole record is open for inspection, and if any error be found in it, the judgment is reversed. *Bank of United States v. Smith,* 11 Wheat. 171.

It is true, as a general rule, that the court will not allow a party to rely on anything as cause for reversing a judgment which was for his advantage. In this, we follow an ancient rule of the common law. But so careful was that law of the preservation of the course of its courts that it made an exception out of that general rule, and allowed a party to assign for error that which was for his advantage if it were a departure by the court itself from its settled course of procedure. The cases on this subject are collected in Bac.Ab., Error H. 4. And this court followed this practice in *Capron v. Van Noorden,*

2 Cranch 126, where the plaintiff below procured the reversal of a judgment for the defendant on the ground that the plaintiff's allegations of citizenship had not shown jurisdiction.

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits when it appears on the record by a plea to the jurisdiction that it is a case to which the judicial power of the United States does not extend. The course of the court is where no motion is made by either party, on its own motion, to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction that jurisdiction does not exist, but even where it does not appear, affirmatively that it does exist. *Pequignot v. The Pennsylvania R.R. Co.,* 16 How. 104. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. *Cutler v. Rae,* 7 How. 729. I consider, therefore, that, when there was a plea to the jurisdiction of the Circuit Court in a case brought here by a writ of error, the first duty of this court is *sua sponte*, if not moved to it by either party, to examine the sufficiency of that plea, and thus to take care that neither the Circuit Court nor this court shall use the judicial power of the United States in a case to which the Constitution and laws of the United States have not extended that power.

I proceed, therefore, to examine the plea to the jurisdiction.

I do not perceive any sound reason why it is not to be judged by the rules of the common law applicable to such pleas. It is true, where the jurisdiction of the Circuit Court depends on the citizenship of the parties, it is incumbent on the plaintiff to allege on the record the necessary citizenship, but when he has done so, the defendant must interpose a plea in abatement the allegations whereof show that the court has not jurisdiction, and it is incumbent on him to prove the truth of his plea.

In *Sheppard v. Graves,* 14 How. 27, the rules on this subject are thus stated in the opinion of the court:

"That although, in the courts of the United States, it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken, *prima facie*, as existing, and it is incumbent

on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes that the necessity for the allegation, and the burden of sustaining it by proof, both rest upon the party taking the exception."

These positions are sustained by the authorities there cited, as well as by *Wickliffe v. Owings,* 17 How. 47.

When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in Bacon Ab., Abatement:

"Abatement, in the general acceptation of the word, signifies a plea, put in by the defendant, in which he shows cause to the court why he should not be impleaded, or, if at all, not in the manner and form he now is."

This being, then, a plea in abatement to the jurisdiction of the court, I must judge of its sufficiency by those rules of the common law applicable to such pleas.

The plea was as follows:

"And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to-wit, the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid."

The plaintiff demurred, and the judgment of the Circuit Court was that the plea was insufficient.

I cannot treat this plea as a general traverse of the citizenship alleged by the plaintiff. Indeed, if it were so treated, the plea was clearly bad, for it concludes with a verification, and not to the country, as a general traverse should. And though this defect in a plea in bar must be pointed out by a special demurrer, it is never necessary to demur specially to a plea in abatement; all matters, though of form only, may be taken advantage of upon a general demurrer to such a plea. Chitty on Pl. 465.

The truth is that, though not drawn with the utmost technical accuracy, it is a special traverse of the plaintiff's allegation

of citizenship, and was a suitable and proper mode of traverse under the circumstances. By reference to Mr. Stephen's description of the uses of such a traverse contained in his excellent analysis of pleadings, Steph. on Pl. 176, it will be seen how precisely this plea meets one of his descriptions. No doubt the defendant might have traversed, by a common or general traverse, the plaintiff's allegation that he was a citizen of the State of Missouri, concluding to the country. The issue thus presented being joined, would have involved matter of law on which the jury must have passed under the direction of the court. But, by traversing the plaintiff's citizenship specially — that is, averring those facts on which the defendant relied to show that, in point of law, the plaintiff was not a citizen, and basing the traverse on those facts as a deduction therefrom — opportunity was given to do what was done — that is, to present directly to the court, by a demurrer, the sufficiency of those facts to negative, in point of law, the plaintiff's allegation of citizenship. This, then, being a special, and not a general or common, traverse, the rule is settled that the facts thus set out in the plea as the reason or ground of the traverse must of themselves constitute, in point of law, a negative of the allegation thus traversed. Stephen on Pl. 183, Ch. on Pl. 620. And upon a demurrer to this plea, the question which arises is whether the facts that the plaintiff is a negro of African descent, whose ancestors were of pure African blood and were brought into this country and sold as negro slaves, may all be true, and yet the plaintiff be a citizen of the State of Missouri within the meaning of the Constitution and laws of the United States which confer on citizens of one State the right to sue citizens of another State in the Circuit Courts. Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. It has been suggested that the plea, in legal effect, does so aver, because, if his ancestors were sold as slaves, the presumption is they continued slaves, and, if so, the presumption is the plaintiff was born a slave, and, if so, the presumption is he continued to be a slave to the time of action brought.

I cannot think such presumptions can be resorted to to help out defective averments in pleading, especially in pleading in abatement, where the utmost certainty and precision are required. Chitty on Pl. 457. That the plaintiff himself was a slave at the time of action brought is a substantive fact having no necessary connection with the fact that his parents were sold as slaves. For they might have been sold after he was born, or the plaintiff himself, if once a slave, might have

became a freeman before action brought. To aver that his ancestors were sold as slaves is not equivalent, in point of law, to an averment that he was a slave. If it were, he could not even confess and avoid the averment of the slavery of his ancestors, which would be monstrous, and if it be not equivalent in point of law, it cannot be treated as amounting thereto when demurred to, for a demurrer confesses only those substantive facts which are well pleaded, and not other distinct substantive facts which might be inferred therefrom by a jury. To treat an averment that the plaintiff's ancestors were Africans, brought to this country and sold as slaves, as amounting to an averment on the record that he was a slave because it may lay some foundation for presuming so is to hold that the facts actually alleged may be treated as intended as evidence of another distinct facts not alleged. But it is a cardinal rule of pleading, laid down in *Dowman's Case*, 9 Rep. 9b, and in even earlier authorities therein referred to, "that evidence shall never be pleaded, for it only tends to prove matter of fact, and therefore the matter of fact shall be pleaded." Or, as the rule is sometimes stated, pleadings must not be argumentative. Stephen on Pleading 384, and authorities cited by him. In Com.Dig., Pleader E. 3, and Bac. Abridgement, Pleas I, 5, and Stephen on Pl., many decisions under this rule are collected. In trover, for an indenture whereby A granted a manor, it is no plea that A did not grant the manor, for it does not answer the declaration except by argument. Yelv. 223.

So, in trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. The court said, "this is an infallible argument that the defendant is not guilty, but it is no plea." Dyer a 43.

In ejectment, the defendant pleaded a surrender of a copyhold by the hand of Fosset, the steward. The plaintiff replied that Fosset was not steward. The court held this no issue, for it traversed the surrender only agrumentatively. Cro.Elis. 260.

In these cases and many others reported in the books, the inferences from the facts stated were irresistible. But the court held they did not, when demurred to, amount to such inferable facts. In the case at bar, the inference that the defendant was a slave at the time of action brought, even if it can be made at all from the fact that his parents were slaves, is certainly not a necessary inference. This case, therefore, is like that of *Digby v. Alexander,* 8 Bing. 116. In that case, the defendant pleaded many facts strongly tending to show that he was once Earl of Stirling, but as there was no positive allegation

that he was so at the time of action brought, and, as every fact averred might be true and yet the defendant not have been Earl of Stirling at the time of action brought, the plea was held to be insufficient.

A lawful seizin of land is presumed to continue. But if, in an action of trespass *quare clausum*, the defendant were to plead that he was lawfully seized of the *locus in quo* one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. *See Mollan v. Torrance,* 9 Wheat. 537. So if a plea to the jurisdiction, instead of alleging that the plaintiff was a citizen of the same State as the defendant, were to allege that the plaintiff's ancestors were citizens of that State, I think the plea could not be supported. My judgment would be, as it is in this case, that if the defendant meant to aver a particular substantive fact as existing at the time of action brought, he must do it directly and explicitly, and not by way of inference from certain other averments which are quite consistent with the contrary hypothesis. I cannot, therefore, treat this plea as containing an averment that the plaintiff himself was a slave at the time of action brought, and the inquiry recurs whether the facts that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri within the meaning of the Constitution and laws of the United States.

In *Gassies v. Ballon,* 6 Pet. 761, the defendant was described on the record as a naturalized citizen of the United States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana, because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri in the courts of the United States.

So that, under the allegations contained in this plea and admitted by the demurrer, the question is whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States. If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so, for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

The first section of the second article of the Constitution

uses the language, “a citizen of the United States at the time of the adoption of the Constitution.” One mode of approaching this question is to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. By the Articles of Confederation, a Government was organized, the style whereof was “The United States of America.” This Government was in existence when the Constitution was framed and proposed for adoption, and was to be superseded by the new Government of the United States of America, organized under the Constitution. When, therefore, the Constitution speaks of citizenship of the United States existing at the time of the adoption of the Constitution, it must necessarily refer to citizenship under the Government which existed prior to and at the time of such adoption.

Without going into any question concerning the powers of the Confederation to govern the territory of the United States out of the limits of the States, and consequently to sustain the relation of Government and citizen in respect to the inhabitants of such territory, it may safely be said that the citizens of the several States were citizens of the United States under the Confederation.

That Government was simply a confederacy of the several States, possessing a few defined powers over subjects of general concern, each State retaining every power, jurisdiction, and right, not expressly delegated to the United States in Congress assembled. And no power was thus delegated to the Government of the Confederation to act on any question of citizenship or to make any rules in respect thereto. The whole matter was left to stand upon the action of the several States, and to the natural consequence of such action that the citizens of each State should be citizens of that Confederacy into which that State had entered, the style whereof was, “The United States of America.”

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New

York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.

The Supreme Court of North Carolina, in the case of the *State v. Manuel*, 4 Dev. and Bat. 20, has declared the law of that State on this subject in terms which I believe to be as sound law in the other States I have enumerated, as it was in North Carolina.

“According to the laws of this State,” says Judge Gaston, in delivering the opinion of the court,

“all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects — those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not, in legal parlance persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution, no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European King to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one and paid a public tax, and it is a matter of universal notoriety that, under it, free persons, without regard to color, claimed and exercised the franchise until it was taken from free men of color a few years since by our amended Constitution.”

In the *State v. Newcomb*, 5 Iredell’s R. 253, decided in 1844, the same court referred to this case of the *State v. Manuel*, and said:

"That case underwent a very laborious investigation, both by the bar and the bench. The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling

influence and authority on all questions of a similar character."

An argument from speculative premises, however well chosen, that the then state of opinion in the Commonwealth of Massachusetts was not consistent with the natural rights of people of color who were born on that soil, and that they were not, by the Constitution of 1780 of that State, admitted to the condition of citizens, would be received with surprise by the people of that State who know their own political history. It is true, beyond all controversy that persons of color, descended from African slaves, were by that Constitution made citizens of the State, and such of them as have had the necessary qualifications have held and exercised the elective franchise, as citizens, from that time to the present. *See Com. v. Aves*, 18 Pick. R. 210.

The Constitution of New Hampshire conferred the elective franchise upon "every inhabitant of the State having the necessary qualifications," of which color or descent was not one.

The Constitution of New York gave the right to vote to "every male inhabitant, who shall have resided," &c., making no discrimination between free colored persons and others. *See* Con. of N.Y., Art. 2, Rev.Stats. of N.Y., vol. 1, p. 126.

That of New Jersey, to "all inhabitants of this colony, of full age, who are worth £ 50 proclamation money, clear estate."

New York, by its Constitution of 1820, required colored persons to have some qualifications as prerequisites for voting, which white persons need not possess. And New Jersey, by its present Constitution, restricts the right to vote to white male citizens. But these changes can have no other effect upon the present inquiry except to show that, before they were made, no such restrictions existed, and colored, in common with white, persons, were not only citizens of those States, but entitled to the elective franchise on the same qualifications as white persons, as they now are in New Hampshire and Massachusetts. I shall not enter into an examination of the existing opinions of that period respecting the African race, nor into any discussion concerning the meaning of those who asserted, in the Declaration of Independence, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. My own opinion is that a calm comparison of these assertions of universal abstract truths and of their own individual opinions and acts would not leave

these men under any reproach of inconsistency; that the great truths they asserted on that solemn occasion, they were ready and anxious to make effectual, wherever a necessary regard to circumstances, which no statesman can disregard without producing more evil than good, would allow; and that it would not be just to them nor true in itself to allege that they intended to say that the Creator of all men had endowed the white race, exclusively, with the great natural rights which the Declaration of Independence asserts. But this is not the place of vindicate their memory. As I conceive, we should deal here not with such disputes, if there can be a dispute concerning this subject, but with those substantial facts evinced by the written Constitutions of States and by the notorious practice under them. And they show, in a manner which no argument can obscure, that, in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States.

The fourth of the fundamental articles of the Confederation was as follows:

"The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States."

The fact that free persons of color were citizens of some of the several States, and the consequence that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged, and both by

its terms of inclusion, “free inhabitants,” and the strong implication from its terms of exclusion, “paupers, vagabonds, and fugitives from justice,” who alone were excepted, it is clear that under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were, entitled to the

privileges and immunities of general citizenship of the United States.

Did the Constitution of the United States deprive them or their descendants of citizenship?

That Constitution was ordained and established by the people of the United States, through the action, in each State, or those persons who were qualified by its laws to act thereon in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of “the people of the United States” by whom the Constitution was ordained and established, but, in at least five of the States, they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.

I can find nothing in the Constitution which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption, nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is that, under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States.

I will proceed to state the grounds of that opinion.

The first section of the second article of the Constitution uses the language, “a natural-born citizen.” It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been in conformity with the common law that free persons born within either of the colonies were subjects of the King that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest,

and thus to continue British subjects. *McIlvain v. Coxe’s Lessee,* 4 Cranch 209; *Inglis v. Sailors’ Snug Harbor,* 3 Pet. 99; *Shanks v. Dupont,* 3 Pet. 242.

The Constitution having recognised the rule that persons born within the several States are citizens of the United States, one of four things must be true:

First. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States, or

Second. That it has empowered Congress to do so, or

Third. That all free persons born within the several States are citizens of the United States, or

Fourth. That it is left to each State to determine what free persons born within its limits shall be citizens of such State, and thereby be citizens of the United States.

If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognises, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

That the Constitution itself has defined citizenship of the United States by declaring what persons born within the several States shall or shall not be citizens of the United States will not be pretended. It contains no such declaration. We may dismiss the first alternative as without doubt unfounded.

Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons born within the several States shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For certainly no limits of that discretion can be found in the Constitution, which is wholly silent concerning it, and the necessary consequence is that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice President

of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy in whose hands would be concentrated the entire power of the Federal Government.

It is a substantive power, distinct in its nature from all others, capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed therefore to examine all the provisions of the Constitution which may have some bearing on this subject.

Among the powers expressly granted to Congress is "the power to establish a uniform rule of naturalization." It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this would do violence to the meaning of the term naturalization, fixed in the common law, Co.Lit. 8a, 129a; 2 Ves. sen. 286; 2 Bl.Com. 293, and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist No. 42; has been understood by Congress, by the Judiciary, 15 U. S. 2 Wheat. 259, 15 U. S. 269, 3 Wash.R. 313, 322, 25 U. S. 12 Wheat. 277, and by commentators on the Constitution. 3 Story's Com. on Con., 1-3; 1 Rawle on Con. 84-88; 1 Tucker's Bl.Com. App. 255-259.

It appears, then that the only power expressly granted to Congress to legislate concerning citizenship is confined to the removal of the disabilities of foreign birth.

Whether there be anything in the Constitution from which a broader power may be implied will best be seen when we come to examine the two other alternatives, which are whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognised by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that, though

the Constitution was to form a Government, and under it the United States of America were to be one united sovereign nation to which loyalty and obedience, on the one side, and from which protection and privileges, on the other, would be due, yet the several sovereign States whose people were then citizens were not only to continue in existence, but with powers unimpaired except so far as they were granted by the people to the National Government.

Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may well enough, for the purpose now in view, be divided into three parts. *First:* the power to remove the disabilities of alienage, either by special acts in reference to each individual case or by establishing a rule of naturalization to be administered and applied by the courts. *Second:* determining what persons should enjoy the privileges of citizenship in respect to the internal affairs of the several States. *Third:* what native-born persons should be citizens of the United States.

The first-named power — that of establishing a uniform rule of naturalization — was granted, and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, converted into a certainty by an examination of all such other clauses of the Constitution as touch this subject.

I will examine each which can have any possible bearing on this question.

The first clause of the second section of the third article of the Constitution is

"The judicial power shall extend to controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between States, or the citizens thereof, and foreign States,

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citizens, or subjects."

I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was to extend the judicial power to those controversies into which local feelings or interests might to enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark in passing that it has never been held — I do not know that it has ever been supposed — that any citizen of a State could bring himself under this clause and the eleventh and twelfth sections of the Judiciary Act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognises that, but it does not recognise citizenship of the United States as something distinct therefrom.

As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States in the contemplation of the Constitution. This cannot be said of other clauses of the Constitution, which I now proceed to refer to.

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Nowhere else in the Constitution is there anything concerning a general citizenship, but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and as such, the privileges and immunities of general citizenship, derived from and guarantied by the Constitution, are to be enjoyed by them. It would seem that, if it had been intended to constitute a class of native-born persons within the States who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

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And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.

But, further: though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship under the American Constitutions, and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a Constitution on this subject must therefore be looked to as bearing directly on the question what persons are citizens under that Constitution, and as being decisive, to this extent — that all such persons as are allowed by the Constitution to exercise the elective franchise, and thus to participate in the Government of the United States, must be deemed citizens of the United States.

Here, again, the consideration presses itself upon us that, if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible.

Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the Legislature of each State may direct, and the qualifications of electors of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature.

Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognised the general principle of public law that allegiance and citizenship depend on the place of birth; that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that, when we turn to the Constitution for an answer to the question what free persons born within the several States are citizens of the United States, the only answer we can receive from any of its express provisions is the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this that the Constitution was ordained by the citizens of the several States that they were "the people of the United States," for whom

and whose posterity the Government was declared in the preamble of the Constitution to be made; that each of them was "a citizen of the United States at the time of the adoption of the Constitution" within the meaning of those words in that instrument; that by them the Government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them — the necessary conclusion is that those persons born within the several States who, by force of their respective Constitutions and laws, are citizens of the State are thereby citizens of the United States.

It may be proper here to notice some supposed objections to this view of the subject.

It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that, in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

Again, it has been objected that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

It has been further objected that, if free colored persons, born within a particular State and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States, and, if so, then colored persons could vote, and be

eligible to not only Federal offices, but offices even in those States whose Constitution and laws disqualify colored persons from voting or being elected to office.

But this position rests upon an assumption which I deem untenable. Its basis is that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. *See* 1 Lit.Kentucky R. 326. That this is not true under the Constitution of the United States seems to me clear.

A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights, and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided is a question to be determined by each State in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State by reason of the operation of causes other than mere citizenship are not conferred. Thus, if the laws of a State require, in addition to

citizenship of the State, some qualification for office or the exercise of the elective franchise, citizens of all other States coming thither to reside and not possessing those qualifications cannot enjoy those privileges, not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges under its Constitution and laws. It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity — if it confer it on all of them by reason of mere naked citizenship — then it may be claimed by every citizen of each State by force of the Constitution, and it must be borne in mind that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” If each State may make such persons its citizens, they became, as such, entitled to the benefits of this article if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several States.

There is one view of this article entitled to consideration in this connection. It is manifestly copied from the fourth of the Articles of Confederation, with only slight changes of phraseology which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested that, in adopting it into the Constitution, the words “free inhabitants” were changed for the word “citizens.” An examination of the forms of expression commonly used in the State papers of that day, and an attention to the substance of this article of the Confederation, will show that the words “free inhabitants,” as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the war of the Revolution, and there were very few persons then embraced in the words “free inhabitants” who were not born on our soil. It was not a time when many save the

children of the soil were willing to embark their fortunes in our cause, and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical, rather than a substantial, difference. If we look into the Constitutions and State papers of that period, we find the inhabitants or people of these colonies, or the inhabitants of this State or Commonwealth, employed to designate those whom we should now denominate citizens. The substance and purpose of the article prove it was in this sense it used these words; it secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not

entitled to enjoy the privileges of citizens in the States where they dwelt that, under this article, there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is that, though the Constitution cured an inaccuracy of language, it left the substance of this article in the National Constitution the same as it was in the Articles of Confederation.

The history of this fourth article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That, under this fourth article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong that the practical effect which it was designed to have, and did have, under the former Government, it was designed to have, and should have, under the new Government.

It may be further objected that, if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political status of the freed man depend, not on the will of the master, but on the will of the State, upon which the political status of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of determining the political status of its native-born

inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated salve as a citizen of the United States. For whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognise such citizens. As has already been said, it recognises the great principle of public law that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and contrary to the laws and policy of the State where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution, and when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State who are its citizens under its Constitution and laws are also citizens of the United States.

It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen cannot depend on laws which refer only to aliens, and do not affect the status of persons born in the United States. The utmost effect which can be attributed to them is to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if though fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added that the power to make colored persons citizens of the United States under the Constitution has been actually exercised in repeated and important instances. *See*the Treaties with the Choctaws, of September 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Guadalupe Hidalgo, February 2, 1848, art. 8.

I do not deem it necessary to review at length the legislation

of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the Government that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus, the act of May 17, 1792, for the organization of the militia directs the enrollment of “every free, able-bodied, white male citizen.” An assumption that none but

white persons are citizens would be as inconsistent with the just import of this language as that all citizens are able-bodied, or males.

So the Act of February 28, 1803, 2 Stat. at Large 205, to prevent the importation of certain persons into States when by the laws thereof their admission is prohibited, in its first section, forbids all masters of vessels to import or bring "any negro, mulatto, or other person of color, not being a native, *a citizen*, or registered seaman of the United States," &c.

The Acts of March 3, 1813, section 1, 2 Stat. at Large 809, and March 1, 1817, section 3, 3 Stat. at Large 351, concerning seamen, certainly imply there may be persons of color, natives of the United States who are not citizens of the United States. This implication is undoubtedly in accordance with the fact. For not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange if laws were found on our statute book to that effect when, by solemn treaties, large bodies of Mexican and North American Indians as well as free colored inhabitants of Louisiana have been admitted to citizenship of the United States.

In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress of March 5, 1821, for the admission of that State into the Union. The Constitution of Missouri, under which that State applied for admission into the Union, provided that it should be the duty

of the Legislature "to pass laws to prevent free negroes and mulattoes from coming to and settling in the State under any pretext whatever." One ground of objection to the admission of the State under this Constitution was that it would require the Legislature to exclude free persons of color, who would be entitled, under the second section of the fourth article of the Constitution, not only to come within the State, but to enjoy there the privileges and immunities of citizens. The resolution of Congress admitting the State was upon the fundamental condition

"that the Constitution of Missouri shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."

It is true that neither this legislative declaration nor anything in the Constitution or laws of Missouri could confer or take away any privilege or immunity granted by the Constitution. But it is also true that it expresses the then conviction of the legislative power of the United States that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States.

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each State are citizens of the United States.

Second. That, as free colored persons born within some of the States are citizens of those States, such persons are also citizens of the United States.

Third. That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

Fourth. That, as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States, and I regret I must go further and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise

Act and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court as described by its repeated decisions, and as I understand, acknowledged in this opinion of the majority of the court.

In the course of that opinion, it became necessary to comment on the case of *Legrand v. Darnall,* reported in 2 Peters 664. In that case, a bill was filed, by one alleged to be a citizen of Maryland against one alleged to be a citizen of Pennsylvania. The bill stated that the defendant was the son of a white man by one of his slaves, and that the defendant's father devised to him certain lands, the title to which was put in controversy by the bill. These facts were admitted in the answer, and upon these and other facts, the court made its decree, founded on the principle that a devise of land by a master to a slave was, by implication, also a bequest of his freedom. The facts that the defendant was of African descent and was born a slave were not only before the court, but entered into the entire substance of its inquiries. The opinion of the majority of my brethren in this case disposes of the case of *Legrand v. Darnall* by saying, among other things, that as the fact that the defendant was born a slave only came before this court on the bill and answer; it was then too late to raise the question of the personal disability of the party, and therefore that decision is altogether inapplicable in this case.

In this I concur. Since the decision of this court in *Livingston v. Story,* 11 Pet. 351, the law has been settled that, when the declaration or bill contains the necessary averments of citizenship, this court cannot look at the record to see whether those averments are true except so far as they are put in issue by a plea to the jurisdiction. In that case, the defendant denied by his answer that Mr. Livingston was a citizen of New York, as he had alleged in the bill. Both parties went into proofs. The court refused to examine those proofs with reference to the personal disability of the plaintiff. This is the

settled law of the court, affirmed so lately as *Shepherd v. Graves,* 14 How. 27, and *Wickliff v. Owings,* 17 How. 51. *See also De Wolf v. Rabaud,* 1 Pet. 476. But I do not understand this to be a rule which the court may depart from at its pleasure. If it be a rule, it is as binding on the court as on the suitors. If it removes from the latter the power to take any objection to the personal disability of a party alleged by the record to be competent, which is not shown by a plea to the jurisdiction, it is because the court are forbidden by law to consider and decide on objections so taken. I do not consider it to be within the scope of the judicial power of the majority of the court to pass upon any question respecting the plaintiff's citizenship in Missouri save that raised by the plea to the jurisdiction, and I do not hold any opinion of this Court, or any court, binding, when expressed on a question not legitimately before it. *Carroll v. Carroll,* 16 How. 275. The judgment of this Court is that the case is to be dismissed for want of jurisdiction because the plaintiff was not a citizen of Missouri, as he alleged in his declaration. Into that judgment, according to the settled course of this Court, nothing appearing after a plea to the merits can enter. A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached.

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the territory acquired from France lying north of latitude thirty-six degrees thirty minutes and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be whether the plaintiff's status as a slave was so changed by his residence within that territory that he was not a slave in the State of Missouri at the time this action was brought.

In such cases, two inquiries arise which may be confounded, but should be kept distinct.

The first is what was the law of the Territory into which the master and slave went respecting the relation between them?

The second is whether the State of Missouri recognises and allows the effect of that law of the Territory on the status of the slave on his return within its jurisdiction.

As to the first of these questions, the will of States and nations,

by whose municipal law slavery is not recognised, has been manifested in three different ways.

One is absolutely to dissolve the relation, and terminate the rights of the master existing under the law of the country whence the parties came. This is said by Lord Stowell, in the *Case of the Slave Grace*, 2 Hag.Ad.R. 94, and by the Supreme Court of Louisiana in the *Case of Maria Louise v. Marot*, 9 Louis.R. 473, to be the law of France, and it has been the law of several States of this Union, in respect to slaves introduced under certain conditions. *Wilson v. Isabel*, 5 Call's R. 430; *Hunter v. Hulcher*, 1 Leigh 172; *Stewart v. Oaks*, 5 Har. and John. 107.

The second is where the municipal law of a country not recognising slavery, it is the will of the State to refuse the master all aid to exercise any control over his slave, and if he attempt to do so, in a manner justifiable only by that relation, to prevent the exercise of that control. But no law exists designed to operate directly on the relation of master and slave, and put an end to that relation. This is said by Lord Stowell, in the case above mentioned, to be the law of England, and by Mr. Chief Justice Shaw, in the case of the *Commonwealth v. Aves*, 18 Pick. 193, to be the law of Massachusetts.

The third is to make a distinction between the case of a master and his slave only temporarily in the country, *animo non manendi*, and those who are there to reside for permanent or indefinite purposes. This is said by Mr. Wheaton to be the law of Prussia, and was formerly the statute law of several States of our Union. It is necessary in this case to keep in view this distinction between those countries whose laws are designed to act directly on the status of a slave, and make him a freeman, and those where his master can obtain no aid from the laws to enforce his rights.

It is to the last case only that the authorities, out of Missouri, relied on by defendant, apply when the residence in the nonslaveholding Territory was permanent. In the *Commonwealth v. Aves*, 18 Pick. 218, Mr. Chief Justice Shaw said:

"From the principle above stated, on which a slave brought here becomes free, to-wit, that he becomes entitled to the protection of our laws, it would seem to follow as a necessary conclusion that, if the slave waives the protection of those laws and returns to the State where he is held as a slave, his condition is not changed."

It was upon this ground, as is apparent from his whole reasoning, that Sir William Scott rests his opinion in the *Case of the Slave Grace*. To use one of his expressions, the effect of the law of England was to put the liberty of the slave into a parenthesis. If there had been an

act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave, it is easy to see that the learned judge could not have arrived at the same conclusion. This distinction is very clearly stated and shown by President Tucker in his opinion in the case of *Betty v. Horton*,5 Leigh's Virginia R. 615. *See also Hunter v. Fletcher*, 1 Leigh's Va.R. 172; *Maria Louise v. Marot*, 9 Louisiana R.; *Smith v. Smith*, 13 *ib.* 441; *Thomas v. Genevieve*, 16 *ib.* 483; *Rankin v. Lydia*, 2 A. K. Marshall 467; *Davies v. Tingle*, 8 B.Munroe 539; *Griffeth v. Fanny*, Gilm.Va.R. 143; *Lumford v. Coquillon*, 14 Martin's La.R. 405; *Josephine v. Poultney*, 1 Louis.Ann.R. 329.

But if the acts of Congress on this subject are valid, the law of the Territory of Wisconsin, within whose limits the residence of the plaintiff and his wife and their marriage and the birth of one or both of their children took place, falls under the first category, and is a law operating directly on the status of the slave. By the eighth section of the Act of March 6, 1820, 3 Stat. at Large 548, it was enacted that, within this Territory,

"slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby, forever prohibited: *Provided always* that any person escaping into the same, from whom labor or service is lawfully claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid."

By the Act of April 20, 1836, 4 Stat. at Large 10, passed in the same month and year of the removal of the plaintiff to Fort Snelling, this part of the territory ceded by France, where Fort Snelling is, together with so much of the territory of the United States east of the Mississippi as now constitutes the State of Wisconsin, was brought under a Territorial Government under the name of the Territory of Wisconsin. By the eighteenth section of this act, it was enacted

"That the inhabitants of this Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages, granted and secured to the people of the Territory of the United States northwest of the river Ohio, by the articles of compact contained in the ordinance for the government of said Territory, passed on the 13th day of July, 1787, and shall be subject to all the restrictions and prohibitions in said articles of compact imposed upon the people of the said Territory."

The sixth article of that compact is

"there shall be neither slavery nor involuntary servitude in the said Territory, otherwise than in

the punishment of crimes, whereof the party shall have been duly convicted.*Provided always* that any person escaping into the same, from whom labor or service is lawfully claimed in anyone of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service, as aforesaid."

By other provisions of this act establishing the Territory of Wisconsin, the laws of the United States, and the then existing laws of the State of Michigan, are extended over the Territory, the latter being subject to alteration and repeal by the legislative power of the Territory created by the act.

Fort Snelling was within the Territory of Wisconsin, and these laws were extended over it. The Indian title to that site for a military post had been acquired from the Sioux nation as early as September 23, 1805, Am.State Papers, Indian Affairs, vol. 1, p. 744, and until the erection of the Territorial Government, the persons at that post were governed by the rules and articles of war, and such laws of the United States, including the eighth section of the Act of March 6, 1820, prohibiting slavery, as were applicable to their condition; but after the erection of the Territory, and the extension of the laws of the United States and the laws of Michigan over the whole of the Territory, including this military post, the persons residing there were under the dominion of those laws in all particulars to which the rules and articles of war did not apply.

It thus appears that, by these acts of Congress, not only was a general system of municipal law borrowed from the State of Michigan, which did not tolerate slavery, but it was positively enacted that slavery and involuntary servitude, with only one exception, specifically described, should not exist there. It is not simply that slavery is not recognised and cannot be aided by the municipal law. It is recognised for the purpose of being absolutely prohibited and declared incapable of existing within the Territory, save in the instance of a fugitive slave.

It would not be easy for the Legislature to employ more explicit language to signify its will that the status of slavery should not exist within the Territory than the words found in the Act of 1820, and in the Ordinance of 1787, and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside that doubt must yield to the inference required by the words of exception. That exception is of cases of fugitive slaves. An exception from a prohibition marks the extent of the prohibition, for it would be absurd, as well as useless, to except from a prohibition

a case not contained within it. 22 U. S. 9 Wheat. 200. I must conclude, therefore that it was the will of Congress that the state of involuntary servitude of a slave coming into the Territory with his master should cease to exist. The Supreme Court of Missouri so held in *Rachel v. Walker,* 4 Misso.R., 350, which was the case of a military officer going into the Territory with two slaves.

But it is a distinct question whether the law of Missouri recognised and allowed effect to the change wrought in the status of the plaintiff by force of the laws of the Territory of Wisconsin.

I say the law of Missouri because a judicial tribunal in one State or nation can recognise personal rights acquired by force of the law of any other State or nation only so far as it is the law of the former State that those rights should be recognised. But, in the absence of positive law to the contrary, the will of every civilized State must be presumed to be to allow such effect to foreign laws as is in accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the State in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said per Chief Justice Taney, 13 Pet. 38 U. S. 589, it is the comity of the State, not of the court. The judges have nothing to do with the motive of the State. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the State, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign State may refuse to recognise a change, wrought by the law of a foreign State, on the

status of a person while within such foreign State, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the State. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the State, to be the will of the State to refuse to recognise such changes of status by force of foreign law, as the rules of the law of nations require to be recognised. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the State and one or more foreign States, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the State should change its own action. To understand and give

just effect to such considerations, and to change the action of the State in consequence of them, are functions of diplomatists and legislators, not of judges.

The inquiry to be made on this part of the case is therefore whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the status of a slave, by foreign law.

I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. 1 Ter.Laws, 436. And the common law, as Blackstone says, 4 Com. 67, adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.

I know of no sufficient warrant for declaring that any rule of international law concerning the recognition, in that State, of a change of status wrought by an extraterritorial law has been displaced or varied by the will of the State of Missouri.

I proceed then to inquire what the rules of international law prescribe concerning the change of status of the plaintiff wrought by the law of the Territory of Wisconsin.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits *in itinere*, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done not in conformity with the principles of international law, other States are not understood to be willing to recognise or allow effect to such applications of personal statutes.

It becomes necessary, therefore, to inquire whether the operation of the laws of the Territory of Wisconsin upon the status of the plaintiff was or was not such an operation as these principles of international law require other States to recognise and allow effect to.

And this renders it needful to attend to the particular facts and circumstances of this case.

It appears that this case came on for trial before the Circuit Court and a jury upon an issue, in substance, whether the plaintiff, together with his wife and children, were the slaves of the defendant.

The court instructed the jury that, “upon the facts in this case, the law is with the defendant.” This withdrew from the jury the consideration and decision of every matter of fact. The evidence in the case consisted of written admissions, signed by the counsel of the parties. If the case had been submitted to the judgment of the court upon an agreed statement of facts, entered of record, in place of a special verdict, it would have been necessary for the court below, and for this court, to pronounce its judgment solely on those facts, thus agreed, without inferring any other facts therefrom. By the rules of the common law applicable to such a case, and by force of the seventh article of the amendments of the Constitution, this court is precluded from finding any fact not agreed to by the parties on the record. No submission to the court on a statement of facts was made. It was a trial by jury, in which certain admissions, made by the parties, were the evidence. The jury were not only competent, but were bound to draw from that evidence every inference which, in their judgment, exercised according to the rules of law, it would warrant. The Circuit Court took from the jury the power to draw any inferences from the admissions made by the parties, and decided the case for the defendant. This course

can be justified here, if at all, only by its appearing that, upon the facts agreed and all such inferences of fact favorable to the plaintiff's case as the jury might have been warranted in drawing from those admissions, the law was with the defendant. Otherwise, the plaintiff would be deprived of the benefit of his trial by jury, by whom, for aught we can know, those inferences favorable to his case would have been drawn.

The material facts agreed bearing on this part of the case are that Dr. Emerson, the plaintiff's master, resided about two years at the military post of Fort Snelling, being a surgeon in the army of the United States, his domicil of origin being unknown, and what, if anything, he had done to preserve or change his domicil prior to his residence at Rock Island being also unknown.

Now it is true that, under some circumstances the residence of a military officer at a particular place in the discharge of his official duties does not amount to the acquisition of a technical domicil. But it cannot be affirmed with correctness that it never does. There being actual residence, and this being presumptive evidence of domicil, all the circumstances

of the case must be considered before a legal conclusion can be reached that his place of residence is not his domicil. If a military officer stationed at a particular post should entertain an expectation that his residence there would be indefinitely protracted, and in consequence should remove his family to the place where his duties were to be discharged, form a permanent domestic establishment there, exercise there the civil rights and discharge the civil duties of an inhabitant, while he did not act and manifested no intent to have a domicil elsewhere, I think no one would say that the mere fact that he was himself liable to be called away by the orders of the Government would prevent his acquisition of a technical domicil at the place of the residence of himself and his family. In other words, I do not think a military officer incapable of acquiring a domicil. *Bruce v. Bruce*, 2 Bos. and Pul. 230; *Munroe v. Douglass*, 5 Mad.Ch.R. 232. This being so, this case stands thus: there was evidence before the jury that Emerson resided about two years at Fort Snelling, in the Territory of Wisconsin. This may or may not have been with such intent as to make it his technical domicil. The presumption is that it was. It is so laid down by this court, in *Ennis v. Smith*, 14 How. and the authorities in support of the position are there referred to. His intent was a question of fact for the jury. *Fitchburg v. Winchendon*, 4 Cush. 190.

The case was taken from the jury. If they had power to find that the presumption of the necessary intent had not been rebutted, we cannot say, on this record that Emerson had not his technical domicil at Fort Snelling. But, for reasons which I shall now proceed to give, I do not deem it necessary in this case to determine the question of the technical domicil of Dr. Emerson.

It must be admitted that the inquiry whether the law of a particular country has rightfully fixed the status of a person, so that in accordance with the principles of international law that status should be recognised in other jurisdictions, ordinarily depends on the question whether the person was domiciled in the country whose laws are asserted to have fixed his status. But, in the United States, questions of this kind may arise where an attempt to decide solely with reference to technical domicil, tested by the rules which are applicable to changes of places of abode from one country to another, would not be consistent with sound principles. And, in my judgment, this is one of those cases.

The residence of the plaintiff, who was taken by his master, Dr. Emerson, as a slave, from Missouri to the State of Illinois, and thence to the Territory of Wisconsin, must be deemed to

have been for the time being, and until he asserted his own separate intention, the same as the residence of his master, and the inquiry whether the personal statutes of the Territory were rightfully extended over the plaintiff, and ought, in accordance with the rules of international law, to be allowed to fix his status, must depend upon the circumstances under which Dr. Emerson went into that Territory and remained there, and upon the further question whether anything was there rightfully done by the plaintiff to cause those personal statutes to operate on him.

Dr. Emerson was an officer in the army of the United States. He went into the Territory to discharge his duty to the United States. The place was out of the jurisdiction of any particular State, and within the exclusive jurisdiction of the United States. It does not appear where the domicil of origin of Dr. Emerson was, nor whether or not he had lost it, and gained another domicil, nor of what particular State, if any, he was a citizen.

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there

for an indefinite length of time, to take part in its civil or military affairs? They were not foreigners, coming from abroad. Dr. Emerson was a citizen of the country which had exclusive jurisdiction over the Territory, and not only a citizen, but he went there in a public capacity, in the service of the same sovereignty which made the laws. Whatever those laws might be, whether of the kind denominated personal statutes or not, so far as they were intended by the legislative will, constitutionally expressed, to operate on him and his servant, and on the relations between them, they had a rightful operation, and no other State or country can refuse to allow that those laws might rightfully operate on the plaintiff and his servant, because such a refusal would be a denial that the United States could, by laws constitutionally enacted, govern their own servants, residing on their own Territory, over which the United States had the exclusive control, and in respect to which they are an independent sovereign power. Whether the laws now in question were constitutionally enacted, I repeat once more, is a separate question. But, assuming that they were, and that they operated directly on the status of the plaintiff, I consider that no other State or country could question the rightful power of the United States so to legislate, or, consistently with the settled rules of international law, could refuse to recognise the effects

of such legislation upon the status of their officers and servants, as valid everywhere.

This alone would, in my apprehension, be sufficient to decide this question.

But there are other facts stated on the record which should not be passed over. It is agreed that, in the year 1836, the plaintiff, while residing in the Territory, was married, with the consent of Dr. Emerson, to Harriet, named in the declaration as his wife, and that Eliza and Lizzie were the children of that marriage, the first named having been born on the Mississippi river, north of the line of Missouri, and the other having been born after their return to Missouri. And the inquiry is whether, after the marriage of the plaintiff in the Territory, with the consent of Dr. Emerson, any other State or country can, consistently with the settled rules of international law, refuse to recognise and treat him as a free man when suing for the liberty of himself, his wife, and the children of the marriage. It is in reference to his status as viewed in other States and countries that the contract of marriage and the birth of children becomes strictly material. At the same time, it is proper to observe that the female to whom he was married having been taken to the same military post of Fort Snelling as a slave, and Dr. Emerson claiming also to be her master at the time of her marriage, her status, and that of the children of the marriage, are also affected by the same considerations.

If the laws of Congress governing the Territory of Wisconsin were constitutional and valid laws, there can be no doubt these parties were capable of contracting a lawful marriage, attended with all the usual civil rights and obligations of that condition. In that Territory, they were absolutely free persons, having full capacity to enter into the civil contract of marriage.

It is a principle of international law, settled beyond controversy in England and America, that a marriage, valid by the law of the place where it was contracted, and not in fraud of the law of any other place, is valid everywhere, and that no technical domicil at the place of the contract is necessary to make it so. *See* Bishop on Mar. and Div. 125-129, where the cases are collected.

If, in Missouri, the plaintiff were held to be a slave, the validity and operation of his contract of marriage must be denied. He can have no legal rights, of course, not those of a husband and father. And the same is true of his wife and children. The denial of his rights is the denial of theirs. So that, though lawfully married in the Territory, when they came out of it, into the State of Missouri, they were no longer

husband and wife, and a child of that lawful marriage, though born under the same dominion where its parents contracted a lawful marriage, is not the fruit of that marriage, nor the child of its father, but subject to the maxim *partus sequitur ventrem.*

It must be borne in mind that, in this case, there is no ground for the inquiry whether it be the will of the State of Missouri not to recognise the validity of the marriage of a fugitive slave, who escapes into a State or country where slavery is not allowed and there contracts a marriage, or the validity of such a marriage where the master, being a citizen of the State of Missouri, voluntarily goes with his slave, *in itinere*, into a State or country which does not permit slavery to exist, and the slave there contracts marriage without the consent of his master, for in this case, it is agreed, Dr. Emerson did consent, and no further question can arise concerning his rights so far as their assertion is inconsistent with the validity of the marriage. Nor do I know of any ground for the assertion that this marriage was in fraud of any law of Missouri. It has been held by this court that a bequest of property by a master to his slave by necessary implication entitles the slave to his freedom, because only as a freeman could he take and hold the bequest. *Legrand v. Darnall,* 2 Pet.R. 664. It has also been held that, when a master goes with his slave to reside for an indefinite

period in a State where slavery is not tolerated, this operates as an act of manumission, because it is sufficiently expressive of the consent of the master that the slave should be free. 2 Marshall's Ken.R. 470, 14 Martin's Louis.R. 401.

What, then, shall we say of the consent of the master that the slave may contract a lawful marriage, attended with all the civil rights and duties which belong to that relation; that he may enter into a relation which none but a free man can assume — a relation which involves not only the rights and duties of the slave, but those of the other party to the contract, and of their descendants to the remotest generation? In my judgment, there can be no more effectual abandonment of the legal rights of a master over his slave than by the consent of the master that the slave should enter into a contract of marriage in a free State, attended by all the civil rights and obligations which belong to that condition.

And any claim by Dr. Emerson, or anyone claiming under him the effect of which is to deny the validity of this marriage and the lawful paternity of the children born from it, wherever asserted, is, in my judgment, a claim inconsistent with good faith and sound reason, as well as with the rules of international law. And I go further: in my opinion, a law of the State

of Missouri which should thus annul a marriage, lawfully contracted by these parties while resident in Wisconsin, not in fraud of any law of Missouri, or of any right of Dr. Emerson, who consented thereto, would be a law impairing the obligation of a contract, and within the prohibition of the Constitution of the United States. *See* 17 U. S. 4 Wheat. 629, 17 U. S. 695, 17 U. S. 696.

To avoid misapprehension on this important and difficult subject, I will state distinctly the conclusions at which I have arrived. They are:

First. The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the status of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

Second. The laws of the United States, constitutionally enacted, which operated directly on and changed the status of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the status of the slave, and it is in conformity with the rules of international law that this change of status should be recognised everywhere.

Third. The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the status of the plaintiff, and change his status to that of a free man.

Fourth. The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract a marriage in that Territory, valid under its laws, and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State or of some right derived from them, which cannot be shown in this case, because the master consented to it.

Fifth. That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which being to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or anyone claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage and bastardize their issue and reduce them to slavery.

But it is insisted that the Supreme Court of Missouri has settled this case by its decision in *Scott v. Emerson*, 15 Missouri Reports 576, and that this decision is in conformity

with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave, and the facts that he went there to reside indefinitely as an officer of the United States, and that the plaintiff was lawfully married there with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicil of Dr. Emerson in that Territory is not questioned in that decision, and it is placed on a broad denial of the operation, in Missouri, of the law of any foreign State or country upon the status of a slave, going with his master from Missouri into such foreign State or country, even though

they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the status of the slave, and changed his status to that of a freeman.

To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble, in his dissenting opinion in that case, said:

"I regard the question as conclusively settled by repeated adjudications of this court, and if I doubted or denied the propriety of those decisions, I would not feel myself any more at liberty to overturn them than I would any other series of decisions by which the law upon any other question had been settled. There is with me nothing in the law of slavery which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary excitements which have gathered around it. . . . But, in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend."

"In this State, it has been recognized from the beginning of the Government as a correct position in law that the master who takes his slave to reside in a State or Territory where slavery is prohibited, thereby emancipates his slave."

Winney v. Whitesides, 1 Mo. 473; *Le Grange v. Chouteau*, 2 Mo. 20; *Milley v. Smith*, *ib.*36; *Ralph v. Duncan*, 3 Mo. 194; *Julia v. McKinney*, *ib.* 270; *Nat v. Ruddle*, *ib.* 400; *Rachel v. Walker*, 4 Mo. 350; *Wilson v. Melvin*, 592.

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Chief Justice Gamble has also examined the decisions of the courts of other States in which slavery is established, and finds them in accordance with these preceding decisions of the Supreme Court of Missouri, to which he refers.

It would be a useless parade of learning for me to go over the ground which he has so fully and ably occupied.

But it is further insisted we are bound to follow this decision. I do not think so. In this case, it is to be determined what laws of the United States were in operation in the Territory of Wisconsin, and what was their effect on the status of the plaintiff. Could the plaintiff contract a lawful marriage there? Does any law of the State of Missouri impair the obligation of that contract of marriage, destroy his rights as a husband, bastardize the issue of the marriage, and reduce them to a state of slavery?

These questions, which arise exclusively under the Constitution and laws of the United States, this Court, under the Constitution and laws of the United States, has the rightful authority finally to decide. And if we look beyond these questions, we come to the consideration whether the rules of international law, which are part of the laws of Missouri until displaced by some statute not alleged to exist, do or do not require the status of the plaintiff, as fixed by the laws of the Territory of Wisconsin, to be recognised in Missouri. Upon such a question, not depending on any statute or local usage, but on principles of universal jurisprudence, this court has repeatedly asserted it could not hold itself bound by the decisions of State courts, however great respect might be felt for their learning, ability, and impartiality. *See Swift v. Tyson,* 16 Peters's R. 1; *Carpenter v. The Providence Ins. Co., ib.* 495; *Foxcroft v. Mallet,* 4 How. 353; *Rowan v. Runnels,* 5 How. 134.

Some reliance has been placed on the fact that the decision in the Supreme Court of Missouri was between these parties, and the suit there was abandoned to obtain another trial in the courts of the United States.

In *Homer v. Brown,* 16 How. 354, this court made a decision upon the construction of a devise of lands, in direct opposition to the unanimous opinion of the Supreme Court of Massachusetts, between the same parties, respecting the same subject matter — the claimant having become nonsuit in the State court in order to bring his action in the Circuit Court of the United States. I did not sit in that case, having been of counsel for one of the parties while at the bar, but, on examining the report of the argument of the counsel for the plaintiff in error, I find they made the point that this court ought to give effect to the construction put upon the will by the State

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court, to the end that rights respecting lands may be governed by one law, and that the law of the place where the lands are situated that they referred to the State decision of the case, reported in 3 Cushing 390, and to many decisions of this court. But this court does not seem to have considered the point of sufficient importance to notice it in their opinions. In *Millar v. Austin,* 13 How. 218, an action was brought by the endorsee of a written promise. The question was whether it was negotiable under a statute of Ohio. The Supreme Court of that State having decided it was not negotiable, the plaintiff became nonsuit, and brought his action in the

Circuit Court of the United States. The decision of the Supreme Court of the State, reported in 4 Ves.L.J. 527, was relied on. This court unanimously held the paper to be negotiable.

When the decisions of the highest court of a State are directly in conflict with each other, it has been repeatedly held here that the last decision is not necessarily to be taken as the rule. *State Bank v. Knoop,* 16 How. 369; *Pease v. Peck,* 18 How. 599.

To these considerations I desire to add that it was not made known to the Supreme Court of Missouri, so far as appears, that the plaintiff was married in Wisconsin with the consent of Dr. Emerson, and it is not made known to us that Dr. Emerson was a citizen of Missouri, a fact to which that court seem to have attached much importance.

Sitting here to administer the law between these parties, I do not feel at liberty to surrender my own convictions of what the law requires, to the authority of the decision in 15 Missouri Reports.

I have thus far assumed, merely for the purpose of the argument that the laws of the United States respecting slavery in this Territory were constitutionally enacted by Congress. It remains to inquire whether they are constitutional and binding laws.

In the argument of this part of the case at bar, it was justly considered by all the counsel to be necessary to ascertain the source of the power of Congress over the territory belonging to the United States. Until this is ascertained, it is not possible to determine the extent of that power. On the one side, it was maintained that the Constitution contains no express grant of power to organize and govern what is now known to the laws of the United States as a Territory. That whatever power of this kind exists is derived by implication from the capacity of the United States to hold and acquire territory out of the limits of any State, and the necessity for its having some government.

On the other side, it was insisted that the Constitution has not failed to make an express provision for this end, and that it is found in the third section of the fourth article of the Constitution.

To determine which of these is the correct view, it is needful to advert to some facts respecting this subject which existed when the Constitution was framed and adopted. It will be found that these facts not only shed much light on the question whether the framers of the Constitution omitted to make a provision concerning the power of Congress to organize and govern Territories, but they will also aid in the construction of any provision which may have been made respecting this subject.

Under the Confederation, the unsettled territory within the limits of the United States had been a subject of deep interest. Some of the States insisted that these lands were within their chartered boundaries, and that they had succeeded to the title of the Crown to the soil. On the other hand, it was argued that the vacant lands had been acquired by the United States by the war carried on by them under a common Government and for the common interest.

This dispute was further complicated by unsettled questions of boundary among several States. It not only delayed the accession of Maryland to the Confederation, but at one time seriously threatened its existence. 5 Jour. of Cong. 208, 442. Under the pressure of these circumstances, Congress earnestly recommended to the several States a cession of their claims and rights to the United States. 5 Jour. of Cong. 442. And before the Constitution was framed, it had been begun. That by New York had been made on the 1st day of March, 1781; that of Virginia on the 1st day of March, 1784; that of Massachusetts on the 19th day of April, 1785; that of Connecticut on the 14th day of September, 1786; that of South Carolina on the 8th day of August, 1787, while the Convention for framing the Constitution was in session.

It is very material to observe in this connection that each of these acts cedes, in terms, to the United States as well the jurisdiction as the soil.

It is also equally important to note that, when the Constitution was framed and adopted, this plan of vesting in the United States, for the common good, the great tracts of ungranted lands claimed by the several States, in which so deep an interest was felt, was yet incomplete. It remained for North Carolina and Georgia to cede their extensive and valuable claims. These were made by North Carolina on the 25th day of February, 1790, and by Georgia on the 24th day of April,

1802. The terms of these last-mentioned cessions will hereafter be noticed in another connection, but I observe here that each of them distinctly shows upon its face that they were not only in execution of the general plan proposed by the Congress of the

Confederation, but of a formed purpose of each of these States existing when the assent of their respective people was given to the Constitution of the United States.

It appears, then, that when the Federal Constitution was framed and presented to the people of the several States for their consideration, the unsettled territory was viewed as justly applicable to the common benefit so far as it then had or might attain thereafter a pecuniary value, and so far as it might become the seat of new States, to be admitted into the Union upon an equal footing with the original States. And also that the relations of the United States to that unsettled territory were of different kinds. The titles of the States of New York, Virginia, Massachusetts, Connecticut, and South Carolina, as well of soil as of jurisdiction, had been transferred to the United States. North Carolina and Georgia had not actually made transfers, but a confident expectation, founded on their appreciation of the justice of the general claim and fully justified by the results, was entertained that these cessions would be made. The Ordinance of 1787 had made provision for the temporary government of so much of the territory actually ceded as lay northwest of the river Ohio.

But it must have been apparent both to the framers of the Constitution and the people of the several States who were to act upon it that the Government thus provided for could not continue unless the Constitution should confer on the United States the necessary powers to continue it. That temporary Government, under the ordinance, was to consist of certain officers, to be appointed by and responsible to the Congress of the Confederation, their powers had been conferred and defined by the ordinance. So far as it provided for the temporary government of the Territory, it was an ordinary act of legislation, deriving its force from the legislative power of Congress and depending for its vitality upon the continuance of that legislative power. But the officers to be appointed for the Northwestern Territory, after the adoption of the Constitution, must necessarily be officers of the United States, and not of the Congress of the Confederation, appointed and commissioned by the President and exercising powers derived from the United States under the Constitution.

Such was the relation between the United States and the Northwestern Territory which all reflecting men must have foreseen would exist when the Government created by the

Constitution should supersede that of the Confederation. That if the new Government should be without power to govern this Territory, it could not appoint and commission officers, and send them into the Territory to exercise there legislative, judicial, and executive power, and that this Territory, which was even then foreseen to be so important, both politically and financially, to all the existing States, must be left not only without the control of the General Government in respect to its future political relations to the rest of the States, but absolutely without any Government, save what its inhabitants, acting in their primary capacity, might from time to time create for themselves.

But this Northwestern Territory was not the only territory the soil and jurisdiction whereof were then understood to have been ceded to the United States. The cession by South Carolina, made in August, 1787, was of

“all the territory included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divides the Eastern from the Western waters, then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river, to the said mountains, and thence to run a due west course to the river Mississippi.”

It is true that, by subsequent explorations, it was ascertained that the source of the Tugaloo river, upon which the title of South Carolina depended, was so far to the northward that the transfer conveyed only a narrow slip of land, about twelve miles wide, lying on the top of the ridge of mountains, and extending from the northern boundary of Georgia to the southern boundary of North Carolina. But this was a discovery made long after the cession, and there can be no doubt that the State of South Carolina, in making the cession, and the Congress, in accepting it, viewed it as a transfer to the United States of the soil and jurisdiction of an extensive and important part of the unsettled territory ceded by the Crown of Great Britain by the treaty of peace, though its quantity or extent then remained to be ascertained. [Footnote 3/1]

It must be remembered also, as has been already stated that not only was there a confident expectation entertained by the

other States that North Carolina and Georgia would complete the plan already so far executed by New York, Virginia, Massachusetts, Connecticut, and South Carolina, but that the opinion was in no small degree prevalent that the just title to this "back country," as it was termed, had vested in the United States by the treaty of peace, and could not rightfully be claimed by any individual State.

There is another consideration applicable to this part of the subject, and entitled, in my judgment, to great weight.

The Congress of the Confederation had assumed the power not only to dispose of the lands ceded, but to institute Governments and make laws for their inhabitants. In other words, they had proceeded to act under the cession, which, as we have seen, was as well of the jurisdiction as of the soil. This ordinance was passed on the 13th of July, 1787. The Convention for framing the Constitution was then in session at Philadelphia. The proof is direct and decisive that it was known to the Convention. [Footnote 3/2] It is equally clear that it was admitted and understood not to be within the legitimate powers of the Confederation to pass this ordinance. Jefferson's Works, vol. 9, pp. 251, 276; Federalist, Nos. 38, 43.

The importance of conferring on the new Government regular powers commensurate with the objects to be attained, and thus avoiding the alternative of a failure to execute the trust assumed by the acceptance of the cessions made and expected, or its execution by usurpation, could scarcely fail to be perceived. That it was in fact perceived is clearly shown by the Federalist, No. 38, where this very argument is made use of in commendation of the Constitution.

Keeping these facts in view, it may confidently be asserted that there is very strong reason to believe, before we examine the Constitution itself, that the necessity for a competent grant of power to hold, dispose of, and govern territory ceded and expected to be ceded could not have escaped the attention of those who framed or adopted the Constitution, and that, if it did not escape their attention, it could not fail to be adequately provided for.

Any other conclusion would involve the assumption that a subject of the gravest national concern, respecting which the small States felt so much jealousy that it had been almost an insurmountable obstacle to the formation of the Confederation, and as to which all the States had deep pecuniary and political interests, and which had been so recently and constantly agitated,

was nevertheless overlooked, or that such a subject was not overlooked, but designedly left unprovided for, though it was manifestly a subject of common concern which belonged to the care of the General Government, and adequate provision for which could not fail to be deemed necessary and proper.

The admission of new States, to be framed out of the ceded territory, early attracted the attention of the Convention. Among the resolutions introduced by Mr. Randolph, on the 29th of May, was one on this subject, Res.No. 10, 5 Elliot 128, which, having been affirmed in Committee of the Whole, on the 5th of June, 5 Elliot 156, and reported to the Convention on the 13th of June, 5 Elliot 190, was referred to the Committee of Detail, to prepare the Constitution, on the 26th of July, 5 Elliot 376. This committee reported an article for the admission of new States "lawfully constituted or established." Nothing was said concerning the power of Congress to prepare or form such States. This omission struck Mr. Madison, who, on the 18th of August, 5 Elliot 439, moved for the insertion of power to dispose of the unappropriated lands of the United States, and to institute temporary Governments for new States arising therein.

On the 29th of August, 5 Elliot 492, the report of the committee was taken up, and after debate, which exhibited great diversity of views concerning the proper mode of providing for the subject, arising out of the supposed diversity of interests of the large and small States, and between those which had and those which had not unsettled territory, but no difference of opinion respecting the propriety and necessity of some adequate provision for the subject, Gouverneur Morris moved the clause as it stands in the Constitution. This met with general approbation, and was at once adopted. The whole section is as follows:

"New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of Congress."

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State."

That Congress has some power to institute temporary Governments over the territory, I believe all agree, and if it be admitted that the necessity of some power to govern the territory

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of the United States could not and did not escape the attention of the Convention and the people, and that the necessity is so great that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory, and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the territory, and to convey to Congress some authority concerning it.

It would seem, also that when we find the subject matter of the growth and formation and admission of new States, and the disposal of the territory for these ends, were under consideration, and that some provision therefor was expressly made, it is improbable that it would be, in its terms, a grossly inadequate provision, and that an indispensably necessary power to institute temporary Governments, and to legislate for the inhabitants of the territory, was passed silently by, and left to be deduced from the necessity of the case.

In the argument at the bar, great attention has been paid to the meaning of the word “territory.”

Ordinarily, when the territory of a sovereign power is spoken of, it refers to that tract of country which is under the political jurisdiction of that sovereign power. Thus, Chief Justice Marshall, in *United States v. Bevans,* 3 Wheat. 386, says:

“What, then, is the extent of jurisdiction which a State possesses? We answer without hesitation the jurisdiction of a State is coextensive with its territory.”

Examples might easily be multiplied of this use of the word, but they are unnecessary, because it is familiar. But the word “territory” is not used in this broad and general sense in this clause of the Constitution.

At the time of the adoption of the Constitution, the United States held a great tract of country northwest of the Ohio, another tract, then of unknown extent, ceded by South Carolina, and a confident expectation was then entertained, and afterwards realized, that they then were or would become the owners of other great tracts claimed by North Carolina and Georgia. These ceded tracts lay within the limits of the United States and out of the limits of any particular State, and the cessions embraced the civil and political jurisdiction and so much of the soil as had not previously been granted to individuals.

These words, “territory belonging to the United States”

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were not used in the Constitution to describe an abstraction, but to identify and apply to these actual subjects matter then existing and belonging to the United States and other similar subjects which might afterwards be acquired, and, this being so, all the essential qualities and incidents attending such actual subjects are embraced within the words “territory belonging to the United States” as fully as if each of those essential qualities and incidents had been specifically described.

I say, the essential qualities and incidents. But in determining what were the essential qualities and incidents of the subject with which they were dealing, we must take into consideration not only all the particular facts which were immediately before them, but the great consideration, ever present to the minds of those who framed and adopted the Constitution, that they were making a frame of government for the people of the United States and their posterity under which they hoped the United States might be what they have now become — a great and powerful nation, possessing the power to make war and to conclude treaties, and thus to acquire territory. *See Cerre v. Pitot,* 6 Cr. 336; *Am. Ins. Co. v. Canter,* 1 Pet. 542. With these in view, I turn to examine the clause of the article now in question.

It is said this provision has no application to any territory save that then belonging to the United States. I have already shown that, when the Constitution was framed, a confident expectation was entertained, which was speedily realized, that North Carolina and Georgia would cede their claims to that great territory which lay west of those States. No doubt has been suggested that the first clause of this same article which enabled Congress to admit new States refers to and includes new States to be formed out of this territory expected to be thereafter ceded by North Carolina and Georgia, as well as new States to be formed out of territory northwest of the Ohio, which then had been ceded by Virginia. It must have been seen, therefore, that the same necessity would

exist for an authority to dispose of and make all needful regulations respecting this territory, when ceded, as existed for a like authority respecting territory which had been ceded.

No reason has been suggested why any reluctance should have been felt by the framers of the Constitution to apply this provision to all the territory which might belong to the United States, or why any distinction should have been made, founded on the accidental circumstance of the dates of the cessions — a circumstance in no way material as respects the necessity for rules and regulations or the propriety of conferring

on the Congress power to make them. And if we look at the course of the debates in the Convention on this article, we shall find that the then unceded lands, so far from having been left out of view in adopting this article, constituted, in the minds of members, a subject of even paramount importance.

Again, in what an extraordinary position would the limitation of this clause to territory then belonging to the United States, place the territory which lay within the chartered limits of North Carolina and Georgia. The title to that territory was then claimed by those States, and by the United States; their respective claims are purposely left unsettled by the express words of this clause, and when cessions were made by those States, they were merely of their claims to this territory, the United States neither admitting nor denying the validity of those claims, so that it was impossible then, and has ever since remained impossible, to know whether this territory did or did not then belong to the United States, and consequently to know whether it was within or without the authority conferred by this clause to dispose of and make rules and regulations respecting the territory of the United States. This attributes to the eminent men who acted on this subject a want of ability and forecast, or a want of attention to the known facts upon which they were acting, in which I cannot concur.

There is not, in my judgment, anything in the language, the history, or the subject matter of this article which restricts its operation to territory owned by the United States when the Constitution was adopted.

But it is also insisted that provisions of the Constitution respecting territory belonging to the United States do not apply to territory acquired by treaty from a foreign nation. This objection must rest upon the position that the Constitution did not authorize the Federal Government to acquire foreign territory, and consequently has made no provision for its government when acquired, or that, though the acquisition of foreign territory was contemplated by the Constitution, its provisions concerning the admission of new States, and the making of all needful rules and regulations respecting territory belonging to the United States, were not designed to be applicable to territory acquired from foreign nations.

It is undoubtedly true that, at the date of the treaty of 1803 between the United States and France for the cession of Louisiana, it was made a question whether the Constitution had conferred on the executive department of the Government of the United States power to acquire foreign territory by a treaty.

There is evidence that very grave doubts were then entertained concerning the existence of this power. But that there was then a settled opinion in the executive and legislative branches of the Government that this power did not exist cannot be admitted without at the same time imputing to those who negotiated and ratified the treaty, and passed the laws necessary to carry it into execution, a deliberate and known violation of their oaths to support the Constitution; and whatever doubts may them have existed, the question must now be taken to have been settled. Four distinct acquisitions of foreign territory have been made by as many different treaties, under as many different Administrations. Six States formed on such territory are now in the Union. Every branch of this Government, during a period of more than fifty years, has participated in these transactions. To question their validity now is vain. As was said by Mr. Chief Justice Marshall in the *American Insurance Company v. Canter,* 1 Peters 542,

“the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that Government possesses the power of acquiring territory either by conquest or treaty.”

See Cerre v. Pitot, 6 Cr. 336. And, I add, it also possesses the power of governing it when acquired, not by resorting to supposititious powers, nowhere found described in the Constitution, but expressly granted in the authority to make all needful rules and regulations respecting the territory of the United States.

There was to be established by the Constitution a frame of government under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument as it is with its language, and I can have no hesitation in rejecting it.

I construe this clause, therefore, as if it had read

"Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the

soil, so far as the soil may be the property of the party making the cession, at the time of making it."

It has been urged that the words "rules and regulations" are not appropriate terms in which to convey authority to make laws for the government of the territory.

But it must be remembered that this is a grant of power to the Congress — that it is therefore necessarily a grant of power to legislate — and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a Legislature to make all needful rules and regulations respecting the territory is a power to pass all needful laws respecting it.

The word "regulate," or "regulation," is several times used in the Constitution. It is used in the fourth Section of the First Article to describe those laws of the States which prescribe the times, places, and manner, of choosing Senators and Representatives; in the Second Section of the Fourth Article to designate the legislative action of a State on the subject of fugitives from service, having a very close relation to the matter of our present inquiry; in the Second Section of the Third Article, to empower Congress to fix the extent of the appellate jurisdiction of this court; and finally in the Eighth Section of the First Article are the words, "Congress shall have power to regulate commerce."

It is unnecessary to describe the body of legislation which has been enacted under this grant of power; its variety and extent are well known. But it may be mentioned in passing that, under this power to regulate commerce, Congress has enacted a great system of municipal laws, and extended it over the vessels and crews of the United States on the high seas and in foreign ports, and even over citizens of the United States resident in China, and has established judicatures with power to inflict even capital punishment within that country.

If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.

Besides this, the rules and regulations must be needful. But undoubtedly the question whether a particular rule or regulation be needful must be finally determined by Congress itself. Whether a law be needful is a legislative or political,

not a judicial, question. Whatever Congress deems needful is so, under the grant of power.

Nor am I aware that it has ever been questioned that laws providing for the temporary government of the settlers on the public lands are needful not only to prepare them for admission to the Union as States, but even to enable the United States to dispose of the lands.

Without government and social order, there can be no property, for without law, its ownership, its use, and the power of disposing of it, cease to exist in the sense in which those words are used and understood in all civilized States.

Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States when, in the judgment of Congress, they should be fitted therefor, since these were the needs provided for, since it is confessed that Government is indispensable to provide for those needs, and the power is to make *all needful*rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory, by such laws as Congress deems needful, until they obtain admission as States.

Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress — a question which of these is needful.

But it is insisted that, whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "*all* needful rules and regulations" respecting the territory belonging to the United States.

The assertion is, though the Constitution says "all," it does not mean all — though it says "all" without qualification, it means all except such as allow or prohibit slavery. It cannot be doubted that it is incumbent on those who would thus introduce an exception not found in the language of the instrument to exhibit some solid and satisfactory reason, drawn from the subject matter or the purposes and objects of the clause, the context, or from other provisions of the Constitution, showing that the words employed in this clause are not to be understood according to their clear, plain, and natural signification.

The subject matter is the territory of the United States out of the limits of every State, and consequently under the exclusive power of the people of the United States. Their

will respecting it, manifested in the Constitution, can be subject to no restriction. The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the temporary government of the settlers thereon until new States should be formed. It will not be questioned that, when the Constitution of the United States was framed and adopted, the allowance and the prohibition of negro slavery were recognised subjects of municipal legislation; every State had in some measure acted thereon, and the only legislative act concerning the territory — the Ordinance of 1787, which had then so recently been passed — contained a prohibition of slavery. The purpose and object of the clause being to enable Congress to provide a body of municipal law for the government of the settlers, the allowance or the prohibition of slavery comes within the known and recognised scope of that purpose and object.

There is nothing in the context which qualifies the grant of power. The regulations must be "respecting the territory." An enactment that slavery may or may not exist there is a regulation respecting the territory. Regulations must be needful, but it is necessarily left to the legislative discretion to determine whether a law be needful. No other clause of the Constitution has been referred to at the bar, or has been seen by me, which imposes any restriction or makes any exception concerning the power of Congress to allow or prohibit slavery in the territory belonging to the United States.

A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind on a question of the interpretation of the Constitution. *Stuart v. Laird,* 1 Cranch 299; *Martin v. Hunter,* 1 Wheat. 304; *Cohens v. Virginia,* 6 Wheat. 264; *Prigg v. Pennsylvania,* 16 Pet. 621; *Cooley v. Port Wardens,* 12 How. 315.

In this view, I proceed briefly to examine the practical construction placed on the clause now in question so far as it respects the inclusion therein of power to permit or prohibit slavery in the Territories.

It has already been stated that, after the Government of the United States was organized under the Constitution, the temporary Government of the Territory northwest of the River Ohio could no longer exist save under the powers conferred on Congress by the Constitution. Whatever legislative, judicial, or executive authority should be exercised therein could be derived only from the people of the United States under the Constitution. And, accordingly, an act was passed on the

7th day of August, 1789, 1 Stat. at Large 50, which recites:

"Whereas, in order that the ordinance of the United States in Congress assembled, for the government of the territory northwest of the River Ohio, may continue to have full effect, it is required that certain provisions should be made, so as to adapt the same to the present Constitution of the United States."

It then provides for the appointment by the President of all officers, who, by force of the ordinance, were to have been appointed by the Congress of the Confederation, and their commission in the manner required by the Constitution, and empowers the Secretary of the Territory to exercise the powers of the Governor in case of the death or necessary absence of the latter.

Here is an explicit declaration of the will of the first Congress, of which fourteen members, including Mr. Madison, had been members of the Convention which framed the Constitution, that the ordinance, one article of which prohibited slavery, "should continue to have full effect." Gen. Washington, who signed this bill as President, was the President of that Convention.

It does not appear to me to be important in this connection that that clause in the ordinance which prohibited slavery was one of a series of articles of what is therein termed a compact. The Congress of the Confederation had no power to make such a compact, nor to act at all on the subject, and after what had been so recently said by Mr. Madison on this subject, in the thirty-eighth number of the Federalist, I cannot suppose that he, or any others who voted for this bill, attributed any intrinsic effect to what was denominated in the ordinance a compact between "the original States and the people and States in the new territory," there being no new States then in existence in the territory with whom a compact could be made, and the few scattered inhabitants, unorganized into a political body, not being capable of becoming a party to a treaty even if the Congress of the Confederation had had power to make one touching the government of that territory.

I consider the passage of this law to have been an assertion by the first Congress of the power of the United States to prohibit slavery within this part of the territory of the United States, for it clearly shows that slavery was thereafter to be prohibited there, and it could be prohibited only by an exertion of the power of the United States under the Constitution, no other power being capable of operating within that territory after the Constitution took effect.

On the 2d of April, 1790, 1 Stat. at Large 106, the first Congress passed an act accepting a deed of cession by North

Carolina of that territory afterwards erected into the State of Tennessee. The fourth express condition contained in this deed of cession, after providing that the inhabitants of the Territory shall be temporarily governed in the same manner as those beyond the Ohio, is followed by these words: "*Provided always* that no regulations made or to be made by Congress shall tend to emancipate slaves."

This provision shows that it was then understood Congress might make a regulation prohibiting slavery, and that Congress might also allow it to continue to exist in the Territory, and, accordingly, when, a few days later, Congress passed the Act of May 20th, 1790, 1 Stat. at Large 123, for the government of the Territory south of the River Ohio, it provided,

"and the Government of the Territory south of the Ohio shall be similar to that now exercised in the Territory northwest of the Ohio except so far as is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled, 'An act to accept a cession of the claims of the State of North Carolina to a certain district of western territory.'"

Under the Government thus established, slavery existed until the Territory became the State of Tennessee.

On the 7th of April, 1798, 1 Stat. at Large 649, an act was passed to establish a Government in the Mississippi Territory in all respects like that exercised in the Territory northwest of the Ohio, "excepting and excluding the last article of the ordinance made for the government thereof by the late Congress, on the 13th day of July, 1787." When the limits of this Territory had been amicably settled with Georgia, and the latter ceded all its claim thereto, it was one stipulation in the compact of cession that the Ordinance of July 13th, 1787, "shall in all its parts extend to the Territory contained in the present act of cession, that article only excepted which forbids slavery." The Government of this Territory was subsequently established and organized under the act of May 10th, 1800, but so much of the ordinance as prohibited slavery was not put in operation there.

Without going minutely into the details of each case, I will now give reference to two classes of acts, in one of which Congress has extended the Ordinance of 1787, including the article prohibiting slavery, over different Territories, and thus exerted its power to prohibit it; in the other, Congress has erected Governments over Territories acquired from France and Spain, in which slavery already existed, but refused to apply to them that part of the Government under the ordinance which excluded slavery.

Of the first class are the Act of May 7th, 1800, 2 Stat. at

Large 58, for the government of the Indiana Territory; the Act of January 11th, 1805, 2 Stat. at Large 309, for the government of Michigan Territory; the Act of May 3d, 1809, 2 Stat. at Large 514, for the government of the Illinois Territory; the Act of April 20th, 1836, 5 Stat. at Large 10, for the government of the Territory of Wisconsin; the Act of June 12th, 1838, for the government of the Territory of Iowa; the Act of August 14th, 1848, for the government of the Territory of Oregon. To these instances should be added the Act of March 6th, 1820, 3 Stat. at Large 548, prohibiting slavery in the territory acquired from France, being northwest of Missouri and north of thirty-six degrees thirty minutes north latitude.

Of the second class, in which Congress refused to interfere with slavery already existing under the municipal law of France or Spain, and established Governments by which slavery was recognised and allowed, are: the Act of March 26th, 1804, 2 Stat. at Large 283, for the government of Louisiana; the Act of March 2d, 1805, 2 Stat. at Large 322, for the government of the Territory of Orleans; the Act of June 4th, 1812, 2 Stat. at Large 743, for the government of the Missouri Territory; the Act of March 30th, 1822, 3 Stat. at Large 654, for the government of the Territory of Florida. Here are eight distinct instances, beginning with the first Congress, and coming down to the year 1848, in which Congress has excluded slavery from the territory of the United States, and six distinct instances in which Congress organized Governments of Territories by which slavery was recognised and continued, beginning also with the first Congress, and coming down to the year 1822. These acts were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted.

If the practical construction of the Constitution contemporaneously with its going into effect, by men intimately acquainted with its history from their personal participation in framing and adopting it, and continued by them through a long series of acts of the gravest importance, be entitled to weight in the judicial mind on a question of construction, it would seem to be difficult to resist the force of the acts above adverted to.

It appears, however, from what has taken place at the bar that, notwithstanding the language of the Constitution and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

One is that, though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it; another is that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery; while the third is that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory and there hold them as property.

No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right.

The second is drawn from considerations equally general concerning the right of self-government and the nature of the political institutions which have been established by the people of the United States.

While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens, and inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States in respect to their use and enjoyment of the territory of the United States.

With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery not found therein nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument and the magnitude and complexity of the interests involved in its construction. To allow this to be

done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible — because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical

interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress, or, what in my opinion would not be preferable, an exponent of the individual political opinions of the members of this court.

If it can be shown by anything in the Constitution itself that, when it confers on Congress the power to make all needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted, or if anything in the history of this provision tends to show that such an exception was intended by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

There have been eminent instances in this court closely analogous to this one in which such an attempt to introduce an exception not found in the Constitution itself has failed of success.

By the eighth section of the first article, Congress has the power of exclusive legislation in all cases whatsoever within this District.

In the case of *Loughborough v. Blake,* 5 Whea. 324, the question arose whether Congress has power to impose direct taxes on persons and property in this District. It was insisted that, though the grant of power was in its terms broad enough to include direct taxation, it must be limited by the principle that taxation and representation are inseparable. It would not be easy to fix on any political truth better established or more fully admitted in our country than that taxation and representation must exist together. We went into the war of the Revolution to assert it, and it is incorporated as fundamental into all American Governments. But however true and important

this maxim may be, it is not necessarily of universal application. It was for the people of the United States, who ordained the Constitution, to decide whether it should or should not be permitted to operate within this District. Their decision was embodied in the words of the Constitution, and as that contained no such exception as would permit the maxim to operate in this District, this court, interpreting that language, held that the exception did not exist.

Again, the Constitution confers on Congress power to regulate commerce with foreign nations. Under this, Congress passed an act on the 22d of December, 1807, unlimited in duration, laying an embargo on all ships and vessels in the ports or within the limits and jurisdiction of the United States. No law of the United States ever pressed so severely upon particular States. Though the constitutionality of the law was contested with an earnestness and zeal proportioned to the ruinous effects which were felt from it, and though, as Mr. Chief Justice Marshall has said, 9 Wheat. 22 U. S. 192,

“a want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this,”

I am not aware that the fact that it prohibited the use of a particular species of property, belonging almost exclusively to citizens of a few States, and this indefinitely, was ever supposed to show that it was unconstitutional. Something much more stringent as a ground of legal judgment was relied on — that the power to regulate commerce did not include the power to annihilate commerce.

But the decision was that, under the power to regulate commerce, the power of Congress over the subject was restricted only by those exceptions and limitations contained in the Constitution, and as neither the clause in question, which was a general grant of power to regulate commerce, nor any other clause of the Constitution imposed any restrictions as to the duration of an embargo, an unlimited prohibition of the use of the shipping of the country was within the power of Congress. On this subject, Mr. Justice Daniel, speaking for the court in the case of *United States v. Marigold,* 9 How. 560, says:

"Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations, and however, at periods of high excitement, an application of the terms 'to regulate commerce' such as would embrace absolute prohibition may have been questioned, yet, since the passage of the embargo and nonintercourse laws and the repeated judicial sanctions these statutes have received, it can scarcely at this day be open to doubt that every subject falling legitimately

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within the sphere of commercial regulation may be partially or wholly excluded when either measure shall be demanded by the safety or the important interests of the entire nation. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it."

If power to regulate commerce extends to an indefinite prohibition of the use of all vessels belonging to citizens of the several States, and may operate, without exception, upon every subject of commerce to which the legislative discretion may apply it, upon what grounds can I say that power to make all needful rules and regulations respecting the territory of the United States is subject to an exception of the allowance or prohibition of slavery therein?

While the regulation is one "respecting the territory;" while it is, in the judgment of Congress, "a needful regulation," and is thus completely within the words of the grant; while no other clause of the Constitution can be shown which requires the insertion of an exception respecting slavery; and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admit also that the kind of Government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate, and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate which are found in the Constitution.

I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save

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that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude?

The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one State, under the laws thereof." Nothing can more clearly describe a status created by municipal law. In *Prigg v. Pennsylvania,* 10 Pet. 611, this court said: "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." In *Rankin v. Lydia,* 2 Marsh. 12, 470, the Supreme Court of Appeals of Kentucky said:

"Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law."

I am not acquainted with any case or writer questioning the correctness of this doctrine. *See also* 1 Burge, Col. and For.Laws 738-741, where the authorities are collected.

The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person when the master takes his life; while in others, the law may recognise a right of the slave to be protected from cruel treatment. In other words, the status of slavery embraces every condition from that in which the slave is known to the law simply as a

chattel, with no civil rights, to that in which he is recognised as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the status of slavery must depend on the municipal law which creates and upholds it.

And not only must the status of slavery be created and measured by municipal law, but the rights, powers, and obligations which grow out of that status must be defined, protected, and enforced by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery?

Is it not more rational to conclude that they who framed and adopted the constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist, and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein? Moreover, if the right exists, what are its limits, and what are its conditions? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with him to the Territory? If it be said to be those laws respecting

slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject, and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved, the status of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact as it is, in my judgment, monstrous in theory.

I consider the assumption which lies at the basis of this theory to be unsound not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as “the people of the United States,” under the Constitution of the United States, to be administered justly and impartially, and as nearly as possible for

the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress, to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances or sectional differences of condition cannot, in my opinion, be recognised in this court without arrogating to the judicial branch of the Government powers not committed to it, and which, with all the unaffected respect I feel for it when acting in its proper sphere, I do not think it fitted to wield.

Nor, in my judgment, will the position that a prohibition to bring slaves into a Territory deprives anyone of his property without due process of law bear examination.

It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from Magna Charta, was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of

the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of Magna Charta, the Ordinance of 1787 also violated it, and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, of the Legislature of any or all the States of the Confederacy, to consent to such a violation? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate Magna Charta by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that, if brought, they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it, as may be seen in *Wilson v. Isabel*, 5 Call's R. 425. *See also Hunter v. Hulsher*, 1 Leigh 172, and a similar law has been recognised as valid in Maryland in *Stewart v. Oaks*, 5 Har. and John. 107. I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves, and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can similar regulation respecting a Territory violate the fifth amendment of the Constitution?

Some reliance was placed by the defendant's counsel upon the fact that the prohibition of slavery in this territory was in the words, "that slavery, &c., shall be and is hereby *forever* prohibited." But the insertion of the word "*forever*" can have no legal effect. Every enactment not expressly limited in its

duration continues in force until repealed or abrogated by some competent power, and the use of the word "forever" can give to the law no more durable operation. The argument is that Congress cannot so legislate as to bind the future States formed out of the territory, and that, in this instance, it has attempted to do so. Of the political reasons which may have induced the Congress to use these words, and which caused them to expect that subsequent Legislatures would conform their action to the then general opinion of the country that it ought to be permanent, this court can take no cognizance.

However fit such considerations are to control the action of Congress, and however reluctant a statesman may be to disturb what has been settled, every law made by Congress may be repealed, and, saving private rights and public rights gained by States, its repeal is subject to the absolute will of the same power which enacted it. If Congress had enacted that the crime of murder, committed in this Indian Territory, north of thirty-six degrees thirty minutes, by or on any white man, should forever be punishable with death, it would seem to me an insufficient objection to an indictment, found while it was a Territory, that, at some future day,

States might exist there, and so the law was invalid because, by its terms, it was to continue in force forever. Such an objection rests upon a misapprehension of the province and power of courts respecting the constitutionality of laws enacted by the Legislature.

If the Constitution prescribe one rule, and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment. If the law include no case save those for which the Constitution has furnished a different rule, or no case which the Legislature has the power to govern, then the law can have no operation. If it includes cases which the Legislature has power to govern, and concerning which the Constitution does not prescribe a different rule, the law governs those cases, though it may, in its terms, attempt to include others on which it cannot operate. In other words, this court cannot declare void an act of Congress which constitutionally embraces some cases, though other cases within its terms are beyond the control of Congress or beyond the reach of that particular law. If, therefore, Congress had power to make a law excluding slavery from this territory while under the exclusive power of the United States, the use of the word "forever" does not invalidate the law so long as Congress has the exclusive legislative power in the territory.

But it is further insisted that the treaty of 1803 between the United States and France, by which this territory was acquired, has so restrained the constitutional powers of Congress that it cannot, by law, prohibit the introduction of slavery into that part of this territory north and west of Missouri and north of thirty-six degrees thirty minutes north latitude.

By a treaty with a foreign nation, the United States may rightfully stipulate that the Congress will or will not exercise its legislative power in some particular manner, on some particular subject. Such promises, when made, should be voluntarily kept with the most scrupulous good faith. But that a treaty with a foreign nation can deprive the Congress of any part of the legislative power conferred by the people, so that it no longer can legislate as it was empowered by the Constitution to do, I more than doubt.

The powers of the Government do and must remain unimpaired. The responsibility of the Government to a foreign nation for the exercise of those powers is quite another matter. That responsibility is to be met, and justified to the foreign nation according to the requirements of the rules of public law, but never upon the assumption that the United States had parted with or restricted any power of acting according to its own free will, governed solely by its own appreciation of its duty.

The second section of the fourth article is

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land."

This has made treaties part of our municipal law, but it has not assigned to them any particular degree of authority, nor declared that laws so enacted shall be irrepealable. No supremacy is assigned to treaties over acts of Congress. That they are not perpetual, and must be in some way repealable, all will agree.

If the President and the Senate alone possess the power to repeal or modify a law found in a treaty, inasmuch as they can change or abrogate one treaty only by making another inconsistent with the first, the Government of the United States could not act at all, to that effect, without the consent of some foreign Government. I do not consider, I am not aware it has ever been considered that the Constitution has placed our country in this helpless condition. The action of Congress in repealing the treaties with France by the Act of July 7th, 1798, 1 Stat. at Large 578, was in conformity with these views. In the case of *Taylor et al. v. Morton*,2 Curtis' Cir.Ct.R.

454, I had occasion to consider this subject, and I adhere to the views there expressed.

If, therefore, it were admitted that the treaty between the United States and France did contain an express stipulation that the United States would not exclude slavery from so much of the ceded territory as is now in question, this court could not declare that an act of Congress excluding it was void by force of the treaty. Whether or no a case existed sufficient to justify a refusal to execute such a stipulation would not be a judicial, but a political and legislative, question, wholly beyond the authority of this Court to try and determine. It would belong to diplomacy and legislation, and not to the administration of existing laws. Such a stipulation in a treaty, to legislate or not to legislate in a particular way has been repeatedly held in this court to address itself to the political or the legislative power, by whose action thereon this court is bound. *Foster v. Nicolson,* 2 Peters 314; *Garcia v. Lee,* 12 Peters 519.

But, in my judgment, this treaty contains no stipulation in any manner affecting the action of the United States respecting the territory in question. Before examining the language of the treaty, it is material to bear in mind that the part of the ceded territory lying north of thirty-six degrees thirty minutes, and west and north of the present State of Missouri was then a wilderness, uninhabited save by savages whose possessory title had not then been extinguished.

It is impossible for me to conceive on what ground France could have advanced a claim, or could have desired to advance a claim, to restrain the United States from making any rules and regulations respecting this territory which the United States might think fit to make, and still less can I conceive of any reason which would have induced the United States to yield to such a claim. It was to be expected that France would desire to make the change of sovereignty and jurisdiction as little burdensome as possible to the then inhabitants of Louisiana, and might well exhibit even an anxious solicitude to protect their property and persons, and secure to them and their posterity their religious and political rights, and the United States, as a just Government, might readily accede to all proper stipulations respecting those who were about to have their allegiance transferred. But what interest France could have in uninhabited territory which, in the language of the treaty, was to be transferred "forever, and in full sovereignty," to the United States, or how the United States could consent to allow a foreign nation to interfere in its purely internal affairs, in which that foreign nation had no concern

whatever, is difficult for me to conjecture. In my judgment, this treaty contains nothing of the kind.

The third article is supposed to have a bearing on the question. It is as follows:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the enjoyment of their liberty, property, and the religion they profess."

There are two views of this article, each of which, I think, decisively shows that it was not intended to restrain the Congress from excluding slavery from that part of the ceded territory then uninhabited. The first is that, manifestly, its sole object was to protect individual rights of the then inhabitants of the territory. They are to be "maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." But this article does not secure to them the right to go upon the public domain ceded by the treaty, either with or without their slaves. The right or power of doing this did not exist before or at the time the treaty was made. The French and Spanish Governments, while they held the country, as well as the United States, when they acquired it, always exercised the undoubted right of excluding inhabitants from the Indian country, and of determining when and on what conditions it should be opened to settlers. And a stipulation that the then inhabitants of Louisiana should be protected in their property can have no reference to their use of that property where they had no right, under the treaty, to go with it save at the will of the United States. If one who was an inhabitant of Louisiana at the time of the treaty had afterwards taken property then owned by him, consisting of firearms, ammunition, and spirits, and had gone into the Indian country north of thirty-six degrees thirty minutes to sell them to the Indians, all must agree the third article of the treaty would not have protected him from indictment under the Act of Congress of March 30, 1802, 2 Stat. at Large 139, adopted and extended to this territory by the Act of March 26, 1804, (2 Stat. at Large 283.)

Besides, whatever rights were secured were individual rights. If Congress should pass any law which violated such rights of any individual, and those rights were of such a character as not to be within the lawful control of Congress under the Constitution, that individual could complain, and the act of Congress, as to such rights of his, would be inoperative, but it

would be valid and operative as to all other persons, whose individual rights did not come under the protection of the treaty. And inasmuch as it does not appear that any inhabitant of Louisiana whose rights were secured by treaty had been injured, it would be wholly inadmissible for this court to assume, first, that one or more such cases may have existed, and second, that if any did exist, the entire law was void — not only as to those cases, if any, in which it could not rightfully operate, but as to all others, wholly unconnected with the treaty, in which such law could rightfully operate.

But it is quite unnecessary, in my opinion, to pursue this inquiry further, because it clearly appears from the language of the article, and it has been decided by this court, that the stipulation was temporary, and ceased to have any effect when the then inhabitants of

the Territory of Louisiana, in whose behalf the stipulation was made, were incorporated into the Union.

In the cases of *New Orleans v. De Armas et al.,* 9 Peters, 223, the question was whether a title to property which existed at the date of the treaty continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said:

"This article obviously contemplates two objects. One, that Louisiana shall be admitted into the Union as soon as possible on an equal footing with the other States, and the other that, till such admission, the inhabitants of the ceded territory shall be protected in the free enjoyment of their liberty, property, and religion. Had anyone of these rights been violated while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this Court, under the twenty-fifth section of the judicial act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were 'admitted to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States.'"

The cases of *Chouteau v. Marguerita,* 12 Peters 507, and *Permoli v. New Orleans,* 3 How. 589, are in conformity with this view of the treaty.

To convert this temporary stipulation of the treaty in behalf of French subjects who then inhabited a small portion of Louisiana into a permanent restriction upon the power of Congress to regulate territory then uninhabited, and to assert that it not only restrains Congress from affecting the rights of property of the then inhabitants, but enabled them and all other citizens of the United States to go into any part of the

ceded territory with their slaves, and hold them there, is a construction of this treaty so opposed to its natural meaning, and so far beyond its subject matter and the evident design of the parties that I cannot assent to it. In my opinion, this treaty has no bearing on the present question.

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude and west of the river Mississippi, were constitutional and valid laws.

I have expressed my opinion, and the reasons therefor, at far greater length than I could have wished, upon the different questions on which I have found it necessary to pass to arrive at a judgment on the case at bar. These questions are numerous, and the grave importance of some of them required me to exhibit fully the grounds of my opinion. I have touched no question which, in the view I have taken, it was not absolutely necessary for me to pass upon to ascertain whether the judgment of the Circuit Court should stand or be reversed. I have avoided no question on which the validity of that judgment depends. To have done either more or less, would have been inconsistent with my views of my duty.

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.

[Footnote 3/1]

This statement that some territory did actually pass by this cession is taken from the opinion of the court, delivered by Mr. Justice Wayne, in the case of *Howard v. Ingersoll,* reported in 13 How. 405. It is an obscure matter, and, on some examination of it, I have been led to doubt whether any territory actually passed by this cession. But as the fact is not important to the argument, I have not thought it necessary further to investigate it.

[Footnote 3/2]

It was published in a newspaper at Philadelphia, in May, and a copy of it was sent by R. H. Lee to Gen. Washington on the 15th of July. *See* p. 261, Cor. of Am.Rev., vol. 4, and Writings of Washington, vol. 9, p. 174.

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9.2: Plessy v. Ferguson 163 US 537 (1896)

U.S. Supreme Court

Plessy v. Ferguson, 163 U.S. 537 (1896)

Plessy v. Ferguson

No. 210

Argued April 18, 1896

Decided May 18, 1896

163 U.S. 537

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Syllabus

The statute of Louisiana, acts of 1890, c. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account

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of the race they belong to; and requiring the officer of the passenger train to assign each passenger to the coach or compartment assigned for the race to which he or she belong; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aide for the race to which he or she belongs; and conferring upon officers of the train power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

This was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that, on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that, upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of

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New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information based upon the unconstitutionality of the act of the General

Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to admit

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that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court, which was allowed by the Chief Justice of the Supreme Court of Louisiana.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts “that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to.”

By the second section, it was enacted “that the officers of such passenger trains shall have power and are hereby required

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to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.”

The third section provides penalties for the refusal or neglect of the officers, directors, conductors, and employees of railway companies to comply with the act, with a proviso that “nothing in this act shall be construed as applying to nurses attending children of the other race.” The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity

secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate

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said coach and take a seat in another assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughterhouse Cases,* 16 Wall. 36, to have been intended primarily to abolish slavery as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights Cases*, 109 U. S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but

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only as involving an ordinary civil injury, properly cognizable by the laws of the State and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States and subject to the jurisdiction thereof are made citizens of the United States and of the State wherein they reside, and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughterhouse Cases,* 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

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The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political,

equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 19, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff" (Mr. Charles Sumner), "is that, by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

It was held that the powers of the committee extended to the establishment

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of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school and yet have not acquired the rudiments of learning to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev.Stat.D.C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 198; *Lehew v. Brummell*, 15 S.W. Rep. 765; *Ward v. Flood*, 48 California 36; *Bertonneau v. School Directors*, 3 Woods 177; *People v. Gallagher*, 93 N.Y. 438; *Cory v. Carter*, 48 Indiana 897; *Dawson v. Lee*, 3 Kentucky 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State v. Gibson*, 36 Indiana 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia*, 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race and no discrimination against them because of color has been asserted in a number of cases. *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Gibson v. Mississippi*, 162 U. S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of

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color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company v. Brown*,17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons traveling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be, so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 48. The court in this case, however,

expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States.

In the *Civil Rights Case*, 109 U. S. 3, it was held that an act of Congress entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void upon the ground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court, Mr. Justice Bradley observed that the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects that are within the

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domain of state legislation, but to provide modes of relief against state legislation or state action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of state laws and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment, but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect, and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point is the case of the *Louisville, New Orleans &c. Railway v. Mississippi*, 133 U. S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi enacting that all railroads carrying passengers should provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi 662, had held that the statute applied solely to commerce within the State, and that, being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section as to the power of the State to separate in different compartments interstate passengers

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or affect in any manner the privileges and rights of such passengers. All that we can consider is whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott v. Hicks, Judge, et al.*, 44 La.Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co. v. State*, 66 Mississippi 662, and affirmed by this court in 133 U. S. 587. In the present case, no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the to races upon public conveyances were held to be constitutional in *West Chester &c. Railroad v. Miles*, 55 Penn.St. 209; *Day v. Owen*, 5 Michigan 520; *Chicago &c. Railway v. Williams*, 5 Illinois 185; *Chesapeake &c. Railroad v. Wells*, 85 Tennessee 613; *Memphis &c. Railroad v. Benson*, 85 Tennessee 627; *The Sue*, 22 Fed.Rep. 83; *Logwood v. Memphis &c. Railroad*, 23 Fed.Rep. 318; *McGuinn v. Forbes*, 37 Fed.Rep. 639; *People v. King*, 18 N.E.Rep. 245; *Houck v. South Pac. Railway*, 38 Fed.Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int.Com.Com'n 111; *S.C.*, 1 *Ibid.* 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of

the laws within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation

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in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's Attorney that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act so far as it requires the railway to provide separate accommodations and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property in the same sense that a right of action or of inheritance is property. Conceding this to be so for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side

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of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo v. Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company v. Husen*, 95 U. S. 465; *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, and cases cited on p. 700; *Duggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 48; *State ex rel. Wood v. Baker*, 38 Wisconsin 71; *Monroe v. Collins*, 17 Ohio St. 66; *Hulseman v. Rems*, 41 Penn. St. 396; *Orman v. Riley*, 1 California 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances

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is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding

acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed."

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly

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or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chaver*, 5 Jones [N.C.] 1, p. 11); others that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three-fourths. (*People v. Dean*, 4 Michigan 406; *Jones v. Commonwealth*, 80 Virginia 538). But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

Affirmed.

MR. JUSTICE HARLAN, dissenting.

By the Louisiana statute the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations."

Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons, nor any white person to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,

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he is subject to be fined or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race " are excepted from the operation of the statute. No exception is made of colored attendants traveling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same

coach with a white woman whom she has been employed to serve, and who may need her personal attention while traveling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act "white and colored races" necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus, the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants' Bank,* 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned."

Mr. Justice Strong, delivering the judgment of

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this court in *Olcott v. The Supervisors,* 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use."

So, in *Township of Pine Grove v. Talcott,* 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester v. Western Railroad Corporation*, 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement. It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation, but it is in trust for the public."

In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the

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race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship and to the security of personal liberty by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it as declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely to secure "to a race recently emancipated, a race that through

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many generations have been held in slavery, all the civil rights that the superior race enjoy."

They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — exemption from legal discriminations, implying inferiority in civil society, Lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U. S. 303, 306, 307; *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370, 386; *Bush v. Kentucky*, 107 U. S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law." *Gibson v. Mississippi*, 162 U.S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It as said in argument that the statute of Louisiana does

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not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor a to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint unless by due course of law." 1 Bl.Com. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from traveling in

the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road

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or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, “the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment.” Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes liberally, in order to carry out the legislative

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will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void because unreasonable are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word “citizens” in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the Constitution, they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

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race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race — a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the

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war under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration, for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the street of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race if his rights under the law were recognized. But he objecting, and ought never to cease objecting, to the proposition that citizens of the white and black race can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

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The arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the

law. The thin disguise of “equal” accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

The result of the whole matter is that, while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a “partition,” when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a “partition,” and that, upon retiring from the courtroom to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the “partition” used in the courtroom happens to be stationary, provision could be made for screens with openings through

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which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion in many localities was dominated by the institution of slavery, when it would not have been safe to do justice to the black man, and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the

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People of the United States, for whom and by whom, through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

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9.3: Korematsu v. US 323 US 214 (1944)

U.S. Supreme Court

Korematsu v. United States, 323 U.S. 214 (1944)

Korematsu v. United States

No. 22

Argued October 11, 12, 1944

Decided December 18, 1944

323 U.S. 214

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

1. Civilian Exclusion Order No. 34 which, during a state of war with Japan and as a protection against espionage and sabotage, was promulgated by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942, and which directed the exclusion after May 9, 1942, from a described West Coast military area of all persons of Japanese ancestry, *held* constitutional as of the time it was made and when the petitioner — an American citizen of Japanese descent whose home was in the described area — violated it. P. 323 U. S. 219.

2. The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding. P. 323 U. S. 222.

3. Even though evacuation and detention in the assembly center were inseparable, the order under which the petitioner was convicted was nevertheless valid. P. 323 U. S. 223.

140 F.2d 289, affirmed.

CERTIORARI, 321 U.S. 760, to review the affirmance of a judgment of conviction.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, [Footnote 1] and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case, prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed.Reg. 1407. That order, issued after we

were at war with Japan, declared that

"the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which, like the exclusion order here, was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities, and of the President, as Commander in Chief of the Army, and, finally, that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case, the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that, by May, 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions, we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 320 U. S. 99,

". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that, in a critical hour, such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was, for the same reason, a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan. [Footnote 2]

We uphold the exclusion order as of the time it was made and when the petitioner violated it. *Cf. Chastleton Corporation v. Sinclair,* 264 U. S. 543, 264 U. S. 547; *Block v. Hirsh*, 256 U. S. 135, 256 U. S. 155. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. *Cf. Ex parte Kawato,* 317 U. S. 69, 317 U. S. 73. But hardships

are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that, on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed.Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry before 12 o'clock noon, May 9; furthermore, it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942, Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that, on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that, on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry at central points, designated as "assembly centers," in order

"to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration."

Public Proclamation No. 4, 7 Fed.Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed.Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center, we cannot say, either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems, and may be governed by different principles. T he lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center, there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. *Cf. Blockburger v. United States*, 284 U. S. 299, 284 U. S. 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case, *post*, p. 323 U. S. 283, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which

petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose, but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint, whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers — and we deem it unjustifiable to call them concentration camps, with all the ugly connotations that term implies — we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot — by availing ourselves of the calm perspective of hindsight — now say that, at that time, these actions were unjustified.

Affirmed.

[Footnote 1]

140 F.2d 289.

[Footnote 2]

Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, Part II, 608-726; Final Report, Japanese Evacuation from the West Coast, 1942, 309-327; Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d Sess., on H.R. 2701 and other bills to expatriate certain nationals of the United States, pp. 37-42, 49-58.

MR. JUSTICE FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear, and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i.e.*, by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Hirabayashi v. United States*, 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is “the power to wage war successfully.” *Hirabayashi v. United States*, *supra*, at 320 U. S. 93, *and see Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398,290 U. S. 426. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an

allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are, of course, very different. But, within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations," *Hamilton v. Kentucky Distilleries Co.,*251 U. S. 146, 251 U. S. 156. To recognize that military orders are "reasonably expedient military precautions" in time of war, and yet to deny them constitutional legitimacy, makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And, being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts.*Compare Interstate Commerce Commission v. Brimson,* 154 U. S. 447; 155 U. S. 155U.S. 3, and *Monongahela Bridge Co. v. United States,* 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

MR. JUSTICE ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night, as was *Hirabayashi v. United States*, 320 U. S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible, and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home by refusing voluntarily to leave, and so knowingly and intentionally defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066, [Footnote 2/1] which, after stating the reason for issuing the order as "protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities," provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent,

"from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions"

the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union — about one-fourth of the total area of the nation.

March 2, 192, General DeWitt promulgated Public Proclamation No. 1, [Footnote 2/2] which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion . . . , and, in connection therewith, is subject to espionage and acts of sabotage." It states that, "as a matter of military necessity," certain military areas and zones are established known as Military

Areas Nos. 1 and 2. It adds that "[s]uch persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that, if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence, he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that, in which he lived.

March 21, 1942, Congress enacted [Footnote 2/3] that anyone who knowingly

"shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander"

shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi v. United States*, *supra*.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4, [Footnote 2/4] the General recited that

"it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1, to restrict and regulate such migration, and ordered that, as of March 29, 1942,"

"all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct. [Footnote 2/5]"

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4, he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34 [Footnote 2/6] providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and nonalien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

The predicament in which the petitioner thus found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document — and, in the light of the above recitation, I think it is not, — that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner

did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty, and convicted. Sentence was suspended, and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102, [Footnote 2/7] establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has been confined either in an Assembly Center within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Endo* (*post*, p. 323 U. S. 283) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34, ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument, then, is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature — a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case. [Footnote 2/8] The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature, the *Hirabayashi* case would be authority for sustaining it.

But the facts above recited, and those set forth in *Ex parte Endo*, *supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that, if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that, under these circumstances, a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that, had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived, he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation, instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the *Endo* case, *supra*. The answer, of course, is that, where he was subject to two conflicting laws, he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again, it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute, but must obey it though he knows it is no law, and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact, he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

[Footnote 2/1]

17 Fed.Reg. 1407.

[Footnote 2/2]

7 Fed.Reg. 2320

[Footnote 2/3]

56 Stat. 173.

[Footnote 2/4]

7 Fed.Reg. 2601.

[Footnote 2/5]

The italics in the quotation are mine. The use of the word “voluntarily” exhibits a grim irony probably not lost on petitioner and others in like case. Either so or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

[Footnote 2/6]

7 Fed.Reg. 3967.

[Footnote 2/7]

7 Fed.Reg. 2165.

[Footnote 2/8]

My agreement would depend on the definition and application of the terms “temporary” and “emergency.” No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained at the date of the restraint out of which the litigation arose. *Cf. Chastleton Corp. v. Sinclair,* 264 U. S. 543.

MR. JUSTICE MURPHY, dissenting.

This exclusion of “all persons of Japanese ancestry, both alien and non-alien,” from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over “the very brink of constitutional power,” and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

Sterling v. Constantin, 287 U. S. 378, 287 U. S. 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and

impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell,* 13 Wall. 623, 80 U. S. 627-628; *Mitchell v. Harmony,* 13 How. 115, 54 U. S. 134-135; *Raymond v. Thomas*, 91 U. S. 712, 91 U. S. 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction, which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic, or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than *bona fide* military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. [Footnote 3/1] In it, he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast. [Footnote 3/2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, [Footnote 3/3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise, by their behavior, furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." [Footnote 3/4] They are claimed to be given to "emperor worshipping ceremonies," [Footnote 3/5] and to "dual citizenship." [Footnote 3/6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, [Footnote 3/7] together with facts as to certain persons being educated and residing at length in Japan. [Footnote 3/8] It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them

"to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so. [Footnote 3/9]"

The need for protective custody is also asserted. The report refers, without identity, to "numerous incidents of violence," as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself," and that the general public "was ready to take matters into its own hands." [Footnote 3/10] Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, [Footnote 3/11] as well as for unidentified radio transmissions and night signaling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices — the same people who have been among the foremost advocates of the evacuation. [Footnote 3/12] A military judgment based upon such racial and sociological considerations is not

entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters. [Footnote 3/13]

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that, under our system of law, individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. *See* House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." [Footnote 3/14] Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued, and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, [Footnote 3/15] a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that, under these circumstances, it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved — or at least for the 70,000 American citizens — especially when a large part of this number represented children and elderly men and women. [Footnote 3/16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

[Footnote 3/1]

Final Report, Japanese Evacuation from the West Coast, 1942, by Lt.Gen. J. L. DeWitt. This report is dated June 5, 1943, but was not made public until January, 1944.

[Footnote 3/2]

Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739 40 (78th Cong., 1st Sess.):

"I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now — if they are permitted to come back — espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

[Footnote 3/3]

The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that, "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

[Footnote 3/4]

Final Report, p. vii; *see also* pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized, or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

[Footnote 3/5]

Final Report, pp. 10-11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

[Footnote 3/6]

Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan, in the past, used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. *See* Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L.Q. 414, 447-8, and authorities there cited; McWilliams, Prejudice, 123-4 (1944).

[Footnote 3/7]

Final Report, pp. 12-13. We have had various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121-3 (1944).

[Footnote 3/8]

Final Report, pp. 13-15. Such persons constitute a very small part of the entire group, and most of them belong to the Kibei movement — the actions and membership of which are well known to our Government agents.

[Footnote 3/9]

Final Report, p. 10; *see also* pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. *See* McWilliams, Prejudice, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

[Footnote 3/10]

Final Report, pp. 8-9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. *See* House Report No.1911 (77th Cong., 2d Sess.) 1-2. *Cf.* House Report No. 2124 (77th Cong., & Sess.) 145-7. In this instance, moreover, there are only two minor instances of violence

on record involving persons of Japanese ancestry. McWilliams, What About Our Japanese-Americans? Public Affairs Pamphlets, No. 91, p. 8 (1944).

[Footnote 3/11]

Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942 — a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. *See* New York Times, Sept. 15, 1942, p. 1, col. 3.

[Footnote 3/12]

Special interest groups were extremely active in applying pressure for mass evacuation. *See* House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, Prejudice, 128 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that

"We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either."

Quoted by Taylor in his article "The People Nobody Wants," 214 Sat.Eve.Post 24, 66 (May 9, 1942).

[Footnote 3/13]

See <l=|323 u.s.="" 214fn3="" 4|="">notes 4-12, *supra*.</l=|323>

[Footnote 3/14]

Final Report, p. vii; *see also* p. 18.

[Footnote 3/15]

The Final Report, p. 34, makes the amazing statement that, as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

[Footnote 3/16]

During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer.Journ. of Int.Law 443, 414-416; House Report No. 2124 (77th Cong., 2d Sess.), 280-281.

MR. JUSTICE JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity, and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that, apart from the matter involved here, he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four — the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole — only Korematsu's presence would have violated the order. The difference between their innocence

and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress, in peacetime legislation, should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that, if the military commander had reasonable military grounds for promulgating the orders, they are constitutional, and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander, in temporarily focusing the life of a community on defense, is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional, and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence, courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." *A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review

and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States*, 320 U. S. 81, when we sustained these orders insofar as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case, we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said:

"Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew.*"

320 U.S. at 320 U. S. 101.

"We decide only the issue as we have defined it — we decide only that the *curfew order*, as applied, and at the time it was applied, was within the boundaries of the war power."

320 U.S. at 320 U. S. 102. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order.*" 320 U.S. at 320 U. S. 105. (Italics supplied.) However, in spite of our limiting words, we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that, in *Hirabayashi*, we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely, and if that, we are told they may also be taken into custody for deportation, and, if that, it is argued, they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course, the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice, as I see them, do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

* Nature of the Judicial Process, p. 51.

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9.4: Brown v. Board of Ed 347 US 483 (1954

U.S. Supreme Court

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

Brown v. Board of Education of Topeka

Argued December 9, 1952

Reargued December 8, 1953

Decided May 17, 1954*

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

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

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. [Footnote 1]

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In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

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they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Fergson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. [Footnote 2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. [Footnote 3]

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Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. [Footnote 4] In the South, the movement toward free common schools, supported

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by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [Footnote 5] The doctrine of

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"separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson, supra*, involving not education but transportation. [Footnote 6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. [Footnote 7] In *Cumming v. County Board of Education*, 175 U. S. 528, and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. [Footnote 8] In more recent cases, all on the graduate school

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level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*,339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter, supra*, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. [Footnote 9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

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the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter, supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents, supra*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

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Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. [Footnote 10]"

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. [Footnote 11] Any language

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in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. [Footnote 12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. [Footnote 13] The Attorney General

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of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954. [Footnote 14]

It is so ordered.

* Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued December 7-8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953, and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

[Footnote 1]

In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and

white students. Kan.Gen.Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const., Art. XI, § 7; S.C.Code § 5377 (1942). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools, and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va.Const., § 140; Va.Code § 22-221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const., Art. X, § 2; Del.Rev.Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (*see* note 10 *infra*), but did not rest his decision on that ground. *Id.* at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[Footnote 2]

344 U. S. 1, 141, 891.

[Footnote 3]

345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae.*

[Footnote 4]

For a general study of the development of public education prior to the Amendment, *see* Butts and Cremin, A History of Education in American Culture (1953), Pts. I, II; Cubberley, Public Education in the United States (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley,

supra, at 288-339, 408-431; Knight, Public Education in the South (1922), cc. VIII, IX.*See also* H. Ex.Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e.g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.* at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, A History of Freedom of Teaching in American Schools (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.

[Footnote 5]

Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); *Strauder v. West Virginia*, 100 U. S. 303, 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also Virginia v. Rives, 100 U. S. 313, 318 (1880); *Ex parte Virginia*, 100 U. S. 339, 344-345 (1880).

[Footnote 6]

The doctrine apparently originated in *Roberts v. City of Boston*, 59 Mass.198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass.Acts 1855, c. 256. But elsewhere in the North, segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[Footnote 7]

See also Berea College v. Kentucky, 211 U. S. 45 (1908).

[Footnote 8]

In the *Cummin* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[Footnote 9]

In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F.Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 149.

[Footnote 10]

A similar finding was made in the Delaware case:

"I conclude from the testimony that, in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."

87 A.2d 862, 865.

[Footnote 11]

K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (Mid-century White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int.J.Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. *And see generally* Myrdal, An American Dilemma (1944).

[Footnote 12]

See Bolling v. Sharpe, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

[Footnote 13]

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment"

"(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or"

"(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

"5. On the assumption on which questions 4(*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),"

"(*a*) should this Court formulate detailed decrees in these cases;"

"(*b*) if so, what specific issues should the decrees reach;"

"(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;"

"(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases and, if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[Footnote 14]

See Rule 42, Revised Rules of this Court (effective July 1, 1954).

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9.5: Loving v. Virginia 388 US 1 (1967)

U.S. Supreme Court

Loving v. Virginia, 388 U.S. 1 (1967)

Loving v. Virginia

No. 395

Argued April 10, 1967

Decided June 12, 1967

388 U.S. 1

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

Syllabus

Virginia's statutory scheme to prevent marriages between persons solely on the basis of racial classifications held to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pp. 388 U. S. 4-12.

206 Va. 924, 147 S.E.2d 78, reversed.

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

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. [Footnote 1] For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June, 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court

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of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 199, the Lovings pleaded guilty to the charge, and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after

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modifying the sentence, affirmed the convictions. [Footnote 2] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U.S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 258 of the Virginia Code:

"*Leaving State to evade law.* — If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 259, which defines the penalty for miscegenation, provides:

"*Punishment for marriage.* — If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding, [Footnote 3] and §§ 20-54 and 1-14 which,

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respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions. [Footnote 4] The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

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Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. [Footnote 5] Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period. [Footnote 6] The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person," [Footnote 7] a prohibition against issuing marriage licenses until the issuing official is satisfied that

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the applicants' statements as to their race are correct, [Footnote 8] certificates of "racial composition" to be kept by both local and state registrars, [Footnote 9] and the carrying forward of earlier prohibitions against racial intermarriage. [Footnote 10]

I

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1965 decision in *Naim v. Naim*,197 Va. 80, 87 S.E.2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. *Id.* at 90, 87 S.E.2d at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska*, 262 U. S. 390 (1923), and *Skinner v. Oklahoma*, 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element

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as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the

Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc. v. New York*, 336 U. S. 106 (1949), or an exemption in Ohio's *ad valorem* tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio,*

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Inc. v. Bowers, 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes, and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem that, although these historical sources "cast some light" they are not sufficient to resolve the problem;

"[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments, and wished them to have the most limited effect."

Brown v. Board of Education, 347 U. S. 483, 347 U. S. 489 (1954). *See also Strauder*

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v. West Virginia, 100 U. S. 303, 100 U. S. 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin v. Florida*, 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace v. Alabama*, 106 U. S. 583 (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin v. Florida, supra,* at 379 U. S. 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose

of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases,* 16 Wall. 36, 83 U. S. 71(1873); *Strauder v. West Virginia,* 100 U. S. 303, 100 U. S. 307-308 (1880); *Ex parte Virginia,* 100 U. S. 339, 100 U. S. 334-335 (1880); *Shelley v. Kraemer,* 334 U. S. 1(1948); *Burton v. Wilmington Parking Authority,* 365 U. S. 715 (1961).

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There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States,* 320 U. S. 81, 320 U. S. 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu v. United States,* 323 U. S. 214, 323 U. S. 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they

"cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."

McLaughlin v. Florida, supra, at 379 U. S. 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. [Footnote 11] We have consistently denied

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the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma,* 316 U. S. 535, 316 U. S. 541 (1942). *See also Maynard v. Hill,* 125 U. S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

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[Footnote 1]

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[Footnote 2]

206 Va. 924, 147 S.E.2d 78 (1966).

[Footnote 3]

Section 257 of the Virginia Code provides:

"*Marriages void without decree.* — All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

Va.Code Ann. § 20-57 (1960 Repl. Vol.).

[Footnote 4]

Section 20-54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term 'white persons.'* — It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Va.Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by "the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocathontas. . . ." Plecker, The New Family and Race Improvement, 17 Va.Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, The *Loving* Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 Va.L.Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

"*Colored persons and Indians defined.* — Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians."

Va.Code Ann. § 1-14 (1960 Repl. Vol.).

[Footnote 5]

After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md.Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala.Const., Art. 4, § 102, Ala.Code, Tit. 14, § 360 (1958); Arkansas, Ark.Stat.Ann. § 55-104 (1947); Delaware, Del.Code Ann., Tit. 13, § 101 (1953); Florida, Fla.Const., Art. 16, § 24, Fla.Stat. § 741.11 (1965); Georgia, Ga.Code Ann. § 53-106 (1961); Kentucky, Ky.Rev.Stat.Ann. § 402.020 (Supp. 1966); Louisiana, La.Rev.Stat. § 14:79 (1950); Mississippi, Miss.Const., Art. 14, § 263, Miss.Code Ann. § 459 (1956); Missouri, Mo.Rev.Stat. § 451.020 (Supp. 1966); North Carolina, N.C.Const., Art. XIV, § 8, N.C.Gen.Stat. § 14-181 (1953); Oklahoma, Okla.Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S.C.Const., Art. 3, § 33, S.C.Code Ann. § 20-7 (1962); Tennessee, Tenn.Const., Art. 11, § 14, Tenn.Code Ann. § 36-402 (1955); Texas, Tex.Pen.Code, Art. 492 (1952); West Virginia, W.Va.Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (1948).

[Footnote 6]

For a historical discussion of Virginia's miscegenation statutes, *see* Wadlington, *supra*, n 4.

[Footnote 7]

Va.Code Ann. § 20-54 (1960 Repl. Vol.).

[Footnote 8]

Va.Code Ann. § 20-53 (1960 Repl. Vol.).

[Footnote 9]

Va.Code Ann. § 20-50 (1960 Repl. Vol.).

[Footnote 10]

Va.Code Ann. § 254 (1960 Repl. Vol.).

[Footnote 11]

Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention, because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida*, 379 U. S. 184, 379 U. S. 198(concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

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9.6: Roe v. Wade 410 US 113 (1973)

U.S. Supreme Court

Roe v. Wade, 410 U.S. 113 (1973)

Roe v. Wade

No. 70-18

Argued December 13, 1971

Reargued October 11, 1972

Decided January 22, 1973

410 U.S. 113

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, *post*, p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast, and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we

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have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U. S. 45, 76 (1905):

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. [Footnote 1] These make it a crime to "procure an abortion," as therein

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defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States. [Footnote 2]

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Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. *See*Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev.Stat., c. 8, Arts. 536-541 (1879); Texas

Rev.Crim.Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [Footnote 3]

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II

Jane Roe, [Footnote 4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint, he alleged that he had been arrested previously for violations of the Texas abortion statutes, and

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that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe, [Footnote 5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that, if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant,

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and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy, and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the

"fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,"

and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (ND Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941 (1971)

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It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell v. Donovan*, 398 U. S. 427 (1970), and *Gunn v. University Committee*, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. *See Carter v. Jury Comm'n*, 396 U. S. 320 (1970); *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. *Cf. Doe v. Bolton*, *post*, p. 179.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U. S. 186, 204 (1962), that insures that

"the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,"

Flast v. Cohen, 392 U. S. 83, 101 (1968), and *Sierra Club v. Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

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A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late a May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F.2d 1121, 1125 (CA2 1971); *Crossen v. Breckenridge*, 446 F.2d 833, 838-839 (CA6 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan.1972). *See Truax v. Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. at 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, [Footnote 6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

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The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.*United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden v. Zwickler, supra; SEC v. Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of

repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). *See Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U. S. 175, 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-633 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

"[I]n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

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James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-692524-H. In both cases, the defendant is charged with abortion. . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant," and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels v. Mackell*, 401 U. S. 66(1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell*, *supra*, and in *Younger v.*

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Harris, 401 U. S. 37 (1971); *Boyle v. Landry*, 401 U. S. 77 (1971); *Perez v. Ledesma*, 401 U. S. 82 (1971); and *Byrne v. Karaleis*, 401 U. S. 216 (1971). *See also Dombrowski v. Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed. [Footnote 7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming

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parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that, sometime in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and, at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place, and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger v. Harris*, 401 U.S. at 41-42; *Golden v. Zwickler*, 394 U.S. at 109-110; *Abele v. Markle*, 452 F.2d at 1124-1125; *Crossen v. Breckenridge*, 446 F.2d at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute v. Camp*, 401 U. S. 617 (1971); *Data Processing Service v. Camp*, 397 U. S. 150 (1970);

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and *Epperson v. Arkansas*, 393 U. S. 97 (1968). *See also Truax v. Raich*, 239 U. S. 33(1915).

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, *see Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *id.* at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

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1. *Ancient attitudes.* These are not capable of precise determination. We are told that, at the time of the Persian Empire, abortifacients were known, and that criminal abortions were severely punished. [Footnote 8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, [Footnote 9] and that "it was resorted to without scruple." [Footnote 10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. [Footnote 11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. [Footnote 12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described

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as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of

the past? [Footnote 13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear:

"I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner, I will not give to a woman a pessary to produce abortion, [Footnote 14]"

or

"I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy. [Footnote 15]"

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe v. Bolton*, *post*, p. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: [Footnote 16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. *See* Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them, the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines,"

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and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity." [Footnote 17]

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion, and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) "give evidence of the violation of almost every one of its injunctions." [Footnote 18] But with the end of antiquity, a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics," and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto, and not the expression of an absolute standard of medical conduct." [Footnote 19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law.* It is undisputed that, at common law, abortion performed before "quickening" — the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [Footnote 20] — was not an indictable offense. [Footnote 21] The absence

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of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. [Footnote 22] This was "mediate animation." Although

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Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that, prior to this point, the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars, and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. [Footnote 23] But the later and predominant view, following the great common law scholars, has

been that it was, at most, a lesser offense. In a frequently cited

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passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder." [Footnote 24] Blackstone followed, saying that, while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. [Footnote 25] A recent review of the common law precedents argues, however, that those precedents contradict Coke, and that even post-quickening abortion was never established as a common law crime. [Footnote 26] This is of some importance, because, while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, [Footnote 27] others followed Coke in stating that abortion

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of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [Footnote 28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but, in § 2, it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85. § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be

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found guilty of the offense

"unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex v. Bourne*, [1939] 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.* at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.* at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a)

"that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated,"

or (b)

"that there is a substantial risk that, if the child were born it would suffer from such physical or mental abnormalities as

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to be seriously handicapped."

The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of

the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the preexisting English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [Footnote 29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. [Footnote 30] In 1828, New York enacted legislation [Footnote 31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it

"shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose."

By 1840, when Texas had received the common law, [Footnote 32] only eight American States

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had statutes dealing with abortion. [Footnote 33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening, but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared, and the typical law required that the procedure actually be necessary for that purpose. Gradually, in the middle and late 19th century, the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. [Footnote 34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. [Footnote 35] Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. [Footnote 36] In

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the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, [Footnote 37] set forth as Appendix B to the opinion in *Doe v. Bolton*, *post*, p. 205.

It is thus apparent that, at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity

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to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May, 1857. It presented its report, 12 Trans. of the Am.Med.Assn. 778 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

"The first of these causes is a widespread popular ignorance of the true character of the crime — a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening."

"The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . ."

"The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus *in utero* and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

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and to its life as yet denies all protection."

Id. at 776. The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.* at 28, 78.

In 1871, a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation,

"We had to deal with human life. In a matter of less importance, we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less."

22 Trans. of the Am.Med.Assn. 268 (1871). It proffered resolutions, adopted by the Association, *id.* at 38-39, recommending, among other things, that it

"be unlawful and unprofessional for any physician to induce abortion or premature labor without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child — if that be possible,"

and calling

"the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females — aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

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patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and.committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available; " and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. [Footnote 38] Proceedings

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of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion. [Footnote 39]

7. *The position of the American Public Health Association.* In October, 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public

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health departments, medical societies, or other nonprofit organizations."

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services."

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications, and not on a routine basis."

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors."

"e. Contraception and/or sterilization should be discussed with each abortion patient."

"Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971). Among factors pertinent to life and health risks associated with abortion were three that 'are recognized as important': "

"a. the skill of the physician,"

"b. the environment in which the abortion is performed, and above all"

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history."

Id. at 397.

It was said that "a well equipped hospital" offers more protection

"to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance."

Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester,

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abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that, at present, abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.* at 398.

8. *The position of the American Bar Association.* At its meeting in February, 1972, the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin. [Footnote 40] The

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Opinion of the Court Conference has appended an enlightening Prefatory Note. [Footnote 41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

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It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. [Footnote 42] The appellants and *amici* contend, moreover, that this is not a proper state purpose, at all and

suggest that, if it were, the Texas statutes are overbroad in protecting it, since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. [Footnote 43] This was particularly true prior to the

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development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. [Footnote 44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

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The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest — some phrase it in terms of duty — in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. [Footnote 45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

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Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. [Footnote 46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. [Footnote 47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health, rather than in preserving the embryo and fetus. [Footnote 48] Proponents of this view point out that in many States, including Texas, [Footnote 49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. [Footnote 50] They claim that adoption of the "quickening" distinction through received common

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law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the eight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U. S. 1, 8-9 (1968), *Katz v. United States*, 389 U. S. 347, 350 (1967), *Boyd v. United States*, 116 U. S. 616(1886), *see Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer v. Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U. S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U. S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453-454; *id*. at 460, 463-465

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(WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944); and childrearing and education, *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer v. Nebraska*, *supra.*

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The

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Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U. S. 200 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights.*Abele v. Markle*, 342 F.Supp. 800 (Conn.1972), *appeal docketed*, No.

72-56; *Abele v. Markle*, 351 F.Supp. 224 (Conn.1972), *appeal docketed*, No. 72-730; *Doe v. Bolton*, 319 F.Supp. 1048 (ND Ga.1970), *appeal decided today, post*, p. 179; *Doe v. Scott*, 321 F.Supp. 1385 (ND Ill.1971), *appeal docketed*, No. 70-105; *Poe v. Menghini*, 339 F.Supp. 986 (Kan.1972); *YWCA v. Kuler*, 342 F.Supp. 1048 (NJ 1972); *Babbitz v. McCann*,

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310 F.Supp. 293 (ED Wis.1970), *appeal dismissed*, 400 U. S. 1 (1970); *People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970); *State v. Barquet*, 262 So.2d 431 (Fla.1972).

Others have sustained state statutes. *Crossen v. Attorney General*, 344 F.Supp. 587 (ED Ky.1972), *appeal docketed*, No. 72-256; *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (ED La.1970), *appeal docketed*, No. 70-42; *Corkey v. Edwards*, 322 F.Supp. 1248 (WDNC 1971), *appeal docketed*, No. 71-92; *Steinberg v. Brown*, 321 F.Supp. 741 (ND Ohio 1970); *Doe v. Rampton* (Utah 1971), *appeal docketed*, No. 71-5666; *Cheaney v. State*, ___ Ind. ___, 285 N.E.2d 265 (1972); *Spears v. State*, 257 So.2d 876 (Miss. 1972); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972), *appeal docketed*, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute, and is subject to some limitations; and that, at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969), *Sherbert v. Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*, 381 U.S. at 485; *Aptheker v. Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U. S. 296, 307-308 (1940); *see*

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Eisenstadt v. Baird, 405 U.S. at 460, 463-464 (WHITE, J., concurring in result).

In the recent abortion cases cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp. at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses,

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for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. [Footnote 51] On the other hand, the appellee conceded on reargument [Footnote 52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;

[Footnote 53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application. [Footnote 54]

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All this, together with our observation, *supra*, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. [Footnote 55] This is in accord with the results reached in those few cases where the issue has been squarely presented.*McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (WD Pa.1972); *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972), *appeal docketed*, No. 72-434; *Abele v. Markle*, 351 F.Supp. 224 (Conn.1972), *appeal docketed*, No. 72-730. *Cf. Cheaney v. State*, ___ Ind. at ___, 285 N.E.2d at 270; *Montana v. Rogers*, 278 F.2d 68, 72 (CA7 1960), *aff'd sub nom. Montana v. Kennedy*, 366 U. S. 308 (1961); *Keeler v. Superior Court*, 2 Cal.3d 619, 470 P.2d 617 (1970); *State v. Dickinson*, 28

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Ohio St.2d 65, 275 N.E.2d 599 (1971). Indeed, our decision in *United States v. Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. *See* Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed.1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

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It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live' birth. This was the belief of the Stoics. [Footnote 56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. [Footnote 57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. [Footnote 58] As we have noted, the common law found greater significance in quickening. Physician and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. [Footnote 59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. [Footnote 60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from

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the moment of conception. [Footnote 61] The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs. [Footnote 62]

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. [Footnote 63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few

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courts have squarely so held. [Footnote 64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. [Footnote 65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. [Footnote 66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches

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term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion

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during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. *See United States v. Vuitch*, 402 U.S. at 67-72.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life

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may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe v. Bolton*, *post*, p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together. [Footnote 67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important

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state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota*, 389 U. S. 241, 252-255 (1967); *Dombrowski v. Pfister*, 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*, 401 U.S. at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment

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of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, *see post*, p. 207.]

[For concurring opinion of MR. JUSTICE DOUGLAS, *see post*, p. 209.]

[For dissenting opinion of MR. JUSTICE WHITE, *see post*, p. 221.]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it:

"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

Id. at 730. [Footnote 1]

Barely two years later, in *Griswold v. Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. [Footnote 2] So it was clear

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to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. [Footnote 3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

"In a Constitution for a free people, there can be no doubt that the meaning of *liberty' must be broad indeed." Board of Regents v. Roth, 408 U. S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U. S. 232, 238-239; Pierce v. Society of Sisters, 268 U. S. 510, 534-535; Meyer v. Nebraska, 262 U. S. 390, 399-400. Cf. Shapiro v. Thompson, 394 U. S. 618, 629-630; United States v. Guest, 383 U. S. 745, 757-758; Carrington v. Rash, 380 U. S. 89, 96; Aptheker v. Secretary of State, 378 U. S. 500, 505; Kent v. Dulles, 357 U. S. 116, 127; Bolling v. Sharpe, 347 U. S. 497, 499-500; Truax v. Raich, 239 U. S. 33, 41.*

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As Mr. Justice Harlan once wrote:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

Poe v. Ullman, 367 U. S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter,

"Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U. S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U. S. 1, 12; *Griswold v. Connecticut*, *supra; Pierce v. Society of Sisters*, *supra; Meyer v. Nebraska*, *supra*. *See also Prince v. Massachusetts*, 321 U. S. 158, 166; *Skinner v. Oklahoma*, 316 U. S. 535, 541. As recently as last Term, in *Eisenstadt v. Baird*, 405 U. S. 438, 453, we recognized

"the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person

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as the decision whether to bear or beget a child."

That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

"Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U. S. 390 (1923)."

Abele v. Markle, 351 F.Supp. 224, 227 (Conn.1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently, or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal

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liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge v. Irvis*, 407 U. S. 163 (1972); *Sierra, Club v. Morton*, 405

U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her last trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may

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impose virtually no restrictions on medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885). *See also Ashwander v. TVA*, 297 U. S. 288, 345 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz v. United States*, 389 U. S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth

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Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.*But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. *See Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

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While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U. S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break

pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn.Stat., Tit. 22, §§ 14, 16. By the time of the adoption of the Fourteenth

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Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. [Footnote 1] While many States have amended or updated

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their laws, 21 of the laws on the books in 1868 remain in effect today. [Footnote 3-2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857,

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and "has remained substantially unchanged to the present time." *Ante* at 119.

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that, at later periods of pregnancy Texas might impose these self-same statutory limitations on abortion. My understanding of past practice is that a statute found

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to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Street v. New York*, 394 U. S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

Footnotes

[Footnote 1]

"Article 1191. Abortion"

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

"Art. 1192. Furnishing the means"

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."

"Art. 1193. Attempt at abortion"

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

"Art. 1194. Murder in producing abortion"

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice"

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child"

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[Footnote 2]

Ariz.Rev.Stat.Ann. § 13-211 (1956); Conn.Pub. Act No. 1 (May 1972 special session) (in 4 Conn.Leg.Serv. 677 (1972)), and Conn.Gen.Stat.Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-601 (1948); Ill.Rev.Stat., c. 38, § 23-1 (1971); Ind.Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky.Rev.Stat. § 436.020 (1962); La.Rev.Stat. § 37: 1285(6) (1964) (loss of medical license) (*but see* § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); Me.Rev.Stat. Ann, Tit. 17, § 51 (1964); Mass.Gen.Laws Ann., c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish v. Bd. of Registration*, 356 Mass. 98, 248 N.E.2d 264 (1969)); Mich.Comp.Laws § 750.14 (1948); Minn.Stat. § 617.18 (1971); Mo.Rev.Stat. § 559.100 (1969); Mont.Rev.Codes Ann. § 94-401 (1969); Neb.Rev.Stat. § 28-405 (1964); Nev.Rev.Stat. § 200.220 (1967); N.H.Rev.Stat.Ann. § 585: 13 (1955); N.J.Stat.Ann. § 2A:87-1 (1969) ("without lawful justification"); N.D.Cent.Code §§ 12-25-01, 12-25-02 (1960); Ohio Rev.Code Ann. § 2901.16 (1953); Okla.Stat.Ann., Tit. 21, § 861 (1972-1973 Supp.); Pa.Stat.Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R.I.Gen.Laws Ann. § 11-3-1 (1969); S.D.Comp.Laws Ann. § 22-17-1 (1967); Tenn.Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt.Stat.Ann., Tit. 13, § 101 (1958); W.Va.Code Ann. § 61-2-8 (1966); Wis.Stat. § 940.04 (1969); Wyo.Stat.Ann. §§ 6-77, 6-78 (1957).

[Footnote 3]

Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question."

Jackson v. State, 55 Tex.Cr.R. 79, 89, 115 S.W. 262, 268 (1908). The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson v. State* (Ct.Crim.App. Tex.1971), *appeal docketed*, No. 71-1200. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth," and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in *[402 U. S.] Vuitch*" (402 U.S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In *Thompson*, n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." *But see Veevers v. State*, 172 Tex.Cr.R. 162, 168-169, 354 S.W.2d 161, 166-167 (1962). *Cf. United States v. Vuitch*, 402 U. S. 62, 69-71 (1971).

[Footnote 4]

The name is a pseudonym.

[Footnote 5]

These names are pseudonyms.

[Footnote 6]

The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries,App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. *See* App. 77.

[Footnote 7]

We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit, and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients. . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp. at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

[Footnote 8]

A. Castiglioni, A History of Medicine 84 (2d ed.1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).

[Footnote 9]

J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed.1950) (hereinafter Ricci); L. Lader, Abortion 75-77 (1966) (hereinafter Lader), K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 37, 38-40 (D. Smith ed.1967); G. Williams, The Sanctity of Life and the Criminal Law 148 (1957) (hereinafter Williams); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3-7 (J. Noonan ed.1970) (hereinafter Noonan); Quay, Justifiable Abortion — Medical and Legal Foundations (pt. 2), 49 Geo.L.J. 395, 40622 (1961) (hereinafter Quay).

[Footnote 10]

L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). *But see*Castiglioni 227.

[Footnote 11]

Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

[Footnote 12]

Edelstein 13-14

[Footnote 13]

Castiglioni 148.

[Footnote 14]

Id. at 154.

[Footnote 15]

Edelstein 3.

[Footnote 16]

Id. at 12, 15-18.

[Footnote 17]

Id. at 18; Lader 76.

[Footnote 18]

Edelstein 63.

[Footnote 19]

Id. at 64.

[Footnote 20]

Dorand's Illustrated Medical Dictionary 1261 (24th ed.1965).

[Footnote 21]

E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129-130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, *see* Lader 78; Noonan 223-226; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality (pt. 1), 14 N.Y.L.F. 411, 418-428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 J.Crim.L.C. & P.S. 84 (1968) (hereinafter Stern); Quay 430-432; Williams 152.

[Footnote 22]

Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male and 80 to 90 days for a female. *See, for example*, Aristotle, Hist.Anim. 7.3.583b; Gen.Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat.Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus.* He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. *See* Augustine, De Origine Animae 4.4 (Pub.Law 44.527). *See also* W. Reany, The Creation of the Human Soul, c. 2 and 83-86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D.C.1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, *see* Means I, pp. 411-412; Noonan 20-26; Quay 426-430; *see also* J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

[Footnote 23]

Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed.1968). *See* Quay 431; *see also* 2 Fleta 661 (Book 1, c. 23) (Selden Society ed.1955).

[Footnote 24]

E. Coke, Institutes III *50.

[Footnote 25]

1 W. Blackstone, Commentaries *129-130.

[Footnote 26]

Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?, 17 N.Y.L.F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion,

coupled with his determination to assert common law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon law crime. *See also* Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, *infra* at 136, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[Footnote 27]

Commonwealth v. Bangs, 9 Mass. 387, 388 (1812); *Commonwealth v. Parker*, 50 Mass. (9 Metc.) 263, 265-266 (1845); *State v. Cooper*, 22 N.J.L. 52, 58 (1849); *Abrams v. Foshee*, 3 Iowa 274, 278-280 (1856); *Smith v. Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell v. Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards v. State*, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907); *Gray v. State*, 77 Tex.Cr.R. 221, 224, 178 S.W. 337, 338 (1915); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). *Contra*, *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850); *State v. Slagle*, 83 N.C. 630, 632 (1880).

[Footnote 28]

See Smith v. State, 33 Me. 48, 55 (1851); *Evans v. People*, 49 N.Y. 86, 88 (1872); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208 (1887).

[Footnote 29]

Conn.Stat., Tit. 20, § 14 (1821).

[Footnote 30]

Conn.Pub. Acts, c. 71, § 1 (1860).

[Footnote 31]

N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661, and Tit. 6, § 21, p. 694 (1829).

[Footnote 32]

Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177-178 (1898); *see Grigsby v. Reib*, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).

[Footnote 33]

The early statutes are discussed in Quay 435-438. *See also* Lader 85-88; Stern 85-86; and Means II 37376.

[Footnote 34]

Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. *See* Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U.Ill.L.F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[Footnote 35]

Ala.Code, Tit. 14, § 9 (1958); D.C.Code Ann. § 22-201 (1967).

[Footnote 36]

Mass.Gen.Laws Ann., c. 272, § 19 (1970); N.J.Stat.Ann. § 2A: 87-1 (1969); Pa.Stat.Ann., Tit. 18, §§ 4718, 4719 (1963).

[Footnote 37]

Fourteen States have adopted some form of the ALI statute. *See* Ark.Stat.Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif.Health & Safety Code §§ 25950-25955.5 (Supp. 1972); Colo.Rev.Stat.Ann. §§ 40-2-50 to 40-2-53 (Cum.Supp. 1967); Del.Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla.Sess.Law Serv., pp. 380-382; Ga.Code §§ 26-1201 to 26-1203 (1972); Kan.Stat.Ann. § 21-3407 (Supp. 1971); Md.Ann.Code, Art. 43, §§ 137-139 (1971); Miss.Code Ann. § 2223 (Supp. 1972); N.M.Stat.Ann. §§ 40A-5-1 to 40A-5-3 (1972); N.C.Gen.Stat. § 14-45.1 (Supp. 1971); Ore.Rev.Stat. §§ 435.405 to 435.495 (1971); S.C.Code Ann. §§ 16-82 to 16-89 (1962 and Supp. 1971); Va.Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972).

Mr. Justice Clark described some of these States as having "led the way." Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L.Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw.Rev.Stat. § 453-16 (Supp. 1971); N.Y.Penal Code § 125.05, subd. 3 (Supp. 1972-1973); Wash.Rev.Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

[Footnote 38]

"Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare, and not mere acquiescence to the patient's demand; and"

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent, should be determinative according to the merits of each individual case; therefore be it"

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further"

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles. In these circumstances, good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice."

Proceedings of the AMA House of Delegates 220 (June 1970).

[Footnote 39]

"The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices."

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

[Footnote 40]

"*UNIFORM ABORTION ACT*"

"SECTION 1. [*Abortion Defined; When Authorized.*]"

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus."

"(b) An abortion may be performed in this state only if it is performed: "

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed] [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, [or political subdivision of either;] or by a female upon herself upon the advice of the physician; and"

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years]."

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary]

not exceeding [5 years], or both."

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it."

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act."

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed: "

"(1)"

"(2)"

"(3)"

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect _____."

[Footnote 41]

"This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy."

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period."

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[Footnote 42]

See, for example, YWCA v. Kugler, 342 F.Supp. 1048, 1074 (N.J.1972); *Abele v. Markle*, 342 F.Supp. 800, 805-806 (Conn.1972) (Newman, J., concurring in result), *appeal docketed*, No. 72-56; *Walsingham v. State*, 250 So.2d 857, 863 (Ervin, J., concurring) (Fla.1971); *State v. Gedicke*, 43 N.J.L. 86, 90 (1881); Means II 381-382.

[Footnote 43]

See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

[Footnote 44]

Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze Lehfeldt, Legal Abortion in Eastern Europe, 175 J.A.M.A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

[Footnote 45]

See Brief of *Amicus* National Right to Life Committee; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith ed.1967); Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233 (1969); Noonan 1.

[Footnote 46]

See, e.g., Abele v. Markle, 342 F.Supp. 800 (Conn.1972), *appeal docketed*, No. 72-56.

[Footnote 47]

See discussions in Means I and Means II.

[Footnote 48]

See, e.g., State v. Murphy, 27 N.J.L. 112, 114 (1858).

[Footnote 49]

Watson v. State, 9 Tex.App. 237, 244-245 (1880); *Moore v. State*, 37 Tex. Cr.R. 552, 561, 40 S.W. 287, 290 (1897); *Shaw v. State*, 73 Tex.Cr.R. 337, 339, 165 S.W. 930, 931 (1914); *Fondren v. State*, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); *Gray v. State*, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett v. State*, 84 Tex.Cr.R. 635, 209 S.W. 661 (1919); *Thompson v. State* (Ct.Crim.App. Tex.1971), *appeal docketed*, No. 71-1200.

[Footnote 50]

See Smith v. State, 33 Me. at 55; *In re Vince*, 2 N.J. 443, 450, 67 A.2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent.Draft No. 9, 1959).

[Footnote 51]

Tr. of Oral Rearg. 20-21.

[Footnote 52]

Tr. of Oral Rearg. 24.

[Footnote 53]

We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[Footnote 54]

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n 49, *supra*, that, in Texas, the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[Footnote 55]

Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis.Stat. § 940.04(6) (1969), and the new Connecticut statute, Pub.Act No. 1 (May 1972 special session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

[Footnote 56]

Edelstein 16.

[Footnote 57]

Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, *see* I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed.1967).

[Footnote 58]

Amicus Brief for the American Ethical Union *et al*. For the position of the National Council of Churches and of other denominations, *see* Lader 99-101.

[Footnote 59]

Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed.1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed.1965).

[Footnote 60]

Hellman & Pritchard, *supra*, n 59, at 493.

[Footnote 61]

For discussions of the development of the Roman Catholic position, *see* D. Callahan, Abortion: Law, Choice, and Morality 409-447 (1970); Noonan 1.

[Footnote 62]

See Brodie, The New Biology and the Prenatal Child, 9 J.Family L. 391, 397 (1970); Gorney, The New Biology and the Future of Man, 15 U.C.L.A.L.Rev. 273 (1968); Note, Criminal Law — Abortion — The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore.L.Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138-139 (1969); Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich.L.Rev. 127 (1968); Note, Artificial Insemination and the Law, 1968 U.Ill.L.F. 203.

[Footnote 63]

W. Prosser, The Law of Torts 335-338 (4th ed.1971); 2 F. Harper & F. James, The Law of Torts 1028-1031 (1956); Note, 63 Harv.L.Rev. 173 (1949).

[Footnote 64]

See cases cited in Prosser, *supra*, n 63, at 336-338; Annotation, Action for Death of Unborn Child, 15 A.L.R.3d 992 (1967).

[Footnote 65]

Prosser, *supra*, n. 63 at 338; Note, The Law and the Unborn Child: The Legal and Logical Inconsistencies, 46 Notre Dame Law. 349, 354-360 (1971).

[Footnote 66]

Louisell, Abortion, The Practice of Medicine and the Due Process of Law, 16 U.C.L.A.L.Rev. 233, 235-238 (1969); Note, 56 Iowa L.Rev. 994, 999-1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351-354 (1971).

[Footnote 67]

Neither in this opinion nor in *Doe v. Bolton*, *post*, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

[Footnote 1]

Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S. at 733.

[Footnote 2]

There is no constitutional right of privacy, as such.

"[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other

forms of governmental invasion. But the protection of a person's General right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States."

Katz v. United States, 389 U. S. 347, 350-351 (footnotes omitted).

[Footnote 3]

This was also clear to Mr. Justice Black, 381 U.S. at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U.S. at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U.S. at 502 (opinion concurring in the judgment). *See also* Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe v. Ullman*, 367 U. S. 497, 522

[Footnote 1]

Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama — Ala. Acts, c. 6, § 2 (1840).

2. Arizona — Howell Code, c. 10, § 45 (1865).

3. Arkansas — Ark.Rev.Stat., c. 44, div. III, Art. II, § 6 (1838).

4. California — Cal.Sess.Laws, c. 99, § 45, p. 233 (1849-1850).

5. Colorado (Terr.) — Colo. Gen.Laws of Terr. of Colo. 1st Sess., § 42, pp 296-297 (1861).

6. Connecticut — Conn.Stat., Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn.Pub. Acts, c. 71, §§ 1, 2, p. 65 (1860).

7. Florida — Fla.Acts 1st Sess., c. 1637, subc. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla.Stat.Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).

8. Georgia Pen.Code, 4th Div., § 20 (1833).

9. Kingdom of Hawaii — Hawaii Pen.Code, c. 12, §§ 1, 2, 3 (1850).

10. Idaho (Terr.) — Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).

11. Illinois — Ill.Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill.Pub.Laws §§ 1, 2, 3, p. 89 (1867).

12. Indiana — Ind.Rev.Stat. §§ 1, 3, p. 224 (1838). By 1868, this statute had been superseded by a subsequent enactment. Ind.Laws, c. LXXXI, § 2 (1859).

13. Iowa (Terr.) — Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev.Stat., c. 49, §§ 10, 13 (1843).

14. Kansas (Terr.) — Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).

15. Louisiana — La.Rev.Stat., Crimes and Offenses § 24, p. 138 (1856).

16. Maine — Me.Rev.Stat., c. 160, §§ 11, 12, 13, 14 (1840).

17. Maryland — Md.Laws, c. 179, § 2, p. 315 (1868).

18. Massachusetts — Mass. Acts & Resolves, c. 27 (1845).

19. Michigan — Mich.Rev.Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).

20. Minnesota (Terr.) — Minn. (Terr.) Rev.Stat., c. 100, § 10, 11, p. 493 (1851).

21. Mississippi — Miss.Code, c. 64, §§ 8, 9, p. 958 (1848).

22. Missouri — Mo.Rev.Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).

23. Montana (Terr.) — Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).

24. Nevada (Terr.) — Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).

25. New Hampshire — N.H.Laws, c. 743, § 1, p. 708 (1848).

26. New Jersey — N.J.Laws, p. 266 (1849).

27. New York — N.Y.Rev.Stat., pt. 4, c. 1, Tit 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N.Y.Laws, c. 260, §§ 1, pp. 285-286 (1845); N.Y.Laws, c. 22, § 1, p. 19 (1846).

28. Ohio — Ohio Gen.Stat. §§ 111(1), 112(2), p. 252 (1841).

29. Oregon — Ore. Gen.Laws, Crim.Code, c. 43, § 509, p. 528 (1845-1864).

30. Pennsylvania — Pa.Laws No. 374, §§ 87, 88, 89 (1860).

31. Texas — Tex. Gen.Stat. Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).

32. Vermont — Vt. Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt.Acts No. 57, §§ 1, 3 (1867).

33. Virginia — Va.Acts, Tit. II, c. 3, § 9, p. 96 (1848).

34. Washington (Terr.) — Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).

35. West Virginia — *See* Va. Acts., Tit. II, c. 3, § 9, p. 96 (1848); W.Va.Const., Art. XI, par. 8 (1863).

36. Wisconsin — Wis.Rev.Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis.Rev.Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[Footnote 2]

Abortion laws in effect in 1868 and still applicable as of August, 1970:

1. Arizona (1865).

2. Connecticut (1860).

3. Florida (1868).

4. Idaho (1863).

5. Indiana (1838).

6. Iowa (1843)

7. Maine (1840).

8. Massachusetts (1845).

9. Michigan (1846).

10. Minnesota (1851).

11. Missouri (1835).

12. Montana (1864).

13. Nevada (1861).

14. New Hampshire (1848).

15. New Jersey (1849).

16. Ohio (1841).

17. Pennsylvania (1860).

18. Texas (1859).

19. Vermont (1867).

20. West Virginia (1863).

21. Wisconsin (1858).

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9.7: Obergefell v. Hodges 576 US ___(2015)

SUPREME COURT OF THE UNITED STATES

Nos. 14–556, 14-562, 14-571 and 14–574

JAMES OBERGEFELL, et al., PETITIONERS

14–556*v.*

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al.;

VALERIA TANCO, et al., PETITIONERS

14–562*v.*

BILL HASLAM, GOVERNOR OF TENNESSEE, et al.;

APRIL DeBOER, et al., PETITIONERS

14–571*v.*

RICK SNYDER, GOVERNOR OF MICHIGAN, et al.; AND

GREGORY BOURKE, et al., PETITIONERS

14–574*v.*

STEVE BESHEAR, GOVERNOR OF KENTUCKY

on writs of certiorari to the united states court of appeals for the sixth circuit

[June 26, 2015]

Chief Justice Roberts, with whom Justice Scalia and Justice Thomas join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.

But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise "neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.

Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage. Many people will rejoice at this decision, and I begrudge none their celebration. But for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. The majority expressly disclaims judicial "caution" and omits even a pretense of humility, openly relying on its desire to remake society according to its own "new insight" into the "nature of injustice." *Ante*, at 11, 23. As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution "is made for people of fundamentally differing views."*Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, "courts are not concerned with the wisdom or policy of legislation." *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own "understanding of what freedom is and must become." *Ante*, at 19. I have no choice but to dissent.

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.

I

Petitioners and their *amici* base their arguments on the "right to marry" and the imperative of "marriage equality." There is no serious dispute that, under our precedents, the Constitution protects a right to marry and requires States to apply their marriage laws equally. The real question in these cases is what constitutes "marriage," or—more precisely—*who decides* what constitutes "marriage"?

The majority largely ignores these questions, relegating ages of human experience with marriage to a paragraph or two. Even if history and precedent are not "the end" of these cases, *ante*, at 4, I would not "sweep away what has so long been settled" without showing greater respect for all that preceded us. *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (slip op., at 8).

A

As the majority acknowledges, marriage "has existed for millennia and across civilizations." *Ante*, at 3. For all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman. See *ante*, at 4; Tr. of Oral Arg. on Question 1, p. 12 (petitioners conceding that they are not aware of any society that permitted same-sex marriage before 2001). As the Court explained two Terms ago, "until recent years, . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *United States* v. *Windsor*, 570 U. S. ___, ___ (2013) (slip op., at 13).

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. See G. Quale, A History of Marriage Systems 2 (1988); cf. M. Cicero, De Officiis 57 (W. Miller transl. 1913) ("For since the reproductive instinct is by nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common.").

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put

it, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." J. Q. Wilson, The Marriage Problem 41 (2002).

This singular understanding of marriage has prevailed in the United States throughout our history. The majority accepts that at "the time of the Nation's founding [marriage] was understood to be a voluntary contract between a man and a woman." *Ante*, at 6. Early Americans drew heavily on legal scholars like William Blackstone, who regarded marriage between "husband and wife" as one of the "great relations in private life," and philosophers like John Locke, who described marriage as "a voluntary compact between man and woman" centered on "its chief end, procreation" and the "nourishment and support" of children. 1 W. Blackstone, Commentaries *410; J. Locke, Second Treatise of Civil Government §§78–79, p. 39 (J. Gough ed. 1947). To those who drafted and ratified the Constitution, this conception of marriage and family "was a given: its structure, its stability, roles, and values accepted by all." Forte, The Framers' Idea of Marriage and Family, in The Meaning of Marriage 100, 102 (R. George & J. Elshtain eds. 2006).

The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with "[t]he whole subject of the domestic relations of husband and wife." *Windsor*, 570 U. S., at ___ (slip op., at 17) (quoting *In re Burrus*, 136 U. S. 586 –594 (1890)). There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way. The four States in these cases are typical. Their laws, before and after statehood, have treated marriage as the union of a man and a woman. See *DeBoer* v. *Snyder*, 772 F. 3d 388, 396–399 (CA6 2014). Even when state laws did not specify this definition expressly, no one doubted what they meant. See *Jones* v. *Hallahan*, 501 S. W. 2d 588, 589 (Ky. App. 1973). The meaning of "marriage" went without saying.

Of course, many did say it. In his first American dictionary, Noah Webster defined marriage as "the legal union of a man and woman for life," which served the purposes of "preventing the promiscuous intercourse of the sexes, . . . promoting domestic felicity, and . . . securing the maintenance and education of children." 1 An American Dictionary of the English Language (1828). An influential 19th-century treatise defined marriage as "a civil status, existing in one man and one woman legally united for life for those civil and social purposes which are based in the distinction of sex." J. Bishop, Commentaries on the Law of Marriage and Divorce 25 (1852). The first edition of Black's Law Dictionary defined marriage as "the civil status of one man and one woman united in law for life." Black's Law Dictionary 756 (1891) (emphasis deleted). The dictionary maintained essentially that same definition for the next century.

This Court's precedents have repeatedly described marriage in ways that are consistent only with its traditional meaning. Early cases on the subject referred to marriage as "the union for life of one man and one woman," *Murphy* v. *Ramsey*, 114 U. S. 15, 45 (1885) , which forms "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard* v. *Hill*, 125 U. S. 190, 211 (1888) . We later described marriage as "fundamental to our very existence and survival," an understanding that necessarily implies a procreative component. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967) ; see *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) . More recent cases have directly connected the right to marry with the "right to procreate." *Zablocki* v. *Redhail*, 434 U. S. 374, 386 (1978) .

As the majority notes, some aspects of marriage have changed over time. Arranged marriages have largely given way to pairings based on romantic love. States have replaced coverture, the doctrine by which a married man and woman became a single legal entity, with laws that respect each participant's separate status. Racial restrictions on marriage, which "arose as an incident to slavery" to promote "White Supremacy," were repealed by many States and ultimately struck down by this Court. *Loving*, 388 U. S., at 6–7.

The majority observes that these developments "were not mere superficial changes" in marriage, but rather "worked deep transformations in its structure."*Ante*, at 6–7. They did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured. *Ante*, at 6.

B

Shortly after this Court struck down racial restrictions on marriage in *Loving*, a gay couple in Minnesota sought a marriage license. They argued that the Constitution required States to allow marriage between people of the same sex for the same reasons that it

requires States to allow marriage between people of different races. The Minnesota Supreme Court rejected their analogy to *Loving*, and this Court summarily dismissed an appeal. *Baker* v. *Nelson*, 409 U. S. 810 (1972) .

In the decades after *Baker*, greater numbers of gays and lesbians began living openly, and many expressed a desire to have their relationships recognized as marriages. Over time, more people came to see marriage in a way that could be extended to such couples. Until recently, this new view of marriage remained a minority position. After the Massachusetts Supreme Judicial Court in 2003 interpreted its State Constitution to require recognition of same-sex marriage, many States—including the four at issue here—enacted constitutional amendments formally adopting the longstanding definition of marriage.

Over the last few years, public opinion on marriage has shifted rapidly. In 2009, the legislatures of Vermont, New Hampshire, and the District of Columbia became the first in the Nation to enact laws that revised the definition of marriage to include same-sex couples, while also providing accommodations for religious believers. In 2011, the New York Legislature enacted a similar law. In 2012, voters in Maine did the same, reversing the result of a referendum just three years earlier in which they had upheld the traditional definition of marriage.

In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.

Petitioners brought lawsuits contending that the Due Process and Equal Protection Clauses of the Fourteenth Amendment compel their States to license and recognize marriages between same-sex couples. In a carefully reasoned decision, the Court of Appeals acknowledged the democratic "momentum" in favor of "expand[ing] the definition of marriage to include gay couples," but concluded that petitioners had not made "the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." 772 F. 3d, at 396, 403. That decision interpreted the Constitution correctly, and I would affirm.

II

Petitioners first contend that the marriage laws of their States violate the Due Process Clause. The Solicitor General of the United States, appearing in support of petitioners, expressly disowned that position before this Court. See Tr. of Oral Arg. on Question 1, at 38–39. The majority nevertheless resolves these cases for petitioners based almost entirely on the Due Process Clause.

The majority purports to identify four "principles and traditions" in this Court's due process precedents that support a fundamental right for same-sex couples to marry. *Ante*, at 12. In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* v. *New York*, 198 U. S. 45 . Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.

A

Petitioners' "fundamental right" claim falls into the most sensitive category of constitutional adjudication. Petitioners do not contend that their States' marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no "Companionship and Understanding" or "Nobility and Dignity" Clause in the Constitution. See *ante*, at 3, 14. They argue instead that the laws violate a right *implied* by the Fourteenth Amendment's requirement that "liberty" may not be deprived without "due process of law."

This Court has interpreted the Due Process Clause to include a "substantive" component that protects certain liberty interests against state deprivation "no matter what process is provided." *Reno* v. *Flores*, 507 U. S. 292, 302 (1993) . The theory is that some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and therefore cannot be deprived without compelling justification. *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

Allowing unelected federal judges to select which unenumerated rights rank as "fundamental"—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role. Our precedents have accordingly insisted that judges "exercise the utmost care" in identifying implied fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997) (internal quotation marks omitted); see Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint 13 (1986)

(Address at Stanford) ("One can conclude that certain essential, or fundamental, rights should exist in any just society. It does not follow that each of those essential rights is one that we as judges can enforce under the written Constitution. The Due Process Clause is not a guarantee of every right that should inhere in an ideal system.").

The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way. The Court first applied substantive due process to strike down a statute in *Dred Scott* v. *Sandford*, 19 How. 393 (1857). There the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so. It asserted that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law." *Id.*, at 450. In a dissent that has outlasted the majority opinion, Justice Curtis explained that when the "fixed rules which govern the interpretation of laws [are] abandoned, and the theoretical opinions of individuals are allowed to control" the Constitution's meaning, "we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Id.*, at 621.

Dred Scott's holding was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox, but its approach to the Due Process Clause reappeared. In a series of early 20th-century cases, most prominently *Lochner* v. *New York*, this Court invalidated state statutes that presented "meddlesome interferences with the rights of the individual," and "undue interference with liberty of person and freedom of contract." 198 U. S., at 60, 61. In *Lochner* itself, the Court struck down a New York law setting maximum hours for bakery employees, because there was "in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law." *Id.*, at 58.

The dissenting Justices in *Lochner* explained that the New York law could be viewed as a reasonable response to legislative concern about the health of bakery employees, an issue on which there was at least "room for debate and for an honest difference of opinion." *Id.*, at 72 (opinion of Harlan, J.). The majority's contrary conclusion required adopting as constitutional law "an economic theory which a large part of the country does not entertain." *Id.*, at 75 (opinion of Holmes, J.). As Justice Holmes memorably put it, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a leading work on the philosophy of Social Darwinism. *Ibid.* The Constitution "is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution." *Id.*, at 75–76.

In the decades after *Lochner*, the Court struck down nearly 200 laws as violations of individual liberty, often over strong dissents contending that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good."*Adkins* v. *Children's Hospital of D. C.*, 261 U. S. 525, 570 (1923) (opinion of Holmes, J.). By empowering judges to elevate their own policy judgments to the status of constitutionally protected "liberty," the *Lochner* line of cases left "no alternative to regarding the court as a . . . legislative chamber." L. Hand, The Bill of Rights 42 (1958).

Eventually, the Court recognized its error and vowed not to repeat it. "The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely," we later explained, "has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963) ; see *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) ("we do not sit as a super-legislature to weigh the wisdom of legislation"). Thus, it has become an accepted rule that the Court will not hold laws unconstitutional simply because we find them "unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) .

Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for "judicial self-restraint." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992) . Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U. S., at 720–721 (internal quotation marks omitted).

Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach. See, *e.g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 72 (2009) ; *Flores*, 507 U. S., at 303; *United States* v. *Salerno*, 481 U. S. 739, 751 (1987) ; *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (plurality opinion); see also *id.*, at 544 (White, J., dissenting) ("The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."); *Troxel* v. *Granville*, 530 U. S. 57 –101 (2000) (Kennedy, J., dissenting) (consulting " '[o]ur Nation's history, legal traditions, and practices' " and concluding that "[w]e owe it to the Nation's domestic relations legal structure . . . to proceed with caution" (quoting *Glucksberg*, 521 U. S., at 721)).

Proper reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. *Ante*, at 18. But given the few "guideposts for responsible decisionmaking in this unchartered area," *Collins*, 503 U. S., at 125, "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore*, 431 U. S., at 504, n. 12 (plurality opinion). Expanding a right suddenly and dramatically is likely to require tearing it up from its roots. Even a sincere profession of "discipline" in identifying fundamental rights, *ante*, at 10–11, does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold*v. *Connecticut*, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment).

B

The majority acknowledges none of this doctrinal background, and it is easy to see why: Its aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*.

1

The majority's driving themes are that marriage is desirable and petitioners desire it. The opinion describes the "transcendent importance" of marriage and repeatedly insists that petitioners do not seek to "demean," "devalue," "denigrate," or "disrespect" the institution. *Ante*, at 3, 4, 6, 28. Nobody disputes those points. Indeed, the compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry. As a matter of constitutional law, however, the sincerity of petitioners' wishes is not relevant.

When the majority turns to the law, it relies primarily on precedents discussing the fundamental "right to marry." *Turner* v. *Safley*, 482 U. S. 78, 95 (1987) ; *Zablocki*, 434 U. S., at 383; see *Loving*, 388 U. S., at 12. These cases do not hold, of course, that anyone who wants to get married has a constitutional right to do so. They instead require a State to justify barriers to marriage as that institution has always been understood. In *Loving*, the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki*, restrictions based on child support debts did not suffice. In *Turner*, restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, *where neither party owes child support or is in prison*." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman *of the same race*." See Tragen, Comment, Statutory Prohibitions Against Interracial Marriage, 32 Cal. L. Rev. 269 (1944) ("at common law there was no ban on interracial marriage"); *post*, at 11–12, n. 5 (Thomas, J., dissenting). Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners." *Ante*, at 11.

In short, the "right to marry" cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here. See *Windsor*, 570 U. S., at ___ (Alito, J., dissenting) (slip op., at 8) ("What Windsor and the United States seek . . . is not the protection of a deeply rooted right but the recognition of a very new

right."). Neither petitioners nor the majority cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.

2

The majority suggests that "there are other, more instructive precedents" informing the right to marry. *Ante*, at 12. Although not entirely clear, this reference seems to correspond to a line of cases discussing an implied fundamental "right of privacy." *Griswold*, 381 U. S., at 486. In the first of those cases, the Court invalidated a criminal law that banned the use of contraceptives. *Id.*, at 485–486. The Court stressed the invasive nature of the ban, which threatened the intrusion of "the police to search the sacred precincts of marital bedrooms." *Id.*, at 485. In the Court's view, such laws infringed the right to privacy in its most basic sense: the "right to be let alone." *Eisenstadt* v. *Baird*, 405 U. S. 438 –454, n. 10 (1972) (internal quotation marks omitted); see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The Court also invoked the right to privacy in *Lawrence* v. *Texas*, 539 U. S. 558 (2003) , which struck down a Texas statute criminalizing homosexual sodomy.*Lawrence* relied on the position that criminal sodomy laws, like bans on contraceptives, invaded privacy by inviting "unwarranted government intrusions" that "touc[h] upon the most private human conduct, sexual behavior . . . in the most private of places, the home." *Id.*, at 562, 567.

Neither *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. *Ante*, at 28. At the same time, the laws in no way interfere with the "right to be let alone."

The majority also relies on Justice Harlan's influential dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497 (1961) . As the majority recounts, that opinion states that "[d]ue process has not been reduced to any formula." *Id.*, at 542. But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan's opinion makes clear that courts implying fundamental rights are not "free to roam where unguided speculation might take them." *Ibid.* They must instead have "regard to what history teaches" and exercise not only "judgment" but "restraint." *Ibid.* Of particular relevance, Justice Harlan explained that "laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis." *Id.*, at 546.

In sum, the privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 196 (1989) ; *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 –37 (1973); *post*, at 9–13 (Thomas, J., dissenting). Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.

3

Perhaps recognizing how little support it can derive from precedent, the majority goes out of its way to jettison the "careful" approach to implied fundamental rights taken by this Court in *Glucksberg*. *Ante*, at 18 (quoting 521 U. S., at 721). It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process. At least this part of the majority opinion has the virtue of candor. Nobody could rightly accuse the majority of taking a careful approach.

Ultimately, only one precedent offers any support for the majority's methodology: *Lochner* v. *New York*, 198 U. S. 45 . The majority opens its opinion by announcing petitioners' right to "define and express their identity." *Ante*, at 1–2. The majority later explains that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Ante*, at 12. This freewheeling notion of individual autonomy echoes nothing so much as "the general right of an individual to be *free in his person* and in his power to contract in relation to his own labor."*Lochner*, 198 U. S., at 58 (emphasis added).

To be fair, the majority does not suggest that its individual autonomy right is entirely unconstrained. The constraints it sets are precisely those that accord with its own "reasoned judgment," informed by its "new insight" into the "nature of injustice," which was invisible to all who came before but has become clear "as we learn [the] meaning" of liberty. *Ante*, at 10, 11. The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to, and that "it would disparage their choices and diminish their personhood to deny them this right." *Ante*, at 19.Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in *Lochner*. See 198 U. S., at 61 ("We do not believe in the soundness of the views which uphold this law," which "is an illegal interference with the rights of individuals . . . to make contracts regarding labor upon such terms as they may think best").

The majority recognizes that today's cases do not mark "the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights." *Ante*, at 25. On that much, we agree. The Court was "asked"—and it agreed—to "adopt a cautious approach" to implying fundamental rights after the debacle of the *Lochner* era. Today, the majority casts caution aside and revives the grave errors of that period.

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Cf. *Brown* v. *Buhman*, 947 F. Supp. 2d 1170 (Utah 2013), appeal pending, No. 14-4117 (CA10). Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," *ante*, at 13, why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," *ante*, at 15, why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," *ante*, at 22, serve to disrespect and subordinate people who find fulfillment in polyamorous relationships? See Bennett, Polyamory: The Next Sexual Revolution? Newsweek, July 28, 2009 (estimating 500,000 polyamorous families in the United States); Li, Married Lesbian "Throuple" Expecting First Child, N. Y. Post, Apr. 23, 2014; Otter, Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage, 64 Emory L. J. 1977 (2015).

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." Tr. of Oral Arg. on Question 2, p. 6. But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

4

Near the end of its opinion, the majority offers perhaps the clearest insight into its decision. Expanding marriage to include same-sex couples, the majority insists, would "pose no risk of harm to themselves or third parties." *Ante*, at 27. This argument again echoes *Lochner*, which relied on its assessment that "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." 198 U. S., at 57.

Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of "due process." There is indeed a process due the people on issues of this sort—the democratic process. Respecting that understanding requires the Court to be guided by law, not any particular school of social thought. As Judge Henry Friendly once put it, echoing Justice Holmes's dissent in *Lochner*, the Fourteenth Amendment does not enact John Stuart

Mill's On Liberty any more than it enacts Herbert Spencer's Social Statics. See Randolph, Before *Roe v. Wade*: Judge Friendly's Draft Abortion Opinion, 29 Harv. J. L. & Pub. Pol'y 1035, 1036–1037, 1058 (2006). And it certainly does not enact any one concept of marriage.

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now. I agree with the majority that the "nature of injustice is that we may not always see it in our own times." *Ante*, at 11. As petitioners put it, "times can blind." Tr. of Oral Arg. on Question 1, at 9, 10. But to blind yourself to history is both prideful and unwise. "The past is never dead. It's not even past." W. Faulkner, Requiem for a Nun 92 (1951).

III

In addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. *Ante*, at 20. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing." G. Stone, L. Seidman, C. Sunstein, M. Tushnet, & P. Karlan, Constitutional Law 453 (7th ed. 2013). The majority's approach today is different:

"Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Ante*, at 19.

The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. *Ante*, at 22. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions. See *Northwest Austin Municipal Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 197 (2009) . In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' "legitimate state interest" in "preserving the traditional institution of marriage." *Lawrence*, 539 U. S., at 585 (O'Connor, J., concurring in judgment).

It is important to note with precision which laws petitioners have challenged. Although they discuss some of the ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents, petitioners' lawsuits target the laws defining marriage generally rather than those allocating benefits specifically. The equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits. Of course, those more selective claims will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples.

IV

The legitimacy of this Court ultimately rests "upon the respect accorded to its judgments." *Republican Party of Minn.* v. *White*, 536 U. S. 765, 793 (2002) (Kennedy, J., concurring). That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law. The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary." *Ante*, at 7–9.

Nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate regarding same-sex marriage. Yes, the majority concedes, on one side are thousands of years of human history in every society known to have populated the planet. But on the other side, there has been "extensive litigation," "many thoughtful District Court decisions," "countless studies, papers, books, and other popular and scholarly writings," and "more than 100" *amicus* briefs in these cases alone. *Ante*, at 9, 10, 23. What would be the point of allowing the democratic process to go on? It is high time for the Court to decide the meaning of marriage, based on five lawyers' "better informed understanding" of "a liberty that remains urgent in our own era." *Ante*, at 19. The answer is surely there in one of those *amicus* briefs or studies.

Those who founded our country would not recognize the majority's conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges. And they certainly would not have been satisfied by a system empowering judges to override policy judgments so long as they do so after "a quite extensive discussion." *Ante*, at 8. In our democracy, debate about the content of the law is not an exhaustion requirement to be checked off before courts can impose their will. "Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unresolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693, 700 (1976). As a plurality of this Court explained just last year, "It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *BAMN*, 572 U. S. ___, ___ –___ (2014) (slip op., at 16–17).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage. They see voters carefully considering same-sex marriage, casting ballots in favor or opposed, and sometimes changing their minds. They see political leaders similarly reexamining their positions, and either reversing course or explaining adherence to old convictions confirmed anew. They see governments and businesses modifying policies and practices with respect to same-sex couples, and participating actively in the civic discourse. They see countries overseas democratically accepting profound social change, or declining to do so. This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again. "That is exactly how our system of government is supposed to work." *Post*, at 2–3 (Scalia, J., dissenting).

But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N. C. L. Rev. 375, 385–386 (1985) (footnote omitted). Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.

Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution. Amdt. 1.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of

course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage.*Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. *Ante*, at 19. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. *Ante*, at 19. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors. *Ante*, at 17, 19, 22, 25. These apparent assaults on the character of fairminded people will have an effect, in society and in court. See *post*, at 6–7 (Alito, J., dissenting). Moreover, they are entirely gratuitous. It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's "better informed understanding" as bigoted.*Ante*, at 19.

In the face of all this, a much different view of the Court's role is possible. That view is more modest and restrained. It is more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues. It is more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment. It is more attuned to the lessons of history, and what it has meant for the country and Court when Justices have exceeded their proper bounds. And it is less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.

* * *

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

I respectfully dissent.

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CHAPTER OVERVIEW

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10.1: Ex Parte Hull – 312 US 546 (1941)

U.S. Supreme Court

Ex parte Hull, 312 U.S. 546 (1941)

Ex parte Hull

No. ___, original

Decided March 3, 1941

312 U.S. 546

ON MOTION FOR LEAVE TO FILE

PETITION FOR WRIT OF HABEAS CORPUS

Syllabus

1. A state prison rule abridging or impairing a prisoner's right to apply to the federal courts for a writ of habeas corpus is invalid. P. 548.

2. A petition for habeas corpus attached as an exhibit to petitioner's response to a warden's return to an order to show cause is treated in this case as a motion for leave to file a petition for the writ. P. 312 U. S. 549.

3. A petition for a writ of habeas corpus to test the validity of a conviction for a second offense, committed while the petitioner was under sentence for a first offense but on parole, and sentence for which has not begun to be served, *held* not premature when revocation of the parole was due to the second conviction. P. 312 U. S. 549.

4. A motion for leave to file a petition for a writ of habeas corpus *held* not sufficient to require answer. P. 312 U. S. 550.

The petition was based on a variance between pleading and proof with respect to the date of the offense. The petitioner was represented by counsel throughout the trial, yet his petition did not say that any objection to evidence, claim of surprise, or motion for continuance was made because of such variance, or that he had an alibi for any other date. The petition did not make clear the extent of any variance, and no transcript of the trial was furnished.

Motion for leave to file a petition for writ of habeas corpus denied.

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MR. JUSTICE MURPHY delivered the opinion of the Court.

In January, 1936, petitioner was convicted of a statutory sex offense and was sentenced to the Michigan state prison at Jackson, Michigan, for an indeterminate term of six months to ten years. About ten months later, he was paroled. In October, 1937, he was convicted of another sex offense, and was returned to the same prison to serve a sentence of two and one-half to five years from entry of the second judgment. Apparently for the sole reason that the second conviction was regarded as a violation of his parole, petitioner was given a hearing before the state parole board and was passed indefinitely toward the maximum sentence for the first offense. *See* Michigan Statutes Annotated, 1940 supplement, § 28.2108.

In November, 1940, petitioner prepared a petition for writ of habeas corpus and exhibits to file in this Court. He took the papers to a prison official and requested him to notarize them. The official refused, and informed petitioner that the papers and a registered letter to the clerk of this Court concerning them would not be accepted for mailing. Although the papers were not notarized, petitioner then delivered them to his father for mailing outside the prison, but guards confiscated them. Several days later, petitioner again attempted to mail a letter concerning his case to the clerk of this Court. It was intercepted and sent to the legal investigator for the state parole board. [Footnote 1] Apparently neither of the letters

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was returned to the petitioner, [Footnote 2] and the papers taken from his father were not returned until late in December.

Petitioner then prepared another document which he somehow managed to have his father, as "agent," file with the clerk of this Court on December 26, 1940. In this document, petitioner detailed his efforts to file the papers confiscated by prison officials,

contended that he was therefore unlawfully restrained, and prayed that he be released.

On January 6, 1941, we issued a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted. The warden filed a return to the rule setting forth the circumstances of the two convictions, the proceedings of the parole board, and numerous exhibits. In justification of the action preventing petitioner from filing his papers or communicating with this Court, the warden alleged that, in November, 1940, he had published a regulation providing that:

"All legal documents, briefs, petitions, motions, habeas corpus proceedings, and appeals will first have to be submitted to the institutional welfare office, and, if favorably acted upon, be then referred to Perry A. Maynard, legal investigator to the Parole Board, Lansing, Michigan.

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Documents submitted to Perry A Maynard, if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

In answer, petitioner filed a "Response to the Return" which again challenged the validity of this regulation and which contained numerous exhibits. One of the exhibits was the petition for writ of habeas corpus taken from petitioner's father. In brief, this petition assailed the legality of petitioner's imprisonment under the second conviction on the ground that he had been denied procedural due process.

The first question concerns the effect of the regulation quoted in the warden's return.

The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.*Compare First National Bank v. Anderson*, 269 U. S. 341, 269 U. S. 346; *Erie Railroad v. Purdy*, 185 U. S. 148, 185 U. S. 152; *Carter v. Texas*, 177 U. S. 442, 177 U. S. 447; *see Ex parte Sharp*, 33 F.Supp. 464.

However, the invalidity of the prison regulation does not compel petitioner's release. For that reason it is necessary to examine the petition annexed to the response. Although it is here as an exhibit to the response, it may be considered as a motion for leave to file a petition for writ of habeas corpus inasmuch as the warden has not had an opportunity to answer it. The next question, therefore, is whether this petition is premature.

The petition is not premature. *Compare McNally v. Hill*, 293 U. S. 131; *In Re Bonner*,151 U. S. 242. Despite

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the fact that petitioner is now in prison under the sentence for the first offense, he was at liberty on parole at the time he was arrested and charged with the second offense. True, parole regulations obligated him to stay within Jackson County, but that is not the imprisonment present in the *McNally* case. Moreover, petitioner's parole was revoked, and he was ordered to serve out his first sentence only because of the second conviction. *See* Michigan Statutes Annotated, *supra*. There is no reason to suppose that he can compel the parole board to review the record of the second conviction, or to make a declaratory ruling that, if that conviction is void, his parole will be reinstated. Thus, the last question is whether the petition, treated as a motion for leave to file a petition for writ of habeas corpus, is sufficient to necessitate an order requiring the warden to answer.

At bottom, petitioner's case is this: that, in the second trial, there was a variance between pleading and proof with respect to the date when the offense was committed, and that petitioner thus was denied the fair notice of the charge guaranteed by the due process clause. From exhibits and rather vague statements in the petition, the following appears: that, in his opening statement and throughout the trial, the prosecutor insisted that the offense occurred on the date charged in the information; that petitioner's defense was that he was elsewhere at the time in question; that some of the testimony tended to fix the date of the offense about a week earlier than that charged in the indictment; that, at the close of all the evidence, petitioner's counsel moved for a directed verdict on the ground that there was no evidence to prove that the offense was committed on the date charged in the information; that the trial judge denied this motion and charged the jury that the precise date was immaterial, it being sufficient to show that the offense occurred during the month previous; that the trial judge

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entered judgment on the jury's verdict of guilty and denied petitioner's motion for a new trial on the same ground urged in the motion for directed verdict, and that the Michigan Supreme Court subsequently denied certiorari.

We conclude that the showing made by the petition and exhibits is insufficient to compel an order requiring the warden to answer. Petitioner was represented by counsel throughout the second trial. Yet there is no claim in the petition that he objected to evidence tending to establish a different date for commission of the offense, or that he claimed surprise, or that he moved for a continuance to enable him to secure other witnesses. He does not allege that, at the time of the trial, he had an alibi for any other date, nor does he make clear the actual extent of any variance. Furthermore, ascertainment of these facts is impossible, since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial. *Compare Hardy v. United States*, 186 U. S. 224, 186 U. S. 225; *Ledbetter v. United States*, 170 U. S. 606, 170 U. S. 612; *Hodgson v. Vermont*, 168 U. S. 262, 168 U. S. 271; *Matthews v. United States*, 161 U. S. 500.

The motion for leave to file a petition for writ of habeas corpus is therefore denied.

Motion denied.

[Footnote 1]

About a week later, petitioner received the following reply from the legal investigator:

"Your letter of November 18, 1940, addressed to the Clerk of the United States Supreme Court, has been referred to the writer for reply. In the first place, your application in its present form would not be acceptable to that court. You must file a petition for whatever relief you are seeking and state your reasons therefor, together with a memorandum brief. Your petition must be verified under oath and supported by proper affidavits, if any you have. Your letter was, no doubt, intercepted for the reason that it was deemed to be inadequate, and which undoubtedly accounts for the fact that it found its way to my desk."

Apparently the legal investigator serves as attorney and advisor to the state parole board. His functions with respect to legal documents of prison inmates appear more fully from the prison regulation quoted hereafter.

[Footnote 2]

Neither of the letters reached the clerk of this Court. On December 12, 1940, petitioner requested the prison superintendent of mail to trace the registered letter, since he had not received the return receipt which accompanied it. The assistant superintendent replied: "This was mailed thru Perry Maynard by orders from Warden." Apparently the legal investigator made no reply.

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10.2: Furman v. Georgia – 408 US 238 (1972)

U.S. Supreme Court

Furman v. Georgia, 408 U.S. 238 (1972)

Furman v. Georgia

No. 69-5003

Argued January 17, 1972

Decided June 29, 1972*

408 U.S. 238

CERTIORARI TO THE SUPREME COURT OF GEORGIA

Imposition and carrying out of death penalty in these cases held to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments.

No. 69-5003, 225 Ga. 253, 167 S.D.2d 628; No. 69-5030, 225 Ga. 790, 171 S.D.2d 501; No. 69-5031, 447 S.W.2d 932, reversed and remanded.

PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia, and was sentenced to death pursuant to Ga.Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia, and was sentenced to death pursuant to Ga.Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S.D.2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas, and was sentenced to death pursuant to Tex.Penal Code, Art. 1189 (1961). 447 S.W.2d 932 (Ct.Crim.App. 1969). Certiorari was granted limited to the following question:

"Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

403 U.S. 952 (1971). The Court holds that the imposition

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and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

So ordered.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL have filed separate opinions in support of the judgments. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST have filed separate dissenting opinions.

MR. JUSTICE DOUGLAS, concurring.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each, the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases, the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. [Footnote 1] I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

That the requirements of due process ban cruel and unusual punishment is now settled. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 329 U. S. 463, and 329 U. S. 473-474 (Burton, J., dissenting); *Robinson v. California*, 370 U. S. 660, 370 U. S. 667. It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature. *Weems v. United States*, 217 U. S. 349, 217 U. S. 378-382.

Congressman Bingham, in proposing the Fourteenth Amendment, maintained that "the privileges or immunities of citizens of the United States," as protected by the Fourteenth Amendment, included protection against "cruel and unusual punishments:"

"[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy, and could provide none."

Cong. Globe, 39th Cong., 1st Sess., 2542.

Whether the privileges and immunities route is followed or the due process route, the result is the same.

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler,*136 U. S. 436, 136 U. S. 447. It is also said in our opinions that the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, *supra*, at 217 U. S. 378. A like statement was made in *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 101, that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties, and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature: [Footnote 2]

"Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account, and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines."

"The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that, 'very likely, there was no clause in the Magna Carta more grateful to the mass of the people.' Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments: "

" A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence, he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way, a villein shall be amerced saving his wainage, if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood."

The English Bill of Rights, enacted December 16, 1689, stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [Footnote 3] These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 1776, [Footnote 4] and in the constitutions

of seven other States. [Footnote 5] The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition of cruel and unusual punishments. [Footnote 6] But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following: [Footnote 7]

"Mr. SMITH, of South Carolina, objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."

"Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

The words "cruel and unusual" certainly include penalties

that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty — or any other penalty — selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. [Footnote 8] Judge Tuttle, indeed, made abundantly clear in *Novak v. Beto*, 43 F.2d 661, 673-679 (CA5) (concurring in part and dissenting in part), that solitary confinement may at times be "cruel and unusual" punishment. *Cf. Ex parte Medley*, 134 U. S. 160; *Brooks v. Florida*, 389 U. S. 413.

The Court in *McGautha v. California*, 402 U. S. 183, 402 U. S. 198, noted that, in this country, there was almost from the beginning a "rebellion against the common law rule imposing a mandatory death sentence on all convicted

murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. [Footnote 9] *Ibid.* But juries "took the

law into their own hands," and refused to convict on the capital offense. *Id.* at 402 U. S. 199.

"In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."

Ibid.

The Court concluded:

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."

Id. at 402 U. S. 207.

The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised. *Id.* at 402 U. S. 207-208.

A recent witness at the Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., Ernest van den Haag, testifying on H.R. 8414 *et al.*, [Footnote 10] stated:

"Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The

vice in this case is not in the penalty, but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is.*"

Id. at 116-117. (Emphasis supplied.)

But those who advance that argument overlook *McGautha*, *supra.*

We are now imprisoned in the *McGautha* holding. Indeed, the seeds of the present cases are in *McGautha*. Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die. [Footnote 11]

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Mr. Justice Field, dissenting in *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 340, said,

"The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration."

What the legislature may not do for all classes uniformly and systematically a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty . . . should be considered *unusually' imposed if it is administered arbitrarily or discriminatorily." [Footnote 12] The same authors add that "[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness." [Footnote 13] The President's Commission on Law Enforcement and Administration of Justice recently concluded: [Footnote 14]*

"Finally, there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed, and carried out on the

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poor, the Negro, and the members of unpopular groups."

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: [Footnote 15]

"Application of the death penalty is unequal: most of those executed were poor, young, and ignorant."

"* * * *"

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"Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty."

"Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty."

Warden Lewis E. Lawes of Sing Sing said: [Footnote 16]

"Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case."

Former Attorney General Ramsey Clark has said, "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." [Footnote 17] One searches our chronicles

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in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none, and a struggle ensued for the scissors, a battle which she lost, and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abrased in the struggle, but was not hospitalized.

Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses — burglary, auto theft, and assault and battery.

Furman, a black, killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his

defense"; and the staff believed "that he is in need of further psychiatric hospitalization and treatment."

Later, the superintendent reported that the staff diagnosis was Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. He concluded, however, that Furman was "not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense."

Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money, and for 30 minutes or more, the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric evidence showing injury to her as a result of Branch's attack.

He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and a half years of grade school education. He had a "dull intelligence," and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Irving Brant has given a detailed account of the Bloody Assizes, the reign of terror that occupied the

closing years of the rule of Charles II and the opening years of the regime of James II (the Lord Chief Justice was George Jeffreys):

"Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys sent to their deaths in the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were awaiting the hangman in three counties. To be absent from home during the uprising was evidence of guilt. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver,"

"a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters"

"along the highways. One could have crossed a good part of northern England by their guidance."

"The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments. But in the polemics that led to the various guarantees of freedom, it had no place compared with the tremendous thrust of the trial and execution of Sidney. The hundreds of judicial murders committed by Jeffreys and his fellow judges were totally inconceivable in a free American republic, but any American could imagine himself in Sidney's place — executed for putting on paper, in his closet, words that later on came to express the basic principles of republican government. Unless barred by fundamental law, the legal rulings that permitted this

result could easily be employed against any person whose political opinions challenged the party in power."

The Bill of Rights 154-155 (1965).

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based not on equal justice, but on discrimination. In those days, the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people.*Id.* at 155-163. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.

In a Nation committed to equal protection of the laws there is no permissible "caste" aspect [Footnote 18] of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu, law a Brahman was exempt from capital punishment, [Footnote 19] and, under that law, "[g]enerally, in the law books, punishment increased in severity as social status diminished." [Footnote 20] We have, I fear, taken in practice the same position, partially as a result of making the death penalty

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discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which, in the overall view, reaches that result in practice [Footnote 21] has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional

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in their operation. They are pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

I concur in the judgments of the Court.

* Together with No. 69-5030, *Jackson v. Georgia*, on certiorari to the same court, and No. 69-5031, *Branch v. Texas*, on certiorari to the Court of Criminal Appeals of Texas.

[Footnote 1]

The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S.E.2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S.E.2d 501. The conviction of Branch of rape and the sentence of death were affirmed by the Court of Criminal Appeals of Texas and reported in 447 S.W.2d 932.

[Footnote 2]

Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 845-846 (1969).

[Footnote 3]

1 W. & M., Sess. 2, c. 2; 8 English Historical Documents, 166 1714, p. 122 (A. Browning ed. 1953).

[Footnote 4]

F. Thorpe, Federal & State Constitutions 3813 (1909).

[Footnote 5]

Delaware, Maryland, New Hampshire, North Carolina, Massachusetts, Pennsylvania, and South Carolina. 1 Thorpe, *supra*, n 4, at 569; 3 *id.* at 1688, 1892; 4 *id.* at 2457; 5 *id.* at 2788, 3101; 6 *id.* at 3264.

[Footnote 6]

Set out in 1 U.S.C. XXXIX-XLI.

[Footnote 7]

Annals of Cong. 754 (1789).

[Footnote 8]

"When, in respect of any class of offenses, the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of banknotes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and, as they could not mitigate the sentence, they brought in verdicts of Not Guilty. The consequence was that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell,"

"been the cause of amending many bad laws which the judges would have administered with professional bigotry, and, above all, it has this important and useful consequence that laws totally repugnant to the feelings of the community for which they are made can not long prevail in England."

W. Forsyth, History of Trial by Jury 367-368 (2d ed. 1971).

[Footnote 9]

This trend was not universally applauded. In the early 1800's, England had a law that made it possible to impose the death sentence for stealing five shillings or more. 3 W. & M., c. 9, § 1. When a bill for abolishing that penalty (finally enacted in 1827, 7 & 8 Geo. 4, c. 27) was before the House of Lords in 1813, Lord Ellenborough said:

"If your Lordships look to t.he particular measure now under consideration, can it, I ask, be seriously maintained, that the most exemplary punishment, and the best suited to prevent the commission of this crime, ought not to be a punishment which might in some cases be inflicted? How, but by the enactments of the law now sought to be repealed, are the cottages of industrious poverty protected? What other security has a poor peasant, when he and his wife leave their home for their daily labours, that, on their return, their few articles of furniture or of clothes which they possess besides those which they carry on their backs, will be safe? . . . [B]y the enacting of the punishment of death, and leaving it to the discretion of the Crown to inflict that punishment or not, as the circumstances of the case may require, I am satisfied, and I am much mistaken if your Lordships are not satisfied, that this object is attained with the least possible expenditure. That the law is, as it has been termed, a bloody law, I can by no means admit. Can there be a better test than by a consideration of the number of persons who have been executed for offences of the description contained in the present Bill? Your Lordships are told what is extremely true, that this number is very small, and this very circumstance is urged as a reason for a repeal of the law; but, before your Lordships are induced to consent to such repeal, I beg to call to your consideration the number of innocent persons who might have been plundered of their property or destroyed by midnight murderers if the law now sought to be repealed had not been in existence — a law upon which all the retail trade of this commercial country depends, and which I, for one, will not consent to be put in jeopardy."

Debate in House of Lords, Apr. 2, 1813, pp. 23-24 (Longman, Hurst, Rees, Orme, & Brown, Paternoster-Row, London 1816).

[Footnote 10]

H.R. 3243, 92d Cong., 1st Sess., introduced by Cong. Celler, would abolish all executions by the United States or by any State.

H.R. 8414, 92d Cong., 1st Sess., introduced by Cong. Celler, would provide an interim stay of all executions by the United States or by any State and contains the following proposed finding:

"Congress hereby finds that there exists serious question — "

"(a) whether the infliction of the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution; and"

"(b) whether the death penalty is inflicted discriminatorily upon members of racial minorities, in violation of the fourteenth amendment to the Constitution,"

"and, in either case, whether Congress should exercise its authority under section 5 of the fourteenth amendment to prohibit the use of the death penalty."

There is the naive view that capital punishment as "meted out in our courts, is the antithesis of barbarism." *See* Henry Paolucci, New York Times, May 27, 1972, p. 29, col. 1. But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed — only those in the lower strata, only those who are members of an unpopular minority or the poor and despised.

[Footnote 11]

The tension between our decision today and *McGautha* highlights, in my view, the correctness of MR. JUSTICE BRENNAN's dissent in that case, which I joined. 402 U.S. at 402 U. S. 248. I should think that if the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on petitioners because they are "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," opinion of MR. JUSTICE STEWART, *post*, at 408 U. S. 309-310, or because

"there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,"

opinion of MR. JUSTICE WHITE, *post*, at 408 U. S. 313, statements with which I am in complete agreement — then the Due Process Clause of the Fourteenth Amendment would render unconstitutional

"capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice."

McGautha v. California, 402 U. S. 183, 402 U. S. 248 (BRENNAN, J., dissenting).

[Footnote 12]

Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1790.

[Footnote 13]

Id. at 1792.

[Footnote 14]

The Challenge of Crime in a Free Society 143 (1967).

[Footnote 15]

Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132, 141 (1969).

In H. Bedau, The Death Penalty in America 474 (1967 rev. ed.), it is stated:

RACE OF THE OFFENDER BY FINAL DISPOSITION

Final Negro White Total

Disposition N % N % N %

Executed 130 88.4 210 79.8 340 82.9

Commuted 17 11.6 53 20.2 70 17.1

Total 147 100.0 263 100.0 410 100.0

X^2=4.33; P less than .05. (For discussion of statistical symbols, *see* Bedau, *supra*, at 469.)

"Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions; nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not proving differential bias by the Pardon Boards over the years since 1914, strongly suggests that such bias has existed."

The latter was a study in Pennsylvania of people on death row between 1914 and 1958, made by Wolfgang, Kelly, & Nolde and printed in 53 J.Crim.L.C. & P.S. 301 (1962). *And see* Hartung, Trends in the Use of Capital Punishment, 284 Annals 8, 14-17 (1952).

[Footnote 16]

Life and Death in Sing Sing 155-160 (1928).

[Footnote 17]

Crime in America 335 (1970).

[Footnote 18]

See Johnson, The Negro and Crime, 217 Annals 93 (1941).

[Footnote 19]

See J. Spellman, Political Theory of Ancient India 112 (1964).

[Footnote 20]

C. Drekmeier, Kingship and Community in Early India 233 (1962).

[Footnote 21]

Cf. B. Prettyman, Jr., Death and The Supreme Court 296-297 (1961).

"The disparity of representation in capital cases raises doubts about capital punishment itself, which has been abolished in only nine states. If a James Avery [345 U.S. 559] can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an Aubry Williams [345 U. S. 349 U.S. 375] can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion."

"The problem of proper representation is not a problem of money, as some have claimed, but of a lawyer's ability, and it is not true that only the rich have able lawyers. Both the rich and the poor usually are well represented — the poor because, more often than not, the best attorneys are appointed to defend them. It is the middle-class defendant, who can afford to hire an attorney but not a very good one, who is at a disadvantage. Certainly William Fikes [352 U. S. 352 U.S. 191], despite the anomalous position in which he finds himself today, received as effective and intelligent a defense from his court-appointed attorneys as he would have received from an attorney his family had scraped together enough money to hire."

"And it is not only a matter of ability. An attorney must be found who is prepared to spend precious hours — the basic commodity he has to sell — on a case that seldom fully compensates him and often brings him no fee at all. The public has no conception of the time and effort devoted by attorneys to indigent cases. And, in a first-degree case, the added responsibility of having a man's life depend upon the outcome exacts a heavy toll."

MR. JUSTICE BRENNAN, concurring.

The question presented in these cases is whether death is today a punishment for crime that is "cruel and unusual" and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict. [Footnote 2/1]

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Almost a century ago, this Court observed that

"[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."

Wilkerson v. Utah, 99 U. S. 130, 99 U. S. 135-136 (1879). Less than 15 years ago, it was again noted that "[t]he exact scope of the constitutional phrase *cruel and unusual' has not been detailed by this Court." Trop v. Dulles*, *356 U. S. 86*, *356 U. S. 99(1958). Those statement remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours." Id. at 356 U. S. 103.*

I

We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes protested:

"What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine,

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what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline."

2 J. Elliot's Debates 111 (2d ed. 1876). Holmes' fear that Congress would have unlimited power to prescribe punishments for crimes was echoed by Patrick Henry at the Virginia convention:

". . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights. — 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. . . . "

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors? —

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That they would not admit of tortures, or cruel and barbarous punishment."

3 *id.* at 447. [Footnote 2/2]

These two statements shed some light on what the Framers meant by "cruel and unusual punishments." Holmes referred to "the most cruel and unheard-of punishments," Henry to "tortures, or cruel and barbarous punishment." It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the specter of the most drastic punishments a legislature might devise.

In addition, it is quite clear that Holmes and Henry focused wholly upon the necessity to restrain the legislative power. Because they recognized "that Congress have to ascertain, point out, and determine what kinds of punishments shall be inflicted on persons convicted of crimes," they insisted that Congress must be limited in its power to punish. Accordingly, they

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called for a "constitutional check" that would ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." [Footnote 2/3]

The only further evidence of he Framers' intent appears from the debates in the First Congress on the adoption of the Bill of Rights. [Footnote 2/4] As the Court noted in *Weems v. United States*, 217 U. S. 349, 217 U. S. 368 (1910),

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the Cruel and Unusual Punishments Clause "received very little debate." The extent of the discussion, by two opponents of the Clause in the House of Representatives, was this:

"Mr. SMITH, of South Carolina, objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite."

"Mr. LIVERMORE. — The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."

"The question was put on the [Eighth Amendment], and it was agreed to by a considerable majority."

1 Annals of Cong. 754 (1789). [Footnote 2/5]

Livermore thus agreed with Holmes and Henry that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe punishments.

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However, in contrast to Holmes and Henry, who were supporting the Clause, Livermore, opposing it, did not refer to punishments that were considered barbarous and torturous. Instead, he objected that the Clause might someday prevent the legislature from inflicting what were then quite common and, in his view, "necessary" punishments — death, whipping, and earcropping. [Footnote 2/6] The only inference to be drawn from Livermore's statement is that the "considerable majority" was prepared to run that risk. No member of the House rose to reply that the Clause was intended merely to prohibit torture.

Several conclusions thus emerge from the history of the adoption of the Clause. We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought "cruel and unusual punishments" were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered "cruel and unusual" at the time. The "import" of the Clause is, indeed, "indefinite," and for good reason. A constitutional provision

"is enacted, it is true, from an experience of evils, but its general language

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should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."

Weems v. United States, 217 U.S. at 217 U. S. 373.

It was almost 80 years before this Court had occasion to refer to the Clause. *See Pervear v. The Commonwealth,* 5 Wall. 475, 72 U. S. 479-480 (1867). These early cases, as the Court pointed out in *Weems v. United States*, *supra*, at 217 U. S. 369, did not undertake to provide "an exhaustive definition" of "cruel and unusual punishments." Most of them proceeded primarily by "looking backwards for examples by which to fix the meaning of the clause," *id.* at 217 U. S. 377, concluding simply that a punishment would be "cruel and unusual" if it were similar to punishments considered "cruel and unusual" at the time the Bill of Rights was adopted. [Footnote 2/7] In *Wilkerson v. Utah*, 99 U.S. at 99 U. S. 136, for instance, the Court found it "safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden." The "punishments of torture," which the Court labeled "atrocities," were cases where the criminal "was embowelled alive, beheaded, and quartered," and cases "of public dissection . . . and burning alive." *Id.* at 99 U. S. 135. Similarly, in *In re Kemmler,*

136 U. S. 436, 136 U. S. 446 (1890), the Court declared that,

"if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

The Court then observed, commenting upon the passage just quoted from *Wilkerson v. Utah*, *supra*, and applying the "manifestly cruel and unusual" test, that

"[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

136 U.S. at 136 U. S. 447.

Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in *Weems v. United States*, *supra*, at 217 U. S. 371, this interpretation led Story to conclude

"that the provision 'would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.'"

And Cooley, in his book, Constitutional Limitations, said the Court,

"apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, . . . hesitate[d] to advance definite views."

Id. at 217 U. S. 375. The result of a judicial application of this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: "In comparison with the *barbarities of quartering, hanging in chains, castration, etc.,' it was easily reduced to insignificance." Id. at 217 U. S. 377.*

But this Court in *Weems* decisively repudiated the "historical" interpretation of the Clause. The Court, returning to the intention of the Framers, "rel[ied] on the conditions which existed when the Constitution was adopted." And the Framers knew

"that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men."

Id. at 217 U. S. 375. The Clause, then, guards against "[t]he abuse of power"; contrary to the implications in *Wilkerson v. Utah*, *supra*, and *In re Kemmler, supra*,the prohibition of the Clause is not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." 217 U.S. at 217 U. S. 372. Although opponents of the Bill of Rights "felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation," *ibid.*, the Framers disagreed:

"[Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their [jealousy] of power had a saner justification than that. They

were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they

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might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the [Stuarts',] or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked."

Id. at 217 U. S. 372-373.

The Court in *Weems* thus recognized that this "restraint upon legislatures" possesses an "expansive and vital character" that is "*essential . . . to the rule of law and the maintenance of individual freedom.'" Id. at 217 U. S. 376-377. Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced. [Footnote 2/8] Referring to cases in which "prominence [was] given to the power of the legislature to define crimes and their punishment," the Court said:*

"We concede the power in most of its exercises. We disclaim the right to assert a judgment

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against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked."

Id. at 217 U. S. 378. [Footnote 2/9]

In short, this Court finally adopted the Framers' view of the Clause as a "constitutional check" to ensure that, "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is "cruel and unusual" "depend[ed] upon virtually unanimous condemnation of the penalty at issue," then,

"[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom."

We know that the Framers did not envision "so narrow a role for this basic guaranty of human rights." Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1782 (1970). The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; [it] depend[s] on the outcome of no elections."

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied

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by the courts."

Board of Education v. Barnette, 319 U. S. 624, 319 U. S. 638 (1943).

Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the "legal principles to be applied by the courts" when a legislatively prescribed punishment is challenged as "cruel and unusual." In formulating those constitutional principles, we must avoid the insertion of "judicial conception[s] of . . . wisdom or propriety," *Weems v. United States*, 217 U.S. at 217 U. S. 379, yet we must not, in the guise of "judicial restraint," abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the "constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." *Id.* at 217 U. S. 373. The Cruel and Unusual Punishments Clause would become, in short, "little more than good advice." *Trop v. Dulles*, 356 U.S. at 356 U. S. 104.

II

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know "that the words of the [Clause] are not precise, and that their scope is not static." We know, therefore, that the Clause "must draw its meaning from the evolving standards of decency that mark the progress

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of a maturing society." *Id.* at 356 U. S. 100-101. [Footnote 2/10] That knowledge, of course, is but the beginning of the inquiry.

In *Trop v. Dulles*, *supra*, at 356 U. S. 99, it was said that "[t]he question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]." It was also said that a challenged punishment must be examined "in light of the basic prohibition against inhuman treatment" embodied in the Clause. *Id.* at 356 U. S. 100 n. 32. It was said, finally, that:

"The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards."

Id. at 356 U. S. 100. At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

This formulation, of course, does not, of itself, yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though "[t]his Court has had little occasion to give precise content to the [Clause]," *ibid.*, there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity.

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The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. *See Weems v. United States*, 217 U.S. at 217 U. S. 366. [Footnote 2/11] Yet the Framers also knew "that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Id.* at 217 U. S. 372. Even though "[t]here may be involved no physical mistreatment, no primitive torture," *Trop v. Dulles*, *supra*, at 356 U. S. 101, severe mental pain may be inherent in the infliction of a particular punishment. *See Weems v. United States*, *supra*, at 217 U. S. 366. [Footnote 2/12] That, indeed, was one of the conclusions underlying the holding of the plurality in *Trop v. Dulles* that the punishment of expatriation violates the Clause. [Footnote 2/13] And the

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physical and mental suffering inherent in the punishment of *cadena temporal*, *see*nn. <l=|408 u.s.="" 238fn2="" 11|="">11-12, *supra*, was an obvious basis for the Court's decision in *Weems v. United States* that the punishment was "cruel and unusual." [Footnote 2/14]</l=|408>

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," are, of course, "attended with acute pain and suffering." *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 339 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat

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members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

The infliction of an extremely severe punishment, then, like the one before the Court in *Weems v. Unite States*, from which "[n]o circumstance of degradation [was] omitted," 217 U.S. at 217 U. S. 366, may reflect the attitude that the person punished is not

entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself. In *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 329 U. S. 464 (1947), for example, the unsuccessful electrocution, although it caused "mental anguish and physical pain," was the result of "an unforeseeable accident." Had the failure been intentional, however, the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it is a punishment. A State may not punish a person for being "mentally ill, or a leper, or . . . afflicted with a venereal disease," or for being addicted to narcotics. *Robinson v. California*,370 U. S. 660, 370 U. S. 666 (1962). To inflict punishment for having a disease is to treat the individual as a diseased thing, rather than as a sick human being. That the punishment is not severe, "in the abstract," is irrelevant; "[e]ven one day in prison would be a cruel and unusual punishment for the *crime' of having a common cold." Id. at 370 U. S. 667. Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a "punishment more primitive than torture," Trop v. Dulles,* 356 U.S. at 356 U. S. 101*, for it necessarily involves a*

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denial by society of the individual's existence as a member of the human community. [Footnote 2/15]

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause — that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause [Footnote 2/16] reveals a particular concern with the establishment of a safeguard against arbitrary punishments. *See* Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 857-860 (1969). [Footnote 2/17]

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This principle has been recognized in our cases. [Footnote 2/18] In *Wilkerson v. Utah,* 99 U.S. at 99 U. S. 133-134, the Court reviewed various treatises on military law in order to demonstrate that, under "the custom of war," shooting was a common method of inflicting the punishment of death. On that basis, the Court concluded:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [treatises on military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that

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category, within the meaning of the [Clause]. Soldiers convicted of desertion or other capital military offenses are, in the great majority of cases, sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial."

Id. at 99 U. S. 134-135. The Court thus upheld death by shooting, so far as appears, solely on the ground that it was a common method of execution. [Footnote 2/19]

As *Wilkerson v. Utah* suggests, when a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases, *Trop v. Dulles,* 356 U.S. at 356 U. S. 101 n. 32, [Footnote 2/20] there is a substantial

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likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes "in an enlightened democracy such as ours," *id.* at 356 U. S. 100, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment doe not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible. [Footnote 2/21]

Thus, for example, *Weems v. United States*, 217 U.S. at 217 U. S. 380, and *Trop v. Dulles*, 356 U.S. at 356 U. S. 102-103, suggest that one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. *Wilkerson v. Utah*, *supra*, suggests that another factor to be considered is the historic usage of the punishment. [Footnote 2/22] *Trop v. Dulles*, *supra*, at 356 U. S. 99, combined present acceptance with past usage by observing that

"the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

In *Robinson v. California*, 370 U.S. at 370 U. S. 666, which involved the infliction of punishment for narcotics addiction, the Court went a step further, concluding simply that,

"in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment."

The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial

task is to review the history of a challenged punishment and to examine society's present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: the infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, *cf. Robinson v. California*, *supra*, at 370 U. S. 666; *id.* at370 U. S. 677 (DOUGLAS, J., concurring); *Trop v. Dulles*, *supra*, at 356 U. S. 114(BRENNAN, J., concurring), the punishment inflicted is unnecessary, and therefore excessive.

This principle first appeared in our cases in Mr. Justice Field's dissent in *O'Neil v. Vermont*, 144 U.S. at 144 U. S. 337. [Footnote 2/23] He there took the position that:

"[The Clause] is directed not only against punishments of the character mentioned [torturous punishments], but against all punishments which, by

their excessive length or severity, are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."

Id. at 144 U. S. 339-340. Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, [Footnote 2/24] the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems v. United States*, *supra*. There the Court, reviewing a severe punishment inflicted for the falsification of an official record, found that

"the highest punishment possible for a crime which may cause the loss of many thousand[s] of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account."

Id. at 217 U. S. 381. Stating that "this contrast shows more than different exercises of legislative judgment," the Court concluded that the punishment was unnecessarily severe in view of the purposes for which it was imposed. *Ibid.*[Footnote 2/25]

See also Trop v. Dulles, 356 U.S. at 356 U. S. 111-112 (BRENNAN, J., concurring). [Footnote 2/26]

There are, then, four principles by which we may determine whether a particular punishment is "cruel and unusual." The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not, by its

severity, be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet "[i]t is unlikely that any State at this moment in history," *Robinson v. California*, 370 U.S. at 370 U. S. 666, would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle.

Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. *See Weems v. United States*,217 U. S. 349 (1910) (12 years in chains at hard and painful labor); *Trop v. Dulles*,356 U. S. 86 (1958) (expatriation); *Robinson v. California*, 370 U. S. 660 (1962) (imprisonment for narcotics addiction). Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these "cruel and unusual punishments" seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and, in most cases, it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual." The test, then, will ordinarily be a cumulative one: if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

III

The punishment challenged in these cases is death. Death, of course, is a "traditional" punishment, *Trop v. Dulles*, *supra*, at 356 U. S. 100, one that "has been employed throughout our history," *id.* at 356 U. S. 99, and its constitutional

background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. [Footnote 2/27] We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishment Clause. [Footnote 2/28] Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. *See supra* at 408 U. S. 262. Finally, it does not advance analysis to insist that the Framers did not believe that adoption

of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, *see* <l=|408 u.s.="”” 238fn2="”” 6|="”">n. 6, *supra*, are now acknowledged to be impermissible. [Footnote 2/29]</l=|408>

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of inflicting this punishment. In *Wilkerson v. Utah*, 99 U. S. 130 (1879), and *In re Kemmler*, 136 U. S. 436 (1890), the Court, expressing in both cases the since-rejected "historical" view of the Clause, *see supra* at 408 U. S. 264-265, approved death by shooting and death by electrocution. In *Wilkerson*, the Court concluded that shooting was a common method of execution, *see*

supra at 408 U. S. 275-276; [Footnote 2/30] in *Kemmler*,the Court held that the Clause did not apply to the States, 136 U.S. at 136 U. S. 447-449. [Footnote 2/31]

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In *Louisiana ex rel. Francis v. Resweber, supra*, the Court approved a second attempt at electrocution after the first had failed. It was said that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner," 329 U.S. at 329 U. S. 463, but that the abortive attempt did not make the "subsequent execution any more cruel in the constitutional sense than any other execution," *id.* at 329 U. S. 464. [Footnote 2/32] These three decisions thus reveal that the Court, while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment. [Footnote 2/33] Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms of the principles

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set out above and the cumulative test to which they lead: it is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a "cruel and unusual" punishment. Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly, the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, *see infra* at 408 U. S. 296-298, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view.

"As all practicing lawyers know who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty."

Griffin v. Illinois, 351 U. S. 12, 351 U. S. 28 (1956) (Burton and Minton, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases.

"It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations."

Ibid. See Williams v. Florida, 399 U. S. 78, 399 U. S. 103 (1970) (all States require juries of 12 in death cases). This Court, too, almost

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always treats death cases as a class apart. [Footnote 2/34] And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. [Footnote 2/35] Since the discontinuance

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of flogging as a constitutionally permissible punishment, *Jackson v. Bishop*, 404 F.2d 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. *Cf. Ex parte Medley*,134 U. S. 160, 134 U. S. 172

(1890). As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *People v. Anderson*, 6 Cal.3d 28, 649, 493 P.2d 880, 894 (1972). [Footnote 2/36] Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting

execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom*, 339 U. S. 9, 339 U. S. 14 (1950) (dissenting opinion). The "fate of ever-increasing fear and distress" to which the expatriate is subjected, *Trop v. Dulles*, 356 U.S. at 356 U. S. 102, can only exist to a greater degree for a person confined in prison awaiting death. [Footnote 2/37]

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that "destroys for the individual the political existence that was centuries in the development," that "strips the citizen of his status in the national and international political community," and that puts "[h]is very existence" in jeopardy. Expatriation thus inherently entails "the total destruction of the individual's status in organized society." *Id.* at 101. "In short, the expatriate has lost the right to have rights." *Id.* at 102. Yet, demonstrably, expatriation is not "a fate worse than death." *Id.* at 125 (Frankfurter, J., dissenting). [Footnote 2/38] Although death, like expatriation, destroys the

individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is, too, at least the possibility that the expatriate will, in the future, regain "the right to have rights." Death forecloses even that possibility.

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, *see Witherspoon v. Illinois*, 391 U. S. 510 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared,

"When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.' [Footnote 2/39] "

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle — that the State may not arbitrarily inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. [Footnote 2/40] Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences

was imposed each year. [Footnote 2/41] Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of Years, [Footnote 2/42] transfers to mental institutions because of insanity, [Footnote 2/43] resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes. [Footnote 2/44] On January 1, 1961, the death row population was 21; on December 31, 1970, it was 608; during that span, there were 135 executions. [Footnote 2/45] Consequently, had the 389 additions to death row also been executed, the annual average would have been 52. [Footnote 2/46] In short, the country

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might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two. [Footnote 2/47]

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized — as "freakishly" or "spectacularly" rare, or simply as rare — it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per

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year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme." [Footnote 2/48] Furthermore, our procedures in death cases,

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rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. *McGautha v. California*, 402 U. S. 183, 402 U. S. 196-208 (1971). In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it, "wantonly and . . . freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.

I cannot add to my Brother MARSHALL's comprehensive treatment of the English and American history of

this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world,

the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries. [Footnote 2/49]

It is this essentially moral conflict that forms the backdrop for the past changes in, and the present operation of, our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant change has been in our methods of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly

more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased. [Footnote 2/50] Our concern for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.

Also significant is the drastic decrease in the crimes for which the punishment of death is actually inflicted. While esoteric capital crimes remain on the books, since 1930, murder and rape have accounted for nearly 99% of the total executions, and murder alone for about 87%. [Footnote 2/51] In addition, the crime of capital murder has itself been limited. As the Court noted in *McGautha v. California*, 402 U.S. at 402 U. S. 198, there was in this country a "rebellion against the common law rule imposing a mandatory death sentence on all convicted murderers." Initially, that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet

"[t]his new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of 'malice aforethought,'"

ibid., the common law means of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but, even in clear cases of first-degree murder, juries continued to take the law into

their own hands: if they felt that death was an inappropriate punishment, "they simply refused to convict of the capital offense." *Id.* at 402 U. S. 199. The phenomenon of jury nullification thus remained to counteract the rigors of mandatory death sentences. Bowing to reality,

"legislatures did not try, as before, to refine further the definition of capital homicides. Instead, they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."

Ibid. In consequence, virtually all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer inflict the punishment of death under any circumstances, [Footnote 2/52] and five others have restricted it to extremely rare crimes. [Footnote 2/53]

Thus, although "the death penalty has been employed throughout our history," *Trop v. Dulles*, 356 U.S. at 356 U. S. 99, in fact the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted. It is, of course, "We, the People" who are responsible for the rarity both of the imposition and the carrying out of this punishment. Juries, "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. at 391 U. S. 519, have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available. Governors, elected by and acting for us, have regularly commuted a substantial number of those sentences. And it is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out. In sum, we have made death a rare punishment today.

The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today. The States point out that many legislatures authorize death as the punishment for certain crimes, and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet the availability of this punishment through statutory authorization, as well as the polls and referenda,

which amount simply to approval of that authorization, simply underscores the extent to which our society has, in fact, rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.

The final principle to be considered is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment. The first part of this claim is that the infliction of death is necessary to stop the individuals executed from committing further crimes. The sufficient answer to this is that, if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate

or minimize the danger while he remains confined. The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent.

It is important to focus upon the precise import of this argument. It is not denied that many, and probably most, capital crimes cannot be deterred by the threat of punishment. Thus, the argument can apply only to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal, under this argument, must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential

criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether, under any imaginable circumstances, the

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threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that, as currently administered, the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment. [Footnote 2/54]

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There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes, and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment, rather than death, encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it. The assertion that death alone is a sufficiently emphatic denunciation for capital crimes suffers from the same defect. If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does, in fact, strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. In any event, this claim simply means that one purpose of punishment is to indicate social disapproval of crime. To serve that purpose, our

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laws distribute punishments according to the gravity of crimes, and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity.

There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it.

Although it is difficult to believe that any State today wishes to proclaim adherence to "naked vengeance," *Trop v. Dulles*, 356 U.S. at 356 U. S. 112 (BRENNAN, J., concurring), the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past, judged by its statutory authorization, death was considered the only fit punishment for the crime of forgery, for the first federal criminal statute provided a mandatory death penalty for that crime. Act of April 30, 1790, § 14, 1 Stat. 115. Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that, for capital crimes, death alone comports with society's notion of proper

punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number af criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random

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few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

In sum, the punishment of death is inconsistent with all four principles: death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time, successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishment Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison.

"The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime

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is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."

Weems v. United States, 217 U.S. at 217 U. S. 381.

I concur in the judgments of the Court.

[Footnote 2/1]

The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*"

(Emphasis added.) The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment.*Robinson v. California*, 370 U. S. 660 (1962); *Gideon v. Wainwright*, 372 U. S. 335, 372 U. S. 342 (1963); *Malloy v. Hogan*, 378 U. S. 1, 378 U. S. 6 n. 6 (1964); *Powell v. Texas*,392 U. S. 514 (1968).

[Footnote 2/2]

Henry continued:

"But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

3 J. Elliot's Debates 447-448 (2d ed. 1876). Although these remarks have been cited as evidence that the Framers considered only torturous punishments to be "cruel and unusual," it is obvious that Henry was referring to the use of torture for the purpose of eliciting confessions from suspected criminals. Indeed, in the ensuing colloquy, *see* <l=|408 u.s.="" 238fn2="" 3|="">n. 3, *infra.*

George Mason responded that the use of torture was prohibited by the right against self-incrimination contained in the Virginia Bill of Rights.</l=|408>

[Footnote 2/3]

It is significant that the response to Henry's plea, by George Nicholas, was simply that a Bill of Rights would be ineffective as a means of restraining the legislative power to prescribe punishments:

"But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments, and that, consequently, we are not free from torture. . . . If we had no security against torture but our [Virginia] declaration of rights, we might be tortured tomorrow, for it has been repeatedly infringed and disregarded."

3 J. Elliot's Debates, *supra*, at 451. George Mason misinterpreted Nicholas' response to Henry:

"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture, for that one clause expressly provided that no man can give evidence against himself, and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition."

Id. at 452. Nicholas concluded the colloquy by making his point again:

"Mr. NICHOLAS acknowledged the [Virginia] bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity."

Ibid. There was thus no denial that the legislative power should be restrained; the dispute was whether a Bill of Rights would provide a realistic restraint. The Framers, obviously, believed it would.

[Footnote 2/4]

We have not been referred to any mention of the Cruel and Unusual Punishments Clause in the debates of the state legislatures on ratification of the Bill of Rights.

[Footnote 2/5]

The elided portion of Livermore's remarks reads:

"What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine."

Since Livermore did not ask similar rhetorical questions about the Cruel and Unusual Punishments Clause, it is unclear whether he included the Clause in his objection that the Eighth Amendment "seems to have no meaning in it."

[Footnote 2/6]

Indeed, the first federal criminal statute, enacted by the First Congress, prescribed 39 lashes for larceny and for receiving stolen goods, and one hour in the pillory for perjury. Act of Apr. 30, 1790, §§ 16-18, 1 Stat. 116.

[Footnote 2/7]

Many of the state courts, "feeling constrained thereto by the incidences of history," *Weems v. United States*, 217 U. S. 349, 217 U. S. 376 (1910), were apparently taking the same position. One court

"expressed the opinion that the provision did not apply to punishment by 'fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel,' etc."

Ibid. Another court

"said that, ordinarily, the terms imply something inhuman and barbarous, torture and the like. . . . Other cases . . . selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition."

Id. at 217 U. S. 368.

[Footnote 2/8]

The Court had earlier emphasized this point in *In re Kemmler*, 136 U. S. 436 (1890), even while stating the narrow, "historical" interpretation of the Clause:

"This [English] Declaration of Rights had reference to the acts of the *executive* and *judicial* departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the *legislature* of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, . . . it would be the duty of the *courts* to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the [Clause], in its application to *Congress*."

Id. at 136 U. S. 446-447 (emphasis added).

[Footnote 2/9]

Indeed, the Court in *Weems* refused even to comment upon some decisions from state courts because they were "based upon sentences of courts, not upon the constitutional validity of laws." 217 U.S. at 217 U. S. 377.

[Footnote 2/10]

The Clause

"may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

Weems v. United States, 217 U.S. at 217 U. S. 378.

[Footnote 2/11]

"It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

[Footnote 2/12]

"His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."

[Footnote 2/13]

"This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious."

Trop v. Dulles, 356 U. S. 86, 356 U. S. 102 (1958). *Cf. id.* at 356 U. S. 110-111 (BRENNAN, J., concurring):

"[I]t can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. . . . Nevertheless, it cannot be denied that the impact of expatriation — especially where statelessness is the upshot — may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment."

[Footnote 2/14]

"It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."

Weems v. United States, 217 U.S. at 217 U. S. 377.

[Footnote 2/15]

"There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights."

Trop v. Dulles, 356 U.S. at 356 U. S. 101-102.

[Footnote 2/16]

"The phrase in our Constitution was taken directly from the English Declaration of Rights of [1689]. . . ." *Id.* at 356 U. S. 100.

[Footnote 2/17]

The specific incident giving rise to the provision was the perjury trial of Titus Oates in 1685.

"None of the punishments inflicted upon Oates amounted to torture. . . . In the context of the Oates' case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."

Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 859 (1969). Thus, "[t]he irregularity and anomaly of Oates' treatment was extreme." Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1789 n. 74 (1970). Although the English provision was intended to restrain the judicial and executive power, *see* <l=|408 u.s.="" 238fn2="" 8|="">n. 8, *supra*,the principle is, of course, fully applicable under our Clause, which is primarily a restraint upon the legislative power.</l=|408>

[Footnote 2/18]

In a case from the Philippine Territory, the Court struck down a punishment that "ha[d] no fellow in American legislation." *Weems v. United States*, 217 U.S. at 217 U. S. 377. After examining the punishments imposed, under both United States and Philippine law, for similar as well as more serious crimes, *id.* at 217 U. S. 380-381, the Court declared that the "contrast"

"exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice,"

id. at 217 U. S. 381. And in *Trop v. Dulles*, *supra*, in which a law of Congress punishing wartime desertion by expatriation was held unconstitutional, it was emphasized that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.* at 356 U. S. 102. When a severe punishment is not inflicted elsewhere, or when more serious crimes are punished less severely, there is a strong inference that the State is exercising arbitrary, "unrestrained power."

[Footnote 2/19]

In *Weems v. United States*, *supra*, at 217 U. S. 369-370, the Court summarized the holding of *Wilkerson v. Utah*, 99 U. S. 130 (1879), as follows:

"The court pointed out that death was an usual punishment for murder, that it prevailed in the Territory for many years, and was inflicted by shooting, also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual."

[Footnote 2/20]

It was said in *Trop v. Dulles*, *supra*, at 356 U. S. 100-101, n. 32, that,

"[o]n the few occasions this Court has had to consider the meaning of the [Clause], precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel,'

however, the meaning should be the ordinary one, signifying something different from that which is generally done."

There are other statements in prior cases indicating that the word "unusual" has a distinct meaning: "We perceive nothing . . . unusual in this [punishment]." *Pervear v. The Commonwealth,* 5 Wall. 475, 72 U. S. 480 (1867). "[T]he judgment of mankind would be that the punishment was not only an unusual, but a cruel one. . . ." *O'Neil v. Vermont,* 144 U. S. 323, 144 U. S. 340 (1892) (Field, J., dissenting). "It is unusual in its character." *Weems v. United States, supra,* at 217 U. S. 377. "And the punishment inflicted . . . is certainly unusual." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson,* 255 U. S. 407, 255 U. S. 430 (1921) (Brandeis, J., dissenting). "The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history." *Id.* at 255 U. S. 435. "There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful?" *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459, 329 U. S. 479 (1947) (Burton, J., dissenting). "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Robinson v. California,* 370 U.S. at 370 U. S. 667.

It is fair to conclude from these statements that "[w]hether the word *unusual' has any qualitative meaning different from `cruel' is not clear." Trop v. Dulles, supra, at 356 U. S. 100 n. 32. The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.*

[Footnote 2/21]

The danger of subjective judgment is acute if the question posed is whether a punishment "shocks the most fundamental instincts of civilized man," *Louisiana ex rel. Francis v. Resweber, supra,* at 329 U. S. 473 (Burton, J., dissenting), or whether "any man of right feeling and heart can refrain from shuddering," *O'Neil v. Vermont, supra,* at 144 U. S. 340 (Field, J., dissenting), or whether "a cry of horror would rise from every civilized and Christian community of the country," *ibid.* Mr. Justice Frankfurter's concurring opinion in *Louisiana ex rel. Francis v. Resweber, supra,* is instructive. He warned "against finding in personal disapproval a reflection of more or less prevailing condemnation" and against

"enforcing . . . private view[s], rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution."

Id. at 329 U. S. 471. His conclusions were as follows:

"I cannot bring myself to believe that [the State's procedure] . . . offends a principle of justice 'rooted in the traditions and conscience of our people.'"

Id. at 329 U. S. 470. ". . . I cannot say that it would be *repugnant to the conscience of mankind.'" Id. at 329 U. S. 471. Yet nowhere in the opinion is there any explanation of how he arrived at those conclusions.*

[Footnote 2/22]

Cf. Louisiana ex rel. Francis v. Resweber, supra, at 329 U. S. 463: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."

[Footnote 2/23]

It may, in fact, have appeared earlier. In *Pervear v. The Commonwealth,* 5 Wall. at 72 U. S. 480, the Court stated:

"We perceive nothing excessive, or cruel, or unusual in this [punishment]. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures."

This discussion suggests that the Court viewed the punishment as reasonably related to the purposes for which it was inflicted.

[Footnote 2/24]

Mr. Justice Field apparently based his conclusion upon an intuitive sense that the punishment was disproportionate to the criminal's moral guilt, although he also observed that "the punishment was greatly beyond anything required by any humane law for the offences," *O'Neil v. Vermont,* 144 U.S. at 144 U. S. 340. *Cf. Trop v. Dulles,* 356 U.S. at 356 U. S. 99:

"Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."

[Footnote 2/25]

“The State thereby suffers nothing, and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”

Weems v. United States, 217 U.S. at 217 U. S. 381.

[Footnote 2/26]

The principle that a severe punishment must not be excessive does not, of course, mean that a severe punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment, no matter how necessary, would be intolerably offensive to human dignity. The point is simply that the unnecessary infliction of suffering is also offensive to human dignity.

[Footnote 2/27]

The Fifth Amendment provides:

“No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb; . . . nor be deprived of *life*, liberty, or property, without due process of law. . . .”

(Emphasis added.)

[Footnote 2/28]

No one, of course, now contends that the reference in the Fifth Amendment to “jeopardy of . . . limb” provides perpetual constitutional sanction for such corporal punishments as branding and ear-cropping, which were common punishments when the Bill of Rights was adopted. *But cf.* <l=|408 u.s.=”” 238fn2=”” 29|=””>n. 29, *infra*. As the California Supreme Court pointed out with respect to the California Constitution:</l=|408>

“The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because, at a time when the death penalty was commonly accepted, they provided elsewhere in the Constitution for special safeguards in its application.”

People v. Anderson, 6 Cal. 3d 628, 639, 493 P.2d 880, 887 (1972).

[Footnote 2/29]

Cf. McGautha v. California, 402 U. S. 183, 402 U. S. 226 (1971) (separate opinion of Black, J.):

“The [Clause] forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the [Clause] was adopted. It is inconceivable to me that the framers intended to end capital punishment by the [Clause].”

Under this view, of course, any punishment that was in common use in 1791 is forever exempt from the Clause.

[Footnote 2/30]

The Court expressly noted that the constitutionality of the punishment itself was not challenged. *Wilkerson v. Utah*, 99 U.S. at 99 U. S. 136-137. Indeed, it may be that the only contention made was that, in the absence of statutory sanction, the sentencing “court possessed no authority to prescribe the mode of execution.” *Id.*at 99 U. S. 137.

[Footnote 2/31]

Cf. McElvaine v. Brush, 142 U. S. 155, 142 U. S. 158-159 (1891):

“We held in the case of *Kemmler* . . . that, as the legislature of the State of New York had determined that [electrocution] did not inflict cruel and unusual punishment, and its courts had sustained that determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law.”

[Footnote 2/32]

It was also asserted that the Constitution prohibits "cruelty inherent in the method of punishment," but does not prohibit "the necessary suffering involved in any method employed to extinguish life humanely." 329 U.S. at 329 U. S. 464. No authority was cited for this assertion, and, in any event, the distinction drawn appears to be meaningless.

[Footnote 2/33]

In a non-death case, *Trop v. Dulles*, it was said that, "in a day when it is still *widely accepted*, [death] cannot be said to violate the constitutional concept of cruelty." 356 U.S. at 356 U. S. 99 (emphasis added). This statement, of course, left open the future constitutionality of the punishment.

[Footnote 2/34]

"That life is at stake is, of course, another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."

Williams v. Georgia, 349 U. S. 375, 349 U. S. 391 (1955) (Frankfurter, J.).

"When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."

Stein v. New York, 346 U. S. 156, 346 U. S. 196 (1953) (Jackson, J.). "In death cases doubts such as those presented here should be resolved in favor of the accused."*Andres v. United States*, 333 U. S. 740, 333 U. S. 752 (1948) (Reed, J.). Mr. Justice Harlan expressed the point strongly:

"I do not concede that whatever process is 'due"an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death."

Reid v. Covert, 354 U. S. 1, 354 U. S. 77 (1957) (concurring in result). And, of course, for many years, this Court distinguished death cases from all others for purposes of the constitutional right to counsel. *See Powell v. Alabama*, 287 U. S. 45 (1932); *Betts v. Brady*, 316 U. S. 455 (1942); *Bute v. Illinois*, 333 U. S. 640 (1948).

[Footnote 2/35]

See Report of Royal Commission on Capital Punishment 1949-1953, ¶¶ 700-789, pp. 246-273 (1953); Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 19-21 (1968) (testimony of Clinton Duffy); H. Barnes & N. Teeters, New Horizons in Criminology 306-309 (3d ed. 1959); C. Chessman, Trial by Ordeal 195-202 (1955); M. DiSalle, The Power of Life and Death 84-85 (1965); C. Duffy & A. Hirschberg, 88 Men and 2 Women 13-14 (1962); B. Eshelman, Death Row Chaplain 26-29, 101-104, 159-164 (1962); R. Hammer, Between Life and Death 208-212 (1969); K. Lamott, Chronicles of San Quentin 228-231 (1961); L. Lawes, Life and Death in Sing Sing 170-171 (1928); Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime & Delin. 121, 128-129 (1969); Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1338-1341 (1968); Brief *amici curiae* filed by James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley, and Lawrence E. Wilson 12-14.

[Footnote 2/36]

See Barnes & Teeters, *supra*, at 309-311 (3d ed. 1959); Camus, Reflections on the Guillotine, in A. Camus, Resistance, Rebellion, and Death 131, 151-156 (1960); C. Duffy & A. Hirschberg, *supra*, at 68-70, 254 (1962); Hammer, *supra*, at 222-235, 244-250, 269-272 (1969); S. Rubin, The Law of Criminal Correction 340 (1963); Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Amer.J.Psychiatry 393 (1962); Gottlieb, Capital Punishment, 15 Crime & Delin. 1, 8-10 (1969); West, Medicine and Capital Punishment, in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 124 (1968); Ziferstein, Crime and Punishment, The Center Magazine 84 (Jan. 1968); Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1342 (1968); Note, Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L.Rev. 814 (1972).

[Footnote 2/37]

The State, of course, does not purposely impose the lengthy waiting period in order to inflict further suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals

avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law, but, apart from that, the plain truth is that it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.

[Footnote 2/38]

It was recognized in *Trop* itself that expatriation is a "punishment short of death." 356 U.S. at 356 U. S. 99. Death, however, was distinguished on the ground that it was "still widely accepted." *Ibid.*

[Footnote 2/39]

Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864).

[Footnote 2/40]

From 1930 to 1939: 155, 153, 140, 160, 168, 199, 195, 147, 190, 160. From 1940 to 1949: 124, 123, 147, 131, 120, 117, 131, 153, 119, 119. From 1950 to 1959: 82, 105, 83, 62, 81, 76, 65, 65, 49, 49. From 1960 to 1967: 56, 42, 47, 21, 15, 7, 1, 2. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 8 (Aug. 1971). The last execution in the United States took place on June 2, 1967. *Id.* at 4.

[Footnote 2/41]

1961 — 140; 1962 — 103; 1963 — 93; 1964 — 106; 1965 — 86; 1966 — 118; 1967 — 85; 1968 — 102; 1969 — 97; 1970 — 127. *Id.* at 9.

[Footnote 2/42]

Commutations averaged about 18 per year. 1961 — 17; 1962 — 27; 1963 — 16; 1964 — 9; 1965 — 19; 1966 — 17; 1967 — 13; 1968 — 16; 1969 — 20; 1970 — 29. *Ibid.*

[Footnote 2/43]

Transfers to mental institutions averaged about three per year. 1961 — 3; 1962 — 4; 1963 — 1; 1964 — 3; 1965 — 4; 1966 — 3; 1967 — 3; 1968 — 2; 1969 — 1; 1970 — 5. *Ibid.*

[Footnote 2/44]

These four methods of disposition averaged about 44 per year. 1961 — 31, 1962 — 30; 1963 — 32; 1964 — 58; 1965 — 39; 1966 — 33; 1967 — 53; 1968 — 59; 1969 — 64; 1970 — 42. *Ibid.* Specific figures are available starting with 1967. Resentences: 1967 — 7; 1968 — 18; 1969 — 12; 1970 — 14. Grants of new trials and orders for resentencing: 1967 — 31; 1968 — 21; 1969 — 13; 1970 — 9. Dismissals of indictments and reversals of convictions: 1967 — 12; 1968 — 19; 1969 — 33; 1970 — 17. Deaths by suicide and natural causes: 1967 — 2; 1968 — 1; 1969 — 5; 1970 — 2. National Prisoner Statistics No. 42, Executions 1930-1967, p. 13 (June 1968); National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 12 (Aug. 1969); National Prisoner statistics, *supra*, <l=|408 u.s.="" 238fn2="" 40|="">n. 40, at 14-15.</l=|408>

[Footnote 2/45]

Id. at 9.

[Footnote 2/46]

During that 10-year period, 1,177 prisoners entered death row, including 120 who were returned following new trials or treatment at mental institutions. There were 653 dispositions other than by execution, leaving 524 prisoners who might have been executed, of whom 135 actually were. *Ibid.*

[Footnote 2/47]

Id. at 8.

[Footnote 2/48]

The victim surprised Furman in the act of burglarizing the victim's home in the middle of the night. While escaping, Furman killed the victim with one pistol shot fired through the closed kitchen door from the outside. At the trial, Furman gave his version of the killing:

"They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off, I was down on the floor, and I got up and ran. That's all to it."

App. 555. The Georgia Supreme Court accepted that version:

"The admission in open court by the accused . . . that, during the period in which he was involved in the commission of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of murder. . . ."

Furman v. State, 225 Ga. 253, 254, 167 S.E.2d 628, 629 (1969). About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at "Superior Upholstery." App. 54. It took the jury one hour and 35 minutes to return a verdict of guilt and a sentence of death. *Id.* at 64-65.

[Footnote 2/49]

T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

[Footnote 2/50]

Eight States still employ hanging as the method of execution, and one, Utah, also employs shooting. These nine States have accounted for less than 3% of the executions in the United States since 1930. National Prisoner Statistics, *supra*, <l=|408 u.s.="" 238fn2="" 40|="">n. 40, at 10-11.</l=|408>

[Footnote 2/51]

Id. at 8

[Footnote 2/52]

Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have abolished death as a punishment for crimes. *Id.* at 50. In addition, the California Supreme Court held the punishment unconstitutional under the state counterpart of the Cruel and Unusual Punishments Clause. *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972).

[Footnote 2/53]

New Mexico, New York, North Dakota, Rhode Island, and Vermont have almost totally abolished death as a punishment for crimes. National Prisoner Statistics, *supra*, <l=|408 u.s.="" 238fn2="" 40|="">n. 40, at 50. Indeed, these five States might well be considered *de facto*abolition States. North Dakota and Rhode Island, which restricted the punishment in 1915 and 1852, respectively, have not carried out an execution since at least 1930, *id.* at 10; nor have there been any executions in New York, Vermont, or New Mexico since they restricted the punishment in 1965, 1965, and 1969, respectively, *id.* at 10-11. As of January 1, 1971, none of the five States had even a single prisoner under sentence of death. *Id.* at 18-19.</l=|408>

In addition, six States, while retaining the punishment on the books in generally applicable form, have made virtually no use of it. Since 1930, Idaho, Montana, Nebraska, New Hampshire, South Dakota, and Wyoming have carried out a total of 22 executions. *Id.* at 10-11. As of January 1, 1971, these six States had a total of three prisoners under sentences of death. *Id.* at 18-19. Hence, assuming 25 executions in 42 years, each State averaged about one execution every 10 years.

[Footnote 2/54]

There is also the more limited argument that death is a necessary punishment when criminals are already serving or subject to a sentence of life imprisonment. If the only punishment available is further imprisonment, it is said, those criminals will have nothing to lose by committing further crimes, and accordingly, the threat of death is the sole deterrent. But "life" imprisonment is a misnomer today. Rarely, if ever, do crimes carry a mandatory life sentence without possibility of parole. That possibility ensures that criminals do not reach the point where further crimes are free of consequences. Moreover, if this argument is simply an assertion that the threat of death is a more effective deterrent than the threat of increased imprisonment by denial of release on parole, then, as noted above, there is simply no evidence to support. it.

MR. JUSTICE STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide. *See Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 297 U. S. 347 (Brandeis, J., concurring).

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of the Eighth Amendment's guarantee against the infliction of cruel and unusual punishments, [Footnote 3/1] and the origin and judicial history of capital punishment. [Footnote 3/2] There

is thus no need for me to review the historical materials here, and what I have to say can, therefore, be briefly stated. Legislatures — state and federal — have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a spy for the enemy in time of war shall be put to death. [Footnote 3/3] The Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder. [Footnote 3/4] Massachusetts has passed a law imposing the death penalty upon anyone convicted of murder in the commission of a forcible rape. [Footnote 3/5] An Ohio law imposes the mandatory penalty of death upon the assassin of the President of the United States or the Governor of a State. [Footnote 3/6]

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature — state or federal — could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, [Footnote 3/7] only

the automatic penalty of death will provide maximum deterrence.

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. [Footnote 3/8] And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. [Footnote 3/9] In a word, neither State

has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As MR. JUSTICE WHITE so tellingly puts it, the "legislative will is not frustrated if the penalty is never imposed." *Post* at 408 U. S. 311.

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson v. California,* 370 U. S. 660. In the first place, it is clear that these sentences are "cruel" in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States,* 217 U. S. 349. In the second place, it is equally clear that these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. [Footnote 3/10] But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, [Footnote 3/11] many just as reprehensible as these, the petitioners are among a capriciously

selected random handful upon whom the sentence of death has in fact been imposed. [Footnote 3/12] My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [Footnote 3/13] *See McLaughlin v. Florida*, 379 U. S. 184. But racial discrimination has not been proved, [Footnote 3/14] and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

[Footnote 3/1]

See , *post*, at 408 U. S. 376-379; concurring opinion of MR. JUSTICE DOUGLAS, *ante*at 408 U. S. 242-244; concurring opinion of MR. JUSTICE BRENNAN, *ante* at 258-269; concurring opinion of MR. JUSTICE MARSHALL, *post* at 408 U. S. 316-328; dissenting opinion of MR. JUSTICE BLACKMUN, *post* at 408 U. S. 407-409; dissenting opinion of MR. JUSTICE POWELL, *post* at 408 U. S. 421-427.

[Footnote 3/2]

See dissenting opinion of THE CHIEF JUSTICE, *post* at 408 U. S. 380; concurring opinion of MR. JUSTICE BRENNAN, *ante* at 408 U. S. 282-285; concurring opinion of MR. JUSTICE MARSHALL, *post* at 408 U. S. 333-341; dissenting opinion of MR. JUSTICE POWELL, *post* at 408 U. S. 421-424.

[Footnote 3/3]

10 U.S.C. § 906.

[Footnote 3/4]

R.I.Gen.Laws Ann. § 11-23-2.

[Footnote 3/5]

Mass.Gen.Laws Ann., c. 265, § 2.

[Footnote 3/6]

Ohio Rev.Code Ann., Tit. 29, §§ 2901.09 and 2901.10.

[Footnote 3/7]

Many statistical studies — comparing crime rates in jurisdictions with and without capital punishment and in jurisdictions before and after abolition of capital punishment — have indicated that there is little, if any, measurable deterrent effect. *See* H. Bedau, The Death Penalty in America 258-332 (1967 rev. ed.). There remains uncertainty, however, because of the difficulty of identifying and holding constant all other relevant variables. *See* Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1275-1292. *See also* dissenting opinion of THE CHIEF JUSTICE, *post*at 408 U. S. 395; concurring opinion of MR. JUSTICE MARSHALL, *post* at 408 U. S. 346-354.

[Footnote 3/8]

Georgia law, at the time of the conviction and sentencing of the petitioner in No. 69-5030, left the jury a choice between the death penalty, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." Ga.Code Ann. § 26-1302 (Supp. 1971) (effective prior to July l, 1969). The current Georgia provision for the punishment of forcible rape continues to leave the same broad sentencing leeway. Ga.Crim.Code § 26-2001 (1971 rev.) (effective July l, 1969). Texas law, under which the petitioner in No. 69-5031 was sentenced, provides that a "person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." Texas Penal Code, Art. 1189.

[Footnote 3/9]

Georgia law, under which the petitioner in No. 69-5003 was sentenced, left the jury a choice between the death penalty and life imprisonment. Ga.Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). Current Georgia law provides for similar sentencing leeway. Ga.Crim.Code § 26-1101 (1971 rev.) (effective July 1, 1969).

[Footnote 3/10]

See dissenting opinion of THE CHIEF JUSTICE, *post* at 408 U. S. 386-387, n. 11; concurring opinion of MR. JUSTICE BRENNAN, *ante* at 408 U. S. 291-293.

[Footnote 3/11]

Petitioner Branch was sentenced to death in a Texas court on July 26, 1967. Petitioner Furman was sentenced to death in a Georgia court on September 20, 1968. Petitioner Jackson was sentenced to death in a Georgia court on December 10, 1968.

[Footnote 3/12]

A former United States Attorney General has testified before the Congress that only a "small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned." Statement by Attorney General Clark in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 93.

In *McGautha v. California*, 402 U. S. 183, the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments. *See* 398 U. S. 936 (limited grant of certiorari).

[Footnote 3/13]

See concurring opinion of MR. JUSTICE DOUGLAS, *ante*, at 408 U. S. 249-251; concurring opinion of MR. JUSTICE MARSHALL, *post* at 408 U. S. 366 n. 155.

[Footnote 3/14]

Cf. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan.L.Rev. 1297 (1969); dissenting opinion of THE CHIEF JUSTICE, *post* at 408 U. S. 389-390, n. 12.

MR. JUSTICE WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all

intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that, no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain

degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death

for so few when, for so many in like circumstances, life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law — to deter others by punishing the convicted criminal — would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes, I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally, and need not reject the death penalty as a more effective deterrent than a lesser punishment. But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct, and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered

under the statutes involved in these cases. Concededly, it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that, as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I "prove" my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries — a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence — has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has, for all practical purposes, run its course.

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the

constitutionality of punishment, and that there are punishments that the Amendment would bar whether legislatively approved or not. Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them. But, as I see it, this case is no different in kind from many others, although it may have wider impact and provoke sharper disagreement.

In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of

the crime. Legislative "policy" is thus necessarily defined not by what is legislatively authorized, but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment, what was done in these cases violated the Eighth Amendment.

I concur in the judgments of the Court.

MR. JUSTICE MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. [Footnote 4/1]

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In No. 69-5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69-5030 and 69-5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is "a punishment no longer consistent with our own self-respect" [Footnote 4/2] and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. [Footnote 4/3] Hence, we must proceed with caution to answer the question presented. [Footnote 4/4] By first examining the historical derivation of the Eighth Amendment and

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the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

I

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses. [Footnote 4/5] Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain. [Footnote 4/6]

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Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses. [Footnote 4/7] Death, of course, was the usual result. [Footnote 4/8]

The treason trials of 1685 — the "Bloody Assizes" — which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. [Footnote 4/9] The conduct of Lord Chief Justice Jeffreys at those trials has been described as an "insane lust for cruelty" which was "stimulated by

orders from the King" (James II). [Footnote 4/10] The assizes received wide publicity from Puritan pamphleteers, and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But,

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the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as is widely thought. After William and Mary of Orange crossed the channel to invade England, James II fled. Parliament was summoned into session, and a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties." [Footnote 4/11] An initial draft of the Bill of Rights prohibited "illegal" punishments, but a later draft referred to the infliction by James II of "illegal and cruel" punishments, and declared "cruel and unusual" punishments to be prohibited. [Footnote 4/12] The use of the word "unusual" in the final draft appears to be inadvertent.

This legislative history has led at least one legal historian to conclude

"that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties, [Footnote 4/13]"

and not primarily a reaction to the torture of the High Commission, harsh sentences, or the assizes.

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Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that, in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. [Footnote 4/14]

The precise language used in the Eighth Amendment first appeared in America on June 12, 1776, in Virginia's "Declaration of Rights," § 9 of which read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [Footnote 4/15] This language was drawn verbatim from the English Bill of Rights of 1689. Other States adopted similar clauses, [Footnote 4/16] and there is evidence in the debates of the various state conventions that were

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called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments. [Footnote 4/17]

The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point, George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred, stating:

"By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? . . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights. — 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. . . . "

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting

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cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors. — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a

confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. [Footnote 4/18]"

Henry's statement indicates that he wished to insure that "relentless severity" would be prohibited by the Constitution. Other expressions with respect to the proposed Eighth Amendment by Members of the First Congress indicate that they shared Henry's view of the need for and purpose of the Cruel and Unusual Punishments Clause. [Footnote 4/19]

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Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term "cruel."

II

This Court did not squarely face the task of interpreting the cruel and unusual punishments language for the first time until *Wilkerson v. Utah*, 9 U. S. 130 (1879), although the language received a cursory examination in several prior cases. *See, e.g.*, *72 U. S. Commonwealth*, 5 Wall. 475 (1867). In *Wilkerson*, the Court unanimously upheld a sentence of public execution by shooting imposed pursuant to a conviction for premeditated murder. In his opinion for the Court, Mr. Justice Clifford wrote:

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

99 U.S. at 99 U. S. 135-136. Thus, the Court found that unnecessary cruelty was no more permissible than torture. To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.

Eleven years passed before the Court again faced a challenge to a specific punishment under the Eighth

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Amendment. *In the case of In re Kemmler*, 136 U. S. 436 (1890), Chief Justice Fuller wrote an opinion for a unanimous Court upholding electrocution as a permissible mode of punishment. While the Court ostensibly held that the Eighth Amendment did not apply to the States, it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment. The Court held that the punishment was not objectionable. Today, *Kemmler* stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it. [Footnote 4/20]

Two years later, in *O'Neil v. Vermont*, 144 U. S. 323 (1892), the Court reaffirmed that the Eighth Amendment was not applicable to the States. O'Neil was found guilty on 307 counts of selling liquor in violation of Vermont law. A fine of $6,140 ($20 for each offense) and the costs of prosecution ($497.96) were imposed. O'Neil was committed to prison until the fine and the costs were paid, and the court provided that, if they were not paid before a specified date, O'Neil was to be confined in the house of corrections for 19,914 days (approximately 54 years) at hard labor. Three Justices — Field, Harlan, and Brewer — dissented. They maintained not only that the Cruel and Unusual Punishments Clause was applicable to the States, but that, in O'Neil's case, it had been violated. Mr. Justice Field wrote:

"That designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which

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are attended with acute pain and suffering. . . . The inhibition is directed not only against punishments of the character mentioned, but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive. . . ."

Id. at 144 U. S. 339-340.

In *Howard v. Fleming*, 191 U. S. 126 (1903), the Court, in essence, followed the approach advocated by the dissenters in *O'Neil*. In rejecting the claim that 10-year sentences for conspiracy to defraud were cruel and unusual, the Court (per Mr. Justice Brewer) considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

The Court used the same approach seven years later in the landmark case of *Weems v. United States*, 217 U. S. 349 (1910). Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document." He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual punishment, the Court found that it was. [Footnote 4/21] The Court emphasized that the Constitution was not an "ephemeral" enactment, or one "designed to meet passing occasions." [Footnote 4/22] Recognizing that "[t]ime works changes, [and] brings into existence new conditions and purposes," [Footnote 4/23] the Court commented that, "[i]n the application of a constitution . . .

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our contemplation cannot be only of what has been, but of what may be." [Footnote 4/24]

In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive. [Footnote 4/25] Justices White and Holmes dissented, and argued that the cruel and unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted. [Footnote 4/26]

Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable a those that were inherently cruel. Thus, it is apparent that the dissenters' position in *O'Neil* had become the opinion of the Court in *Weems.*

Weems was followed by two cases that added little to our knowledge of the scope of the cruel and unusual language, *Badders v. United States*, 240 U. S. 391 (1916), and *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921). [Footnote 4/27] Then

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came another landmark case, *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459(1947).

Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure, and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States. [Footnote 4/28] The Court was virtually unanimous in agreeing that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain," [Footnote 4/29] but split 5-4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like *In re Kemmler*, and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case. [Footnote 4/30]

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The four dissenters felt that the case should be remanded for further facts.

As in *Weems*, the Court was concerned with excessive punishments. *Resweber* is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in *O'Neil* was at last firmly entrenched in the minds of an entire Court.

Trop v. Dulles, 356 U. S. 86 (1958), marked the next major cruel and unusual punishment case in this Court. Trop, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, DOUGLAS, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment. [Footnote 4/31]

Emphasizing the flexibility inherent in the words "cruel and unusual," the Chief Justice wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [Footnote 4/32] His approach to the problem was that utilized by the Court in *Weems:* he scrutinized the severity of the penalty in relation to the offense, examined the

practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical.

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Whereas, in *Trop*, a majority of the Court failed to agree on whether loss of citizenship was a cruel and unusual punishment, four years later, a majority did agree in *Robinson v. California*, 370 U. S. 660 (1962), that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "be addicted to the use of narcotics" was cruel and unusual. MR. JUSTICE STEWART, writing the opinion of the Court, reiterated what the Court had said in *Weems* and what Chief Justice Warren wrote in *Trop* — that the cruel and unusual punishment clause was not a static concept, but one that must be continually reexamined "in the light of contemporary human knowledge." [Footnote 4/33] The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted. [Footnote 4/34]

We distinguished *Robinson* in *Powell v. Texas*, 392 U. S. 514 (1968), where we sustained a conviction for drunkenness in a public place and a fine of $20. Four Justices dissented on the ground that *Robinson* was controlling. The analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed. *Powell* marked the last time prior to today's decision that the Court has had occasion to construe the meaning of the term "cruel and unusual" punishment.

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases.

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III

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: *i.e.*, the cruel and unusual language "must draw its meaning from the evolving standard of decency that mark the progress of a maturing society." [Footnote 4/35] Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. A fair reading of *Wilkerson v. Utah, supra; In re Kemmler, supra; and Louisiana ex rel. Francis v. Resweber, supra*, would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible. Several Justices have also expressed their individual opinions that the death penalty is constitutional. [Footnote 4/36] Yet, some of these same Justices and others have at times expressed concern over capital punishment. [Footnote 4/37]

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There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that, unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

Faced with an open question, we must establish our standards for decision. The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them — *e.g.*, use of the rack, the thumbscrew, or other modes of torture. *See O'Neil v. Vermont*, 144 U.S. at 144 U. S. 339 (Field, J., dissenting). Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it. These are punishments that have been barred since the adoption of the Bill of Rights.

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Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. *Cf. United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. at 255 U. S. 435(Brandeis, J., dissenting). If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. *In re Kemmler*, 136 U.S. at 136 U. S. 447; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 464. Prior decisions leave open the question of just how

much the word "unusual" adds to the word "cruel." I have previously indicated that use of the word "unusual" in the English Bill of Rights of 1689 was inadvertent, and there is nothing in the history of the Eighth Amendment to give flesh to its intended meaning. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. *Weems v. United States*, *supra*. The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties, *e.g.*, *Wilkerson v. Utah*, 99 U.S. at 99 U. S. 134; *O'Neil v. Vermont*, 144 U.S. at 144 U. S. 339-340 (Field, J., dissenting); *Weems v. United States*, 217 U.S. at 217 U. S. 381; *Louisiana ex rel. Francis v. Resweber*, *supra;* these punishments are unconstitutional even though popular sentiment may favor them. Both THE CHIEF JUSTICE and MR. JUSTICE POWELL seek to ignore or to minimize this aspect of the Court's prior decisions. But, since Mr. Justice Field first suggested that "[t]he whole inhibition [of the prohibition against cruel and unusual punishments]

is against that which is excessive," *O'Neil v. Vermont*, 144 U.S. at 144 U. S. 340, this Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel. This is what the Founders of this country intended; this is what their fellow citizens believed the Eighth Amendment provided; and this was the basis for our decision in *Robinson v. California*, *supra*, for the plurality opinion by Mr. Chief Justice Warren in *Trop v. Dulles*, *supra*, and for the Court's decision in *Weems v. United States*, *supra*. *See also* W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am.J.Legal Hist. 122, 127 (1968). It should also be noted that the "cruel and unusual" language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against "that which is excessive."

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or

unnecessary, or because it is abhorrent to currently existing moral values.

We must proceed to the history of capital punishment in the United States.

IV

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. [Footnote 4/38] Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance. [Footnote 4/39]

As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its "divine right" to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function. [Footnote 4/40] Capital punishment worked its way into the laws of various countries, [Footnote 4/41] and was inflicted in a variety of macabre and horrific ways. [Footnote 4/42]

It was during the reign of Henry II (1154-1189) that English law first recognized that crime was more than a personal affair between the victim and the perpetrator. [Footnote 4/43]

The early history of capital punishment in England is set forth in *McGautha v. California*, 402 U. S. 183, 402 U. S. 197-200 (1971), and need not be repeated here.

By 1500, English law recognized eight major capital crimes: treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson. [Footnote 4/44] Tudor and Stuart kings added many more crimes to the list of those punishable by death, and, by 1688, there were nearly 50. [Footnote 4/45] George II (1727-1760) added nearly 36 more, and George III (1760-1820) increased the number by 60. [Footnote 4/46]

By shortly after 1800, capital offenses numbered more than 200, and not only included crimes against person and property, but even some against the public peace. While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe. [Footnote 4/47]

Capital punishment was not as common a penalty in the American Colonies. “The Capitall Lawes of New England,” dating from 1636, were drawn by the Massachusetts Bay Colony, and are the first written expression of capital offenses known to exist in this country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source. [Footnote 4/48] It is not known with any certainty exactly when, or even if, these laws were enacted as drafted; and, if so, just how vigorously these laws were enforced. [Footnote 4/49] We do know that the other Colonies had a variety of laws that spanned the spectrum of severity. [Footnote 4/50]

By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes. [Footnote 4/51] This was far fewer than existed in England, and part of the reason was that there was a scarcity of labor in the Colonies. [Footnote 4/52] Still, there were many executions, because “[w]ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines.” [Footnote 4/53]

Even in the 17th century, there was some opposition

to capital punishment in some of the colonies. In his “Great Act” of 1682, William Penn prescribed death only for premeditated murder and treason, [Footnote 4/54] although his reform was not long-lived. [Footnote 4/55]

In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons. [Footnote 4/56] These groups pressured for reform of all penal laws, including capital offenses. Dr. Benjamin Rush soon drafted America’s first reasoned argument against capital punishment, entitled An Enquiry into the Effects of Public Punishments upon Criminals and upon Society. [Footnote 4/57] In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted “An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania.” [Footnote 4/58] He concluded that it was doubtful whether capital punishment was at all necessary, and that, until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder. [Footnote 4/59]

The “Enquiries” of Rush and Bradford and the Pennsylvania movement toward abolition of the death

penalty had little immediate impact on the practices of other States. [Footnote 4/60] But in the early 1800’s, Governors George and DeWitt Clinton and Daniel Tompkins unsuccessfully urged the New York Legislature to modify or end capital punishment. During this same period, Edward Livingston, an American lawyer who later became Secretary of State and Minister to France under President Andrew Jackson, was appointed by the Louisiana Legislature to draft a new penal code. At the center of his proposal was “the total abolition of capital punishment.” [Footnote 4/61] His Introductory Report to the System of Penal Law Prepared for the State of Louisiana [Footnote 4/62] contained a systematic rebuttal of all arguments favoring capital punishment. Drafted in 1824, it was not published until 1833. This work was a tremendous impetus to the abolition movement for the next half century.

During the 1830’s, there was a rising tide of sentiment against capital punishment. In 1834, Pennsylvania abolished public executions, [Footnote 4/63] and, two years later, The Report on Capital Punishment Made to the Maine Legislature was published. It led to a law that prohibited the executive from issuing a warrant for execution within one year after a criminal was sentenced by

the courts. The totally discretionary character of the law was at odds with almost all prior practices. The "Maine Law" resulted in little enforcement of the death penalty, which was not surprising, since the legislature's idea in passing the law was that the affirmative burden placed on the governor to issue a warrant one full year

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or more after a trial would be an effective deterrent to exercise of his power. [Footnote 4/64] The law spread throughout New England, and led to Michigan's being the first State to abolish capital punishment in 1846. [Footnote 4/65]

Anti-capital-punishment feeling grew in the 1840's as the literature of the period pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived not from fear, but from harmony with nature. [Footnote 4/66]

By 1850, societies for abolition existed in Massachusetts, New York, Pennsylvania, Tennessee, Ohio, Alabama, Louisiana, Indiana, and Iowa. [Footnote 4/67] New York, Massachusetts, and Pennsylvania constantly had abolition bills before their legislatures. In 1852, Rhode Island followed in the footsteps of Michigan and partially abolished capital punishment. [Footnote 4/68] Wisconsin totally abolished the death penalty the following year. [Footnote 4/69] Those States that did not abolish the death penalty greatly reduced its scope, and "[f]ew states outside the South had more than one or two . . . capital offenses" in addition to treason and murder. [Footnote 4/70]

But the Civil War halted much of the abolition furor. One historian has said that,

"[a]fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and

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blunted. [Footnote 4/71]"

Some of the attention previously given to abolition was diverted to prison reform. An abolitionist movement still existed, however. Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887; Iowa abolished capital punishment from 1872-1878; Colorado began an erratic period of *de facto*abolition and revival in 1872; and Kansas also abolished it *de facto* in 1872, and by law in 1907. [Footnote 4/72]

One great success of the abolitionist movement in the period from 1830-1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of "jury nullification," in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced. [Footnote 4/73] Tennessee was the first State to give juries discretion, Tenn.Laws 1837-1838, c. 29, but other States quickly followed suit. Then, Rep. Curtis of New York introduced a federal bill that ultimately became law in 1897 which reduced the number of federal capital offenses from 60 to 3 (treason, murder, and rape) and gave the jury sentencing discretion in murder and rape cases. [Footnote 4/74]

By 1917, 12 States had become abolitionist jurisdictions. [Footnote 4/75] But, under the nervous tension of World War I,

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four of these States reinstituted capital punishment and promising movements in other State came grinding to a halt. [Footnote 4/76] During the period following the First World War, the abolitionist movement never regained its momentum.

It is not easy to ascertain why the movement lost its vigor. Certainly, much attention was diverted from penal reform during the economic crisis of the depression and the exhausting years of struggle during World War II. Also, executions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public. [Footnote 4/77]

In recent years, there has been renewed interest in modifying capital punishment. New York has moved toward abolition, [Footnote 4/78] as have several other States. [Footnote 4/79] In 1967, a bill was introduced in the Senate to abolish

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capital punishment for all federal crimes, but it died in committee. [Footnote 4/80]

At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime. It would be fruitless to attempt here to categorize the approach to capital punishment taken by the various States. [Footnote 4/81] It is sufficient to note that murder is the crime most often punished by death, followed by kidnaping and treason. [Footnote 4/82] Rape is a capital offense in 16 States and the federal system. [Footnote 4/83]

The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably. At times in our history, strong abolitionist movements have existed. But they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has

reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

V

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered *seriatim* below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question "why do men in fact punish?" with the question "what justifies men in punishing?" [Footnote 4/84] Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we only

tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. *See Trop v. Dulles*, 356 U.S. at 356 U. S. 111 (BRENNAN, J., concurring). Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries, [Footnote 4/85] and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

In *Weems v. United States*, 217 U.S. at 217 U. S. 381, the Court, in the course of holding that Weems' punishment violated the Eighth Amendment, contrasted it with penalties provided for other offenses, and concluded:

"[T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing, and loses no power. *The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.*"

(Emphasis added.)

It is plain that the view of the *Weems* Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the "cruel and unusual" language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But the fact that *some*punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would, by definition, be acceptable means for designating society's moral approbation of a particular act. The "cruel and unusual" language would thus be read out of the Constitution, and the fears of Patrick Henry and the other Founding Fathers would become realities. To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. [Footnote 4/86] It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times, a cry is heard that morality requires vengeance to evidence

society's abhorrence of the act. [Footnote 4/87] But the Eighth Amendment is our insulation from our baser selves. The "cruel and unusual" language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and a return to the rack and other tortures would be possible in a given case.

Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment

"would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. [Footnote 4/88]"

I would reach an opposite conclusion — that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. [Footnote 4/89]

While the contrary position has been argued, [Footnote 4/90] it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are

some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here — *i.e.*, whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such. [Footnote 4/91]

It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is

a deterrent, but whether it is a better deterrent than life imprisonment. [Footnote 4/92]

There is no more complex problem than determining the deterrent efficacy of the death penalty.

"Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged. [Footnote 4/93]"

This is the nub of the problem, and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics. [Footnote 4/94]

The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:

"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are, in themselves, more obvious than any proof can make them. It is

possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain

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inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly. [Footnote 4/95]"

This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that,

"life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer. [Footnote 4/96]"

This hypothesis advocates a limited deterrent effect under particular circumstances.

Abolitionists attempt to disprove these hypotheses by amassing statistical evidence to demonstrate that there is no correlation between criminal activity and the existence or nonexistence of a capital sanction. Almost all of the evidence involves the crime of murder, since murder is punishable by death in more jurisdictions than are other offenses, [Footnote 4/97] and almost 90% of all executions since 1930 have been pursuant to murder convictions. [Footnote 4/98]

Thorsten Sellin, one of the leading authorities on capital punishment, has urged that, if the death penalty

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deters prospective murderers, the following hypotheses should be true:

"(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects — character of population, social and economic condition, etc. — in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states."

"(b) Murders should increase when the death penalty is abolished, and should decline when it is restored."

"(c) The deterrent effect should be greatest, and should therefore affect murder rates most powerfully, in those communities where the crime occurred and its consequences are most strongly brought home to the population."

"(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it. [Footnote 4/99]"

(Footnote omitted.)

Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides, and they, of course, include noncapital killings. [Footnote 4/100] A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there

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is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital murders in a State's or nation's homicide statistics remains reasonably constant, [Footnote 4/101] and that the homicide statistics are therefore useful.

Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that, irrespective of their position on capital punishment, they have similar murder rates. In the New England States, for example, there is no correlation between executions [Footnote 4/102] and homicide rates. [Footnote 4/103] The same is true for Midwestern States, [Footnote 4/104] and for all others studied. Both the United Nations [Footnote 4/105] and Great Britain [Footnote 4/106] have acknowledged the validity of Sellin's statistics.

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. [Footnote 4/107] This conclusion is borne out by others who have made similar

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inquiries [Footnote 4/108] and by the experience of other countries. [Footnote 4/109] Despite problems with the statistics, [Footnote 4/110] Sellin's evidence has been relied upon in international studies of capital punishment. [Footnote 4/111]

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. [Footnote 4/112] In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. [Footnote 4/113] And, while police and law enforcement officers

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are the strongest advocates of capital punishment, [Footnote 4/114] the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it. [Footnote 4/115]

There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. [Footnote 4/116] Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners. [Footnote 4/117]

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In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act. [Footnote 4/118] These claims of specific deterrence are often spurious, [Footnote 4/119] however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes. [Footnote 4/120]

The United Nations Committee that studied capital punishment found that

"[i]t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime. [Footnote 4/121]"

Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case.

In 1793, William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect, but that more evidence

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was needed. [Footnote 4/122] Edward Livingston reached a similar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana. [Footnote 4/123] Virtually every study that has since been undertaken has reached the same result. [Footnote 4/124]

In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect. [Footnote 4/125]

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C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious — if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes, either in prison or upon their release. [Footnote 4/126] For the most part, they are first offenders, and, when released from prison, they are known to become model citizens. [Footnote 4/127] Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of thee facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to

be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction — encouraging guilty pleas and confessions, eugenics, and reducing state expenditures — may be dealt with quickly. If the death penalty is used to encourage guilty pleas, and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States*

v. Jackson, 390 U. S. 570 (1968). [Footnote 4/128] Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.

Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. [Footnote 4/129] As I pointed out above, there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. No test or procedure presently exists by which incurables can be screened from those who would benefit from treatment. On the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that all incurables be executed, *cf. Skinner v. Oklahoma*, 316 U. S. 535 (1942). In addition, the "cruel and unusual" language

would require that life imprisonment, treatment, and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, [Footnote 4/130] that capital punishment cannot be defended on the basis of any eugenic purposes.

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support. a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. [Footnote 4/131] Condemned men are not productive members of the prison community, although they could be, [Footnote 4/132] and executions are expensive. [Footnote 4/133] Appeals are often automatic, and courts admittedly spend more time with death cases. [Footnote 4/134]

At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, [Footnote 4/135] and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the State. There are also continual assertions that the condemned prisoner has gone insane. [Footnote 4/136] Because there is a formally established policy of not executing insane persons, [Footnote 4/137] great sums of money may be spent on detecting and curing mental illness in order to perform the execution. [Footnote 4/138] Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. [Footnote 4/139] The entire process is very costly.

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life. [Footnote 4/140]

E. There is but one conclusion that can be drawn from all of this — *i.e.*, the death penalty is an excessive and unnecessary punishment that violates the Eighth

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Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that, for more than 200 years, men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that, at some point, the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment. [Footnote 4/141]

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VI

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless "it shocks the conscience and sense of justice of the people." [Footnote 4/142]

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Judge Frank once noted the problems inherent in the use of such a measuring stick:

"[The court,] before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, such a standard — the community's attitude — is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully taken 'public opinion poll' would be inconclusive in a case like this. [Footnote 4/143]"

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, [Footnote 4/144] its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. [Footnote 4/145]

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In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that, with respect to this test of unconstitutionality, people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens. [Footnote 4/146]

It has often been noted that American citizens know almost nothing about capital punishment. [Footnote 4/147] Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: *e.g.*, that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are

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rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that, while in prison, a convict under sentence of death performs none of the useful functions that

life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public's desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as is sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral, and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince

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even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that

"[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group — the man who, because he is without means, and is defended by a court-appointed attorney — who becomes society's sacrificial lamb. . . . [Footnote 4/148] Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. [Footnote 4/149] Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; [Footnote 4/150] 455 persons, including 48 whites and 405 Negroes, were executed for rape. [Footnote 4/151] It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that, while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. [Footnote 4/152]

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Racial or other discriminations should not be surprising. In *McGautha v. California*,402 U.S. at 402 U. S. 207, this Court held"

"that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution."

This was an open invitation to discrimination.

There is also overwhelming evidence that the death penalty is employed against men, and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. [Footnote 4/153] It is difficult to understand why women have received such favored treatment, since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes. [Footnote 4/154]

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged

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members of society. [Footnote 4/155] It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the *status quo*, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated, and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not

foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. [Footnote 4/156]

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Proving one's innocence after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury's interpretation of the evidence. This is, perhaps, as it should be. But if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely. [Footnote 4/157]

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. [Footnote 4/158] We have no way of

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judging how many innocent persons have been executed, but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted — *i.e.*, it "tends to distort the course of the criminal law." [Footnote 4/159] As Mr. Justice Frankfurter said:

"I am strongly against capital punishment. . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be, in my judgment, does not outweigh the social loss due to the inherent sensationalism of a trial for life. [Footnote 4/160] "

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The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its very existence "inevitably sabotages a social or institutional program of reformation." [Footnote 4/161] In short

"[t]he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line, and is the stumbling block in the path of general reform and of the treatment of crime and criminals. [Footnote 4/162]"

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. [Footnote 4/163] For this reason alone, capital punishment cannot stand.

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VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous.

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Yet I firmly believe that we have not deviated in the slightest from the principles with which we began.

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In

recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve “a major milestone in the long road up from barbarism” [Footnote 4/164] and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment. [Footnote 4/165]

I concur in the judgments of the Court.

[Appendices I, II, and III follow.]

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[Footnote 4/1]

Certiorari was also granted in a fourth case, *Aikens v. California,* No. 68-5027, but the writ was dismissed after the California Supreme Court held that capital punishment violates the State Constitution. 406 U. S. 813. *See People v. Anderson,* 6 Cal.3d 628, 493 P.2d 880, *cert. denied,* 406 U.S. 958 (1972). The California decision reduced by slightly more than 100 the number of persons currently awaiting execution.

[Footnote 4/2]

268 Parl.Deb., H. L. (5th ser.) 703 (1965) (Lord Chancellor Gardiner).

[Footnote 4/3]

Compare, e.g., Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 329 U. S. 470(1947) (Frankfurter, J., concurring), *with* F. Frankfurter, Of Law and Men 81 (1956).*See In re Anderson,* 69 Cal.2d 613, 634-635, 447 P.2d 117, 131-132 (1968) (Mosk, J., concurring); *cf. McGautha v. California,* 402 U. S. 183, 402 U. S. 226 (1971) (separate opinion of Black, J.); *Witherspoon v. Illinois,* 391 U. S. 510, 391 U. S. 542 (1968) (WHITE, J., dissenting).

[Footnote 4/4]

See generally Frankel, Book Review, 85 Harv.L.Rev. 354, 362 (1971).

[Footnote 4/5]

Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif.L.Rev. 839, 848 (1969).

[Footnote 4/6]

Ibid. Beale’s views were conveyed from England to America, and were first written into American law by the Reverend Nathaniel Ward, who wrote the Body of Liberties for the Massachusetts Bay Colony. Clause 46 of that work read: “For bodilie punishments we allow amongst us none that are inhumane, Barbarous or cruel.” 1 B. Schwartz, The Bill of Rights: A Documentary History 71, 77 (1971).

[Footnote 4/7]

4 W. Blackstone, Commentaries *376-377. *See also* 1 J. Chitty, The Criminal Law 785-786 (5th ed. 1847); Sherman, “. . . Nor Cruel and Unusual Punishments Inflicted,” 14 Crime & Delin. 73, 74 (1968).

[Footnote 4/8]

Not content with capital punishment as a means of retribution for crimes, the English also provided for attainder (“dead in law”) as the immediate and inseparable concomitant of the death sentence. The consequences of attainder were forfeiture of real and personal estates and corruption of blood. An attainted person could not inherit land or other hereditaments, nor retain those he possessed, nor transmit them by descent to any heir. Descents were also obstructed whenever posterity derived a title through one who was attainted. 4 W. Blackstone, Commentaries *380-381.

[Footnote 4/9]

E.g., 2 J. Story, On the Constitution § 1903, p. 650 (5th ed. 1891).

[Footnote 4/10]

2 G. Trevelyan, History of England 467 (1952 reissue).

[Footnote 4/11]

Granucci, *supra*, <l=|408 u.s.="" 238fn4="" 5|="">n. 5, at 854.</l=|408>

[Footnote 4/12]

Id. at 855.

[Footnote 4/13]

Id. at 860. In reaching this conclusion, Professor Granucci relies primarily on the trial of Titus Oates as the impetus behind the adoption of the clause. Oates was a minister of the Church of England who proclaimed the existence of a plot to assassinate King Charles II. He was tried for perjury, convicted, and sentenced to a fine of 2,000 marks, life imprisonment, whippings, pillorying four times a year, and defrocking. Oates petitioned both the House of Commons and the House of Lords for release from judgment. The House of Lords rejected his petition, but a minority of its members concluded that the King's Bench had no jurisdiction to compel defrocking, and that the other punishments were barbarous, inhumane, unchristian, and unauthorized by law. The House of Commons agreed with the dissenting Lords. *Id.* at 857-859.

The author also relies on the dictionary definition of "cruel," which meant "severe" or "hard" in the 17th century, to support his conclusion. *Ibid.*

[Footnote 4/14]

Most historians reach this conclusion by reading the history of the Cruel and Unusual Punishments Clause as indicating that it was a reaction to inhumane punishments. Professor Granucci reaches the same conclusion by finding that the draftsmen of the Constitution misread the British history and erroneously relied on Blackstone. Granucci, *supra*, <l=|408 u.s.="" 238fn4="" 5|="">n. 5, at 862-865. It is clear, however, that, prior to the adoption of the Amendment, there was some feeling that a safeguard against cruelty was needed, and that this feeling had support in past practices. *See* <l=|408 u.s.="" 238fn4="" 6|="">n. 6, *supra*, and accompanying text.</l=|408></l=|408>

[Footnote 4/15]

^15, Grannucci, *supra*, <l=|408 u.s.="" 238fn4="" 5|="">n. 5, at 840; 1 Schwartz, *supra*, <l=|408 u.s.="" 238fn4="" 6|="">n. 6, at 276, 278.</l=|408></l=|408>

[Footnote 4/16]

See, e.g., Delaware Declaration of Rights (1776), Maryland Declaration of Rights (1776), Massachusetts Declaration of Rights (1780), and New Hampshire Bill of Rights (1783). 1 Schwartz, *supra*, <l=|408 u.s.="" 238fn4="" 6|="">n. 6, at 276, 278; 279, 281; 337, 343; 374, 379.</l=|408>

[Footnote 4/17]

See 2 J. Elliot's Debates 111 (2d ed. 1876); 3 *id.* at 47-481. *See also*, 2 Schwartz, *supra*, <l=|408 u.s.="" 238fn4="" 6|="">n. 6, at 629, 674, 762, 852, 968.</l=|408>

[Footnote 4/18]

3 Elliot, *supra*, <l=|408 u.s.="" 238fn4="" 17|="">n. 17, at 446-448. A comment by George Mason which misinterprets a criticism leveled at himself and Patrick Henry is further evidence of the intention to prohibit torture and the like by prohibiting cruel and unusual punishments. *Id.*at 452.</l=|408>

[Footnote 4/19]

Annals of Cong. 782-783 (1789). There is some recognition of the fact that a prohibition against cruel and unusual punishments is a flexible prohibition that may change in meaning as the mores of a society change, and that may eventually bar certain punishments not barred when the Constitution was adopted. *Ibid.*(remarks of Mr. Livermore of New Hampshire). There is also evidence that the general opinion at the time the Eighth Amendment was adopted was that it prohibited every punishment that was not "evidently necessary." W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am.J.Legal Hist. 122, 127 (1968).

[Footnote 4/20]

The New York Court of Appeals had recognized the unusual nature of the execution, but attributed it to a legislative desire to minimize the pain of persons executed.

[Footnote 4/21]

The prohibition against cruel and unusual punishments relevant to Weems was that found in the Philippine Bill of Rights. It was, however, borrowed from the Eighth Amendment to the United States Constitution, and had the same meaning. 217 U.S. at 217 U. S. 367.

[Footnote 4/22]

Id. at 217 U. S. 373.

[Footnote 4/23]

Ibid.

[Footnote 4/24]

Ibid.

[Footnote 4/25]

Id. at 217 U. S. 381.

[Footnote 4/26]

Id. at 217 U. S. 389-413. Mr. Justice Black expressed a similar point of view in his separate opinion in *McGautha v. California*, 402 U.S. at 402 U. S. 226 (1971).

[Footnote 4/27]

Badders was found guilty on seven counts of using the mails as part of a scheme to defraud. He was sentenced to concurrent five-year sentences and to a $1,000 fine on each count. The Court summarily rejected his claim that the sentence was a cruel and unusual punishment. In *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921), the Court upheld the denial of second-class mailing privileges to a newspaper that had allegedly printed articles conveying false reports of United States conduct during the First World War with intent to cause disloyalty. Mr. Justice Brandeis dissented, and indicated his belief that the "punishment" was unusual and possibly excessive under *Weems v. United States*, 217 U. S. 349 (1910). There is nothing in either of these cases demonstrating a departure from the approach used in *Weems*, or adding anything to it.

[Footnote 4/28]

Mr. Justice Frankfurter was the only member of the Court unwilling to make this assumption. However, like Chief Justice Fuller in *In re Kemmler*, 136 U. S. 436 (1890), he examined the propriety of the punishment under the Due Process Clause of the Fourteenth Amendment. 329 U.S. at 329 U. S. 471. As MR. JUSTICE POWELL makes clear, Mr. Justice Frankfurter's analysis was different only in form from that of his Brethren; in substance, his test was fundamentally identical to that used by the rest of the Court.

[Footnote 4/29]

Id. at 329 U. S. 463.

[Footnote 4/30]

English law required a second attempt at execution if the first attempt failed. L. Radzinowicz, A History of English Criminal Law 185-186 (1948).

[Footnote 4/31]

MR. JUSTICE BRENNAN concurred, and concluded that the statute authorizing deprivations of citizenship exceeded Congress' legislative powers. 356 U.S. at 356 U. S. 114.

[Footnote 4/32]

Id. at 356 U. S. 101.

[Footnote 4/33]

370 U.S. at 370 U. S. 666.

[Footnote 4/34]

Robinson v. California, 370 U. S. 660 (1962), removes any lingering doubts as to whether the Eighth Amendment's prohibition against cruel and unusual punishments is binding on the States. *See also Powell v. Texas*, 392 U. S. 514 (1968).

[Footnote 4/35]

Trop v. Dulles, 356 U. S. 86, 356 U. S. 101 (1958). *See also Weems v. United States*, 217 U.S. at 217 U. S. 373; *Robinson v. California*, 370 U.S. at 370 U. S. 666. *See also* <l=|408 u.s.="" 238fn4="" 19|="">n. 19, *supra*.</l=|408>

[Footnote 4/36]

E.g., McGautha v. California, 402 U.S. at 402 U. S. 226 (separate opinion of Black, J.); *Trop v. Dulles*, *supra*, at 356 U. S. 99 (Warren, C.J.), 125 (Frankfurter, J., dissenting).

[Footnote 4/37]

See, e.g., Louisiana ex rel. Francis v. Resweber, 329 U.S. at 329 U. S. 474 (Burton, J., dissenting); *Trop v. Dulles*, *supra*, at 356 U. S. 99 (Warren, C.J.); *Rudolph v. Alabama*,375 U. S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); F. Frankfurter, Of Law and Men 81 (1956).

There is no violation of the principle of *stare decisis* in a decision that capital punishment now violates the Eighth Amendment. The last case that implied that capital punishment was still permissible was *Trop v. Dulles*, *supra*, at 356 U. S. 99. Not only was the implication purely dictum, but it was also made in the context of a flexible analysis that recognized that, as public opinion changed, the validity of the penalty would have to be reexamined. *Trop v. Dulles* is nearly 15 years old now, and 15 years change many minds about many things. MR. JUSTICE POWELL suggests, however, that our recent decisions in *Witherspoon v. Illinois*, 391 U. S. 510(1968), and *McGautha v. California*, 402 U. S. 183 (1971), imply that capital punishment is constitutionally permissible because, if they are viewed any other way, they amount to little more than an academic exercise. In my view, this distorts the "rule of four" by which this Court decides which cases and which issues it will consider, and in what order. *See United States v. Generes*, 405 U. S. 93, 405 U. S. 113(1972) (DOUGLAS, J., dissenting). There are many reasons why four members of the Court might have wanted to consider the issues presented in those cases before considering the difficult question that is now before us. While I do not intend to catalogue these reasons here, it should suffice to note that I do not believe that those decisions can, in any way, fairly be used to support any inference whatever that the instant cases have already been disposed of *sub silentio*.

[Footnote 4/38]

Ancel, The Problem of the Death Penalty, in Capital Punishment 4-5 (T. Sellin ed. 1967); G. Scott, The History of Capital Punishment 1 (1950).

[Footnote 4/39]

Scott, *supra*, <l=|408 u.s.="" 238fn4="" 38|="">n. 38, at 1.</l=|408>

[Footnote 4/40]

Id. at 2; Ancel, *supra*, <l=|408 u.s.="" 238fn4="" 38|="">n. 38, at 4-5.</l=|408>

[Footnote 4/41]

The Code of Hammurabi is one of the first known laws to have recognized the concept of an "eye for an eye," and consequently to have accepted death as an appropriate punishment for homicide. E. Block, And May God Have Mercy . . . 13-14 (1962).

[Footnote 4/42]

Scott, *supra*, <l=|408 u.s.="" 238fn4="" 38|="">n. 38, at 19-33.</l=|408>

[Footnote 4/43]

Id. at 5. Prior to this time, the laws of Alfred (871-901) provided that one who willfully slayed another should die, at least under certain circumstances. 3 J. Stephen, History of the Criminal Law of England 24 (1883). But punishment was apparently left largely to private enforcement.

[Footnote 4/44]

T. Plucknett, A Concise History of the Common Law 424-454 (5th ed. 1956).

[Footnote 4/45]

Introduction in H. Bedau, The Death Penalty in America 1 (1967 rev. ed.).

[Footnote 4/46]

Ibid.

[Footnote 4/47]

4 W. Blackstone, Commentaries *377. How many persons were actually executed for committing capital offenses is not known. *See* Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 3; L. Radzinowicz, A History of English Criminal Law 151, 153 (1948); Sellin, Two Myths in the History of Capital Punishment, 50 J.Crim.L.C. & P.S. 114 (1959). "Benefit of clergy" mitigated the harshness of the law somewhat. This concept arose from the struggle between church and state and originally provided that members of the clergy should be tried in ecclesiastical courts. Eventually, all first offenders were entitled to "benefit of clergy." Bedau, *supra*, at 4.</l=|408>

[Footnote 4/48]

G. Haskins, The Capitall Lawes of New England, Harv.L.Sch.Bull. 111 (Feb. 1956).

[Footnote 4/49]

Compare Haskins, *supra*, <l=|408 u.s.="" 238fn4="" 48|="">n. 48, *with* E. Powers, Crime and Punishment in Early Massachusetts, 1620-1692 (1966). *See also* Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 5.</l=|408></l=|408>

[Footnote 4/50]

Id. at 6.

[Footnote 4/51]

Filler, Movements to Abolish the Death Penalty in the United States, 284 Annals Am.Acad.Pol. & Soc.Sci. 124 (1952).

[Footnote 4/52]

Ibid.

[Footnote 4/53]

Ibid. (footnotes omitted).

[Footnote 4/54]

Ibid.; Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 6.</l=|408>

[Footnote 4/55]

For an unknown reason, Pennsylvania adopted the harsher penal code of England upon William Penn's death in 1718. There was no evidence, however of an increase in crime between 1682 and 1718. Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 124. In 1794, Pennsylvania eliminated capital punishment except for "murder of the first degree," which included all "willful, deliberate or premeditated" killings. The death penalty was mandatory for this crime. Pa.Stat. 1794, c. 1777. Virginia followed Pennsylvania's lead and enacted similar legislation. Other States followed suit.</l=|408>

[Footnote 4/56]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 124.</l=|408>

[Footnote 4/57]

Id. at 124-125.

[Footnote 4/58]

Reprinted in 12 Am.J.Legal Hist. 122 (1968).

[Footnote 4/59]

His advice was in large measure followed. *See* <l=|408 u.s.="" 238fn4="" 55|="">n. 55, *supra.*</l=|408>

[Footnote 4/60]

One scholar has noted that the early abolition movement in the United States lacked the leadership of major public figures. Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 8.</l=|408>

[Footnote 4/61]

Ibid.; Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 126-127.</l=|408>

[Footnote 4/62]

See Scott, *supra*, <l=|408 u.s.="" 238fn4="" 38|="">n. 38, at 114-116.</l=|408>

[Footnote 4/63]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 127.</l=|408>

[Footnote 4/64]

Davis, The Movement to Abolish Capital Punishment in America, 1787-1861, 63 Am.Hist.Rev. 23, 33 (1957).

[Footnote 4/65]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 128. Capital punishment was abolished for all crimes but treason. The law was enacted in 1846, but did not go into effect until 1847.</l=|408>

[Footnote 4/66]

Davis, *supra*, <l=|408 u.s.="" 238fn4="" 64|="">n. 64, at 29-30.</l=|408>

[Footnote 4/67]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 129.</l=|408>

[Footnote 4/68]

Id. at 130.

[Footnote 4/69]

Ibid.

[Footnote 4/70]

Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 10.</l=|408>

[Footnote 4/71]

Davis, *supra*, <l=|408 u.s.="" 238fn4="" 64|="">n. 64, at 46.</l=|408>

[Footnote 4/72]

Kansas restored it in 1935. *See* Appendix I to this opinion, *infra* at 408 U. S. 372.

[Footnote 4/73]

See McGautha v. California, 402 U.S. at 402 U. S. 199.

[Footnote 4/74]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 133. *See also Winston v. United States*, 172 U. S. 303 (1899). More than 90% of the executions since 1930 in this country have been for offenses with a discretionary death penalty. Bedau, The Courts, the Constitution, and Capital Punishment, 1968 Utah L.Rev. 201, 204.</l=|408>

[Footnote 4/75]

See <l=|408 u.s.="" 238fn4="" 72|="">n. 72, *supra*.</l=|408>

[Footnote 4/76]

Filler, *supra*, <l=|408 u.s.="" 238fn4="" 51|="">n. 51, at 134.</l=|408>

[Footnote 4/77]

Sellin, Executions in the United States, in Capital Punishment 35 T. Sellin ed. (1967); United Nations, Department of Economic and Social Affairs, Capital Punishment, Pt. II, ¶¶ 82-85, pp. 101-102 (1968).

[Footnote 4/78]

New York authorizes the death penalty only for murder of a police officer or for murder by a life term prisoner. N.Y.Penal Code § 125.30 (1967).

[Footnote 4/79]

See generally Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 74|="">n. 74. Nine States do not authorize capital punishment under any circumstances: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. Puerto Rico and the Virgin Islands also have no provision for capital punishment. Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 39. Those States that severely restrict the imposition of the death penalty are: New Mexico, N.M.Stat.Ann. § 40A-29-2.1 (1972); New York, N.Y.Penal Code § 125.30 (1967); North Dakota, N.D.Cent.Code §§ 12-07-01, 12-27-13 (1960); Rhode Island, R.I.Gen.Laws § 1123-2 (1970); Vermont, Vt.Stat.Ann., Tit. 13, § 2303 (Supp. 1971). California is the only State in which the judiciary has declared capital punishment to be invalid. *See* <l=|408 u.s.="" 238fn4="" 1|="">n. 1, *supra*.</l=|408></l=|408></l=|408>

[Footnote 4/80]

See generally Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

[Footnote 4/81]

Extensive compilations of the capital crimes in particular States can be found in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 39-52, and in the Brief for the Petitioner in No. 68-5027, App. G (*Aikens v. California*, 406 U. S. 813 (1972)). An attempt is made to break down capital offenses into categories in Finkel, A Survey of Capital Offenses, in Capital Punishment 22 (T. Sellin ed. 1967).</l=|408>

[Footnote 4/82]

Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 43.</l=|408>

[Footnote 4/83]

Ibid. See also Ralph v. Warden, 438 F.2d 786, 791-792 (CA4 1970).

[Footnote 4/84]

See Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw.U.L.Rev. 433, 448 (1957); Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶¶ 52-53, PP. 17-18 (1953). *See generally*,Reichert, Capital Punishment Reconsidered, 47 Ky.L.J. 397, 399 (1959).

[Footnote 4/85]

See, e.g., C. Beccaria, On Crimes and Punishment (tr. by H. Paolucci 1963); 1 Archibold, On the Practice, Pleading, and Evidence in Criminal Cases §§ 11-17, pp. XV-XIX (T. Waterman 7th ed. 1860).

[Footnote 4/86]

See, e.g., *Rudolph v. Alabama*, 375 U. S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); *Trop v. Dulles*, 356 U.S. at 356 U. S. 97 (Warren, C.J.), 356 U. S. 113 (BRENNAN, J., concurring); *Morissette v. United States*, 342 U. S. 246 (1952); *Williams v. New York*, 337 U. S. 241 (1949). In *Powell v. Texas*, 392 U.S. at 392 U. S. 530, we said:

"This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects. . . ."

This is, of course, correct, since deterrence and isolation are clearly recognized as proper. *E.g., Trop v. Dulles, supra,* at 356 U. S. 111 (BRENNAN, J., concurring). There is absolutely nothing in the language, the rationale, or the holding of *Powell v. Texas,* that implies that retribution for its own sake is a proper legislative aim in punishing.

[Footnote 4/87]

See, e.g., Vellenga, Christianity and The Death Penalty, in Bedau, *supra,* <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 123-130; Hook, The Death Sentence, in Bedau, *supra,* at 146-154. *See also*Ehrenzweig, A Psychoanalysis of the Insanity Plea — Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell, 73 Yale L.J. 425, 433-439 (1964).</l=|408>

[Footnote 4/88]

2 J. Story, On the Constitution § 1903, p. 650 (5th ed. 1891).

[Footnote 4/89]

Note, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1275 (1968); Note, Justice or Revenge?, 60 Dick.L.Rev. 342, 343 (1956); Royal Commission, *supra,* <l=|408 u.s.="" 238fn4="" 84|="">n. 84, 55, at 18.</l=|408>

[Footnote 4/90]

Barzun, In Favor of Capital Punishment, in Bedau, *supra,* <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 154, 163; Hook, *supra,* <l=|408 u.s.="" 238fn4="" 87|="">n. 87, at 152.</l=|408></l=|408>

[Footnote 4/91]

See Commonwealth v. Elliott, 371 Pa. 70, 78, 89 A.2d 782, 786 (1952) (Musmanno, J., dissenting); F. Frankfurter, Of Law and Men 101 (1956). The assertion that life imprisonment may somehow be more cruel than death is usually rejected as frivolous. Hence, I confess to surprise at finding the assertion being made in various ways in today's opinions. If there were any merit to the contention, it would do much to undercut even the retributive motive for imposing capital punishment. In any event, there is no better response to such an assertion than that of former Pennsylvania Supreme Court Justice Musmanno in his dissent in *Commonwealth v. Elliott, supra,* at 79-80, 89 A.2d at 787:

"One of the judges of the lower court indicated from the bench that a sentence of life imprisonment is not to be regarded as a leaser penalty than that of death. I challenge that statement categorically. It can be stated as a universal truth stretching from nadir to zenith that, regardless of circumstances, no one wants to die. Some person may, in an instant of spiritual or physical agony express a desire for death as an anodyne from intolerable pain, but that desire is never full-hearted, because there is always the reserve of realization that the silken cord of life is not broken by a mere wishing. There is no person in the actual extremity of dropping from the precipice of life who does not desperately reach for a crag of time to which to cling even for a moment against the awful eternity of silence below. With all its 'slings and arrows of outrageous fortune,' life is yet sweet and death is always cruel."

Attention should also be given to the hypothesis of Sir James Stephen, quoted in the text, *infra* at 408 U. S. 347-348.

[Footnote 4/92]

See Bedau, Deterrence and the Death Penalty: A Reconsideration, 61 J.Crim.L.C. & P.S. 539, 542 (1970).

[Footnote 4/93]

Royal Commission, *supra,* <l=|408 u.s.="" 238fn4="" 84|="">n. 84, 59, at 20.</l=|408>

[Footnote 4/94]

United Nations, *supra,* <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 1134, at 117. The great advantage that this country has is that it can compare abolitionist and retentionist States with geographic, economic, and cultural similarities.</l=|408>

[Footnote 4/95]

Reprinted in Royal Commission, *supra,* <l=|408 u.s.="" 238fn4="" 84|="">n. 84, 57, at 19.</l=|408>

[Footnote 4/96]

United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, ¶ 139, at 118.</l=|408>

[Footnote 4/97]

See Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 43.</l=|408>

[Footnote 4/98]

T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (ALI) 5 (1959); Morris, Thoughts on Capital Punishment, 35 Wash.L.Rev. & St. Bar J. 335, 340 (1960).

[Footnote 4/99]

Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 21.</l=|408>

[Footnote 4/100]

Such crimes might include lesser forms of homicide or homicide by a child or a lunatic. *Id.* at 22; The Laws, The Crimes, and The Executions, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 32, 61.</l=|408>

[Footnote 4/101]

Sutherland, Murder and the Death Penalty, 15 J.Crim.L. & Crim. 522 (1925); ALI, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 22; Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 73.</l=|408></l=|408>

[Footnote 4/102]

Executions were chosen for purposes of comparison because whatever impact capital punishment had would surely be most forcefully felt where punishment was actually imposed.

[Footnote 4/103]

See Appendix II to this opinion, *infra* at 408 U. S. 373.

[Footnote 4/104]

See Appendix III to this opinion, *infra* at 408 U. S. 374.

[Footnote 4/105]

United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, ¶ 134, at 117.</l=|408>

[Footnote 4/106]

Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, at 349-351. *Accord*, Vold, Extent and Trend of Capital Crimes in United States, 284 Annals Am.Acad.Pol. & Soc.Sci. 1, 4 (1952).</l=|408>

[Footnote 4/107]

Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 34.</l=|408>

[Footnote 4/108]

See, *e.g.*, Guillot, Abolition and Restoration of the Death Penalty in Missouri, in Bedau, *supra*, n. <l=|408 u.s.="" 238fn4="" 45|="">45, at 351, 358-359; Cobin, Abolition and Restoration of the Death Penalty in Delaware, in Bedau, *supra*, at 359, 371-372. </l=|408>

[Footnote 4/109]

Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 38-39; Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, at 353; United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 130-136, at 116-118.</l=|408></l=|408></l=|408>

[Footnote 4/110]

One problem is that the statistics for the 19th century are especially suspect; another is that *de jure* abolition may have been preceded by *de facto* abolition which would have distorted the figures. It should also be noted that the figures for several States reflect homicide convictions, rather than homicide rates.

[Footnote 4/111]

Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, 65, at 23; 346-349; United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 132, at 117.</l=|408></l=|408>

[Footnote 4/112]

Hayner & Cranor, The Death Penalty in Washington State, 284 Annals Am.Acad.Pol. & Soc.Sci. 101 (1952); Graves, A Doctor Looks at Capital Punishment 10 Med.Arts & Sci. 137 (1956); Dann, The Deterrent Effect of Capital Punishment, Bull. 29, Friends Social Service Series, Committee on Philanthropic Labor and Philadelphia Yearly Meeting of Friends (1935); Savitz, A Study in Capital Punishment, 49 J.Crim.L.C. & P.S. 338 (1958); United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 135, at 118.</l=|408>

[Footnote 4/113]

Graves, *supra*, <l=|408 u.s.="" 238fn4="" 112|="">n. 112; Hearings, *supra*, <l=|408 u.s.="" 238fn4="" 80|="">n. 80, at 23 (testimony of C. Duffy), 126 (statement of Dr. West); T. Reik, The Compulsion to Confess 474 (1959); McCafferty, Major Trends in the Use of Capital Punishment, 25 Fed.Prob., No. 3, P. 15 (Sept. 1961). Capital punishment may provide an outlet for suicidal impulses or a means of achieving notoriety, for example.</l=|408></l=|408>

[Footnote 4/114]

See, e.g., Gerstein, A Prosecutor Looks at Capital Punishment, 51 J.Crim.L.C. & P.S. 252 (1960); Hoover, Statements in Favor of the Death Penalty, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 130; Younger, Capital Punishment: A Sharp Medicine Reconsidered, 42 A.B.A.J. 113 (1956). *But see* Symposium on Capital Punishment, District Attorneys' Assn. of State of New York, Jan. 27, 1961, 7 N.Y.L.F. 249, 267 (1961) (statement of A. Herman, head of the homicide bureau of the New York City District Attorney's office).</l=|408>

[Footnote 4/115]

Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 56-58; Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132 (1969); Sellin, Does the Death Penalty Protect Municipal Police, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 284; United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 136, at 118.</l=|408></l=|408></l=|408>

[Footnote 4/116]

L. Lawes, Life and Death in Sing Sing 150 (1928); McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed.Prob., No. 2, p. 11 (June 1964); 1950 Survey of the International Penal and Penitentiary Commission, cited in Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 70-72; Sellin, Prisons Homicides, in Capital Punishment 154 (T. Sellin ed. 1967); *cf.* Akman, Homicides and Assaults in Canadian Prisons, in Capital Punishment, *supra*, at 161-168. The argument can be made that the reason for the good record of murderers is that those who are likely to be recidivists are executed. There is, however, no evidence to show that, in choosing between life and death sentences, juries select the lesser penalties for those persons they believe are unlikely to commit future crimes.</l=|408>

[Footnote 4/117]

E.g., United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 88|="">n. 77, 144, at 119; B. Eshelman & F. Riley, Death Row Chaplain 224 (1962). This is supported also by overwhelming statistics showing an extremely low rate of recidivism for convicted murderers who are released from prison. Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, App. 15, at 486-491; Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 72-79; United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 144, at 119.</l=|408></l=|408></l=|408></l=|408>

[Footnote 4/118]

See, e.g., The Question of Deterrence, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 267.</l=|408>

[Footnote 4/119]

Ibid. and n. 11; Note, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1282-1283 (1968).

[Footnote 4/120]

See <l=|408 u.s.="" 238fn4="" 113|="">n. 113, *supra*.</l=|408>

[Footnote 4/121]

United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, § 159, at 123.</l=|408>

[Footnote 4/122]

See nn. <l=|408 u.s.="" 238fn4="" 58|="">58 and <l=|408 u.s.="" 238fn4="" 59|="">59, *supra*, and accompanying text.</l=|408> </l=|408>

[Footnote 4/123]

See n. <l=|408 u.s.="" 238fn4="" 62|="">62, *supra*, and accompanying text.</l=|408>

[Footnote 4/124]

Graves, A Doctor Looks at Capital Punishment, 10 Med.Arts. & Sci. 137 (1956); Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, § 60, at 20-21; Schuessler, The Deterrent Influence of the Death Penalty, 284 Annals Am.Acad.Pol. & Soc.Sci. 54 (1952); United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, § 142, at 119; M. Wolfgang, Patterns in Criminal Homicide (1958).</l=|408></l=|408>

One would assume that if deterrence were enhanced by capital punishment, the increased deterrence would be most effective with respect to the premeditating murderer or the hired killer who plots his crime before committing it. But such people rarely expect to be caught, and usually assume that, if they are caught, they will either be acquitted or sentenced to prison. This is a fairly dependable assumption, since a reliable estimate is that one person is executed for every 100 capital murders known to the police. Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw.U.L.Rev. 433, 444-445 (1957). For capital punishment to deter anybody, it must be a certain result of a criminal act, *cf. Ex parte Medley*, 134 U. S. 160 (1890), and it is not. It must also follow swiftly upon completion of the offense, and it cannot in our complicated due process system of justice. *See, e.g.*, The Question of Deterrence, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 258, 271-272; DiSalle, Trends in the Abolition of Capital Punishment, 1969 U.Toledo L.Rev. 1, 4. It is ironic that those persons whom we would like to deter the most have the least to fear from the death penalty, and recognize that fact. Sellin, Address for Canadian Society for Abolition of the Death Penalty, Feb. 7, 1965, in 8 Crim.L.Q. 36, 48 (1966); Proceedings of the Section of Criminal Law of the ABA, Aug. 24, 1959, p. 7 (M. DiSalle).</l=|408>

[Footnote 4/125]

In reaching this conclusion, I maintain agreement with that portion of Stephen's hypothesis that suggests that convicted criminals fear death more than they fear life imprisonment. As I stated earlier, the death penalty is a more severe sanction. The error in the hypothesis lies in its assumption that, because men fear death more than imprisonment after they are convicted, they necessarily must weigh potential penalties prior to committing criminal acts, and that they will conform their behavior so as to insure that, if caught, they will receive the lesser penalty. It is extremely unlikely that much thought is given to penalties before the act is committed, and, even if it were, the preceding footnote explains why such thought would not lead to deterrence.

[Footnote 4/126]

See <l=|408 u.s.="" 238fn4="" 117|="">n. 117, *supra*.</l=|408>

[Footnote 4/127]

See, e.g., Royal Commission, *supra*, <l=|408 u.s.="" 238fn4="" 84|="">n. 84, App. 15, at 486-491.</l=|408>

[Footnote 4/128]

Jackson applies to the States under the criteria articulated in *Duncan v. Louisiana*,391 U. S. 145, 391 U. S. 149 (1968).

[Footnote 4/129]

See, e.g., Barzun, In Favor of Capital Punishment, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 154.</l=|408>

[Footnote 4/130]

See, e.g., Death as a Punishment, in Bedau, *supra*, at 214, 226-228; Caldwell, Why is the Death Penalty Retained?, 284 Annals Am.Acad.Pol. & Soc.Sci. 45, 50 (1952); Johnson, Selective Factors in Capital Punishment, 36 Social Forces 165, 169 (1957); Sellin, Capital Punishment, 25 Fed.Prob., No. 3, p. 3 (Sept. 1961). We should not be surprised at the lack of merit in the eugenic arguments. There simply is no evidence that mentally ill persons who commit capital offenses constitute a psychiatric entity distinct from other mentally disordered patients, or that they do not respond as readily to treatment. Cruvant & Waldrop, The Murderer in the Mental Institution, 284 Annals Am.Acad.Pol. & Soc.Sci. 35, 43 (1952).

[Footnote 4/131]

Caldwell, *supra*, <l=|408 u.s.="" 238fn4="" 130|="">n. 130, at 48; McGee, *supra*, <l=|408 u.s.="" 238fn4="" 116|="">n. 116. </l=|408></l=|408>

[Footnote 4/132]

McGee, *supra*, at 13-14; Bailey, Rehabilitation on Death Row, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 556. </l=|408>

[Footnote 4/133]

T. Thomas, This Life We Take 20 (3d ed. 1965).

[Footnote 4/134]

Stein v. New York, 346 U. S. 156, 346 U. S. 196 (1953) (Jackson, J.); *cf. Reid v. Covert*,354 U. S. 1, 354 U. S. 77 (1957) (Harlan, J., concurring in result).

[Footnote 4/135]

See, e.g., Witherspoon v. Illinois, 391 U. S. 510 (1968).

[Footnote 4/136]

Slovenko, And the Penalty is (Sometimes) Death, 24 Antioch Review 351 (1964).

[Footnote 4/137]

See, e.g., Caritativo v. California, 357 U. S. 549 (1958).

[Footnote 4/138]

To others, as well as to the author of this opinion, this practice has seemed a strange way to spend money. *See, e.g.*, T. Arnold, The Symbols of Government 10-13 (1935).

[Footnote 4/139]

Slovenko, *supra*, <l=|408 u.s.="" 238fn4="" 136|="">n. 136, at 363.</l=|408>

[Footnote 4/140]

B. Eshelman & F. Riley, Death Row Chaplain 226 (1962); Caldwell, *supra*, <l=|408 u.s.="" 238fn4="" 130|="">n. 130, at 48; McGee, *supra*, <l=|408 u.s.="" 238fn4="" 116|="">n. 116, at 13; Sellin, *supra*, <l=|408 u.s.="" 238fn4="" 130|="">n. 130, at 3 (Sept. 1961).</l=|408></l=|408></l=|408>

[Footnote 4/141]

This analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process. *See* Packer, Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1074 (1964). There is one difference, however. Capital punishment is unconstitutional because it is excessive and unnecessary punishment, not because it is irrational.

The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life), *Johnson v. Zerbst*, 304 U. S. 458, 304 U. S. 462 (1938), the State needs a compelling interest to justify it. *See* Note, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1324-1354 (1968). Thus stated, the substantive due process argument

reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment — *i.e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

THE CHIEF JUSTICE asserts that if we hold that capital punishment is unconstitutional because it is excessive, we will next have to determine whether a 10-year prison sentence rather than a five-year sentence, is also excessive, or whether a $5 fine would not do equally well as a $10 fine. He may be correct that such determinations will have to be made, but, as in these cases, those persons challenging the penalty will bear a heavy burden of demonstrating that it is excessive. These cases arise after 200 years of inquiry, 200 years of public debate and 200 years of marshaling evidence. The burden placed on those challenging capital punishment could not have been greater. I am convinced that they have met their burden. Whether a similar burden will prove too great in future cases is a question that we can resolve in time.

[Footnote 4/142]

United States v. Rosenberg, 195 F.2d 583, 608 (CA2) (Frank, J.), *cert. denied*, 344 U.S. 838 (1952). *See also Kasper v. Brittain*, 245 F.2d 92, 96 (CA6), *cert. denied*, 355 U.S. 834 (1957) ("shocking to the sense of justice"); *People v. Morris*, 80 Mich. 634, 639, 45 N.W. 591, 592 (1890) ("shock the moral sense of the people"). In *Repouille v. United States*, 165 F.2d 152 (CA2 1947), and Schmidt v. United States, 177 F.2d 450, 451 (CA2 1949), Judge Learned Hand wrote that the standard of "good moral character" in the Nationality Act was to be judged by "the generally accepted moral conventions current at the time." 165 F.2d at 153. Judge Frank, who was later to author the *Rosenberg* opinion, in which a similar standard was adopted, dissented in *Repouille* and urged that the correct standard was the "attitude of our ethical leaders." 165 F.2d at 154. In light of *Rosenberg*, it is apparent that Judge Frank would require a much broader based moral approbation before striking down a punishment as cruel and unusual than he would for merely holding that conduct was evidence of bad moral character under a legislative act. 1

[Footnote 4/143]

United States v. Rosenberg, *supra*, at 608.

[Footnote 4/144]

See Repouille v. United States, *supra*, at 153. In *Witherspoon v. Illinois*, 391 U.S. at 391 U. S. 520, the Court cited a public opinion poll that showed that 42% of the American people favored capital punishment, while 47% opposed it. But the polls have shown great fluctuation. *See* What Do Americans Think of the Death Penalty?, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 231-241.</l=|408>

[Footnote 4/145]

The fact that the constitutionality of capital punishment turns on the opinion of an informed citizenry undercuts the argument that, since the legislature is the voice of the people, its retention of capital punishment must represent the will of the people. So few people have been executed in the past decade that capital punishment is a subject only rarely brought to the attention of the average American. Lack of exposure to the problem is likely to lead to indifference, and indifference and ignorance result in preservation of the *status quo*, whether or not that is desirable, or desired.

It might be argued that, in choosing to remain indifferent and uninformed, citizens reflect their judgment that capital punishment is really a question of utility, not morality, and not one, therefore. of great concern. As attractive as this is on its face, it cannot be correct, because such an argument requires that the choice to remain ignorant or indifferent be a viable one. That, in turn, requires that it be a knowledgeable choice. It is therefore imperative for constitutional purposes to attempt to discern the probable opinion of an informed electorate.

[Footnote 4/146]

Cf. Packer, Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1076 (1964).

[Footnote 4/147]

E.g., Gold, A Psychiatric Review of Capital Punishment, 6 J. Forensic Sci. 465, 466 (1961); A. Koestler, Reflections on Hanging 164 (1957); *cf.* C. Duffy & A. Hirshberg, 88 Men and 2 Women 257-258 (1962).

[Footnote 4/148]

Hearings, *supra*, <l=|408 u.s.="" 238fn4="" 80|="">n. 80, at 11 (statement of M. DiSalle).</l=|408>

[Footnote 4/149]

National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 7 (Aug. 1969).

[Footnote 4/150]

Ibid.

[Footnote 4/151]

Ibid.

[Footnote 4/152]

Alexander, The Abolition of Capital Punishment, Proceedings of the 96th Congress of Correction of the American Correctional Association, Baltimore, Md., 57 (1966); Criminal Justice: The General Aspects, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 405, 411-414; Bedau. Death Sentences in New Jersey, 1907-1960, 19 Rutgers L.Rev. 1, 18-21, 52-53 (1964); R. Clark, Crime in America 335 (1970); Hochkammer, The Capital Punishment Controversy, 60 J.Crim.L.C. & P.S. 360, 361-362 (1969); Johnson, The Negro and Crime, 217 Annals Am.Acad.Pol. & Soc.Sci. 93, 95, 99 (1941); Johnson, Selective Factors in Capital Punishment, 36 Social Forces 165 (1957); United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 69, at 98; Williams, The Death Penalty and the Negro, 67 Crisis 501, 511 (1960); M. Wolfgang & B. Cohen, Crime and Race: Conceptions and Misconceptions 77, 80-81, 85-86 (1970); Wolfgang, Kelly, & Nolde, Comparison of the Executed and the Commuted Among Admissions to Death Row, 53 J.Crim.L.C. & P.S. 301 (1962). MR. JUSTICE DOUGLAS explores the discriminatory application of the death penalty at great length, *ante* at 408 U. S. 249-257.</l=|408></l=|408>

[Footnote 4/153]

National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 28 (Aug. 1969).

[Footnote 4/154]

Men kill between four and five times more frequently than women. *See* Wolfgang, A Sociological Analysis of Criminal Homicide, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 74, 75. Hence, it would not be irregular to see four or five times as many men executed as women. The statistics show a startlingly greater disparity, however. United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, 67, at 97-98.</l=|408></l=|408>

[Footnote 4/155]

Criminal Justice: The General Aspects, in Bedau, *supra*, at 405, 411; Bedau, Capital Punishment in Oregon, 1903-64, 45 Ore.L.Rev. 1 (1965); Bedau, Death Sentences in New Jersey, 1907-1960, 19 Rutgers L.Rev. 1 (1964); R. Clark, Crime in America 335 (1970); C. Duffy & A. Hirshberg, 88 Men and 2 Women 256-257 (1962); Carter & Smith, The Death Penalty in California: A Statistical and Composite Portrait, 15 Crime & Delin. 62 (1969); Hearings, *supra*, <l=|408 u.s.="" 238fn4="" 80|="">n. 80, at 124-125 (statement of Dr. West); Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132 (1969); McGee, *supra*, <l=|408 u.s.="" 238fn4="" 116|="">n. 116, at 11-12.</l=|408></l=|408>

[Footnote 4/156]

See, e.g., E. Borchard, Convicting the Innocent (1932); J. Frank & B. Frank, Not Guilty (1957); E. Gardner, Court of Last Resort (1952). These three books examine cases in which innocent persons were sentenced to die. None of the innocents was actually executed, however. Bedau has abstracted 74 cases occurring in the United States since 1893 in which a wrongful conviction for murder was alleged and usually proved "beyond doubt." In almost every case, the convictions were sustained on appeal. Bedau seriously contends that innocent persons were actually executed. Murder, Errors of Justice, and Capital Punishment, in Bedau, *supra*, <l=|408 u.s.="" 238fn4="" 45|="">n. 45, at 434, 438. *See also* Black, The Crisis in Capital Punishment, 31 Md.L.Rev. 289 (1971); Hirschberg, Wrongful Convictions, 13 Rocky Mt.L.Rev. 20 (1940); Pollak, The Errors of Justice, 284 Annals Am.Acad.Pol. & Soc.Sci. 115 (1952).</l=|408>

[Footnote 4/157]

E. Gardner, Court of Last Resort 178 (1952).

[Footnote 4/158]

MR. JUSTICE DOUGLAS recognized this fact when he wrote:

"One who reviews the records of criminal trials need not look long to find an instance where the issue of guilt or innocence hangs in delicate balance. A judge who denies a stay of execution in a capital case often wonders if an innocent man is going to his death. . . . "

"Those doubts exist because our system of criminal justice does not work with the efficiency of a machine — errors are made and innocent as well as guilty people are sometimes punished. . . . "

". . . We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."

"Yet the sad truth is that a cog in the machine often slip: memories fail; mistaken identifications are made; those who wield the power of life and death itself — the police officer, the witness, the prosecutor, the juror, and even the judge — become overzealous in their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness."

Foreword, J. Frank & B. Frank, Not Guilty 11-12 (1957).

There has been an "incredible lag" between the development of modern scientific methods of investigation and their application to criminal cases. When modern methodology is available, prosecutors have the resources to utilize it, whereas defense counsel often may not. Lassers, Proof of Guilt in Capital Cases — An Unscience, 58 J.Crim.L.C. & P.S. 310 (1967). This increases the chances of error.

[Footnote 4/159]

Ehrmann, The Death Penalty and the Administration of Justice, 284 Annals Am.Acad.Pol. & Soc.Sci. 73, 83 (1952).

[Footnote 4/160]

F. Frankfurter, Of Law and Men 81 (1956).

[Footnote 4/161]

B. Eshelman & F. Riley, Death Row Chaplain 222 (1962).

[Footnote 4/162]

McCafferty, Major Trends in the Use of Capital Punishment, 25 Fed.Prob., No. 3, pp. 15, 21 (Sept. 1961) (quoting Dr. S. Glueck of Harvard University).

[Footnote 4/163]

MR. JUSTICE POWELL suggests that this conclusion is speculative, and he is certainly correct. But the mere recognition of this truth does not undercut the validity of the conclusion. MR. JUSTICE POWELL himself concedes that judges somehow know that certain punishments are no longer acceptable in our society; for example, he refers to branding and pillorying. Whence comes this knowledge? The answer is that it comes from our intuition as human beings that our fellow human beings no longer will tolerate such punishments

I agree wholeheartedly with the implication in my Brother POWELL's opinion that judges are not free to strike down penalties that they find personally offensive. But I disagree with his suggestion that it is improper for judges to ask themselves whether a specific punishment is morally acceptable to the American public. Contrary to some current thought, judges have not lived lives isolated from a broad range of human experience. They have come into contact with many people, many ways of life, and many philosophies. They have learned to share with their fellow human beings common views of morality. If, after drawing on this experience and considering the vast range of people and views that they have encountered, judges conclude that these people would not knowingly tolerate a specific penalty in light of its costs, then this conclusion is entitled to weight. *See*Frankel, Book Review, 85 Harv.L.Rev. 354 (1971). Judges can find assistance in determining whether they are being objective, rather than subjective, by referring to the attitudes of the persons whom most citizens consider our "ethical leaders."*See Repouille v. United States*, 165 F.2d at 154 (Frank, J., dissenting).

I must also admit that I am confused as to the point that my Brother POWELL seeks to make regarding the underprivileged members of our society. If he is stating that this Court cannot solve all of their problems in the context of this case, or even many of them, I would agree with him. But if he is opining that it is only the poor, the ignorant, the racial minorities, and the hapless in our

society who are executed; that they are executed for no real reason other than to satisfy some vague notion of society's cry for vengeance; and that, knowing these things, the people of this country would not care, then I most urgently disagree.

There is too much crime, too much killing, too much hatred in this country. If the legislatures could eradicate these elements from our lives by utilizing capital punishment, then there would be a valid purpose for the sanction, and the public would surely accept it. It would be constitutional. As THE CHIEF JUSTICE and MR. JUSTICE POWELL point out, however, capital punishment has been with us a long time. What purpose has it served? The evidence is that it has served none. I cannot agree that the American people have been so hardened, so embittered, that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with my fellow citizens. Rather, I have found that they earnestly desire their system of punishments to make sense in order that it can be a morally justifiable system. *See generally* Arnold, The Criminal Trial As a Symbol of Public Morality, in Criminal Justice In Our Time 137 (A. Howard ed. 1967).

[Footnote 4/164]

164 R. Clark, Crime in America 336 (1970).

[Footnote 4/165]

Some jurisdictions have *de facto* abolition; others have *de jure*. *Id.* at 330; Hearings, *supra*, <l=|408 u.s.="" 238fn4="" 80|="">n. 80, at 9-10 (statement of M. DiSalle). *See generally* Patrick, The Status of Capital Punishment: A World Perspective, 56 J.Crim.L.C. & P.S. 397 (1965); United Nations, *supra*, <l=|408 u.s.="" 238fn4="" 77|="">n. 77, ⁂ 10-17, 63-65, at 83-85, 96-97; Brief for Petitioner in No. 68-5027, App. E (*Aikens v. California*, 406 U. S. 813 (1972)).</l=|408></l=|408>

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APPENDIX I TO OPINION OF MARSHALL, J., CONCURRING

ABOLITION OF THE DEATH PENALTY IN THE UNITED

STATES: 1846-1968

(States are listed according to year most recent action was taken)

bwm:

Year of Year of

partial complete Year of Year of

State abolition abolition restoration reabolition

New York . . . . 1965 [Footnote 5/1] — — —

Vermont. . . . . 1965 [Footnote 5/2] — — —

West Virginia. . — 1965 — —

Iowa . . . . . — 1872 1878 1965

Oregon . . . . . — 1914 1920 1964

Michigan . . . . 1847 [Footnote 5/3] 1963 — —

Delaware . . . . — 1958 1961 —

Alaska . . . . . — 1957 — —

Hawaii . . . . . — 1957 — —

South Dakota . — 1915 1939 —

Kansas . . . . . — 1907 1935 —

Missouri . . . . — 1917 1919 —

Tennessee. . . . 1915 [Footnote 5/4] — 1919 —

Washington . . . — 1913 1919 —

Arizona. . . . . 1916 [Footnote 5/5] — 1918 —

North Dakota . . 1915 [Footnote 5/6] — — —

Minnesota. . . . — 1911 — —

Colorado . . . . — 1897 1901 —

Maine. . . . . — 1876 1883 1887

Wisconsin. . . . — 1853 — —

Rhode Island . . 1852 [Footnote 5/7] — — —

ewm:

[Footnote 5/1]

Death penalty retained for persons found guilty of killing a peace officer who is acting in line of duty, and for prisoners under a life sentence who murder a guard or inmate while in confinement or while escaping from confinement.

[Footnote 5/2]

Death penalty retained for persons convicted of first-degree murder who commit a second "unrelated" murder, and for the first-degree murder of any law enforcement officer or prison employee who is in the performance of the duties of his office

[Footnote 5/3]

Death penalty retained for treason. Partial abolition was voted in 1846, but was not put into effect until 1847.

[Footnote 5/4]

Death penalty retained for rape.

[Footnote 5/5]

Death penalty retained for treason

[Footnote 5/6]

Death penalty retained for treason, and for first-degree murder committed by a prisoner who is serving a life sentence for first-degree murder

[Footnote 5/7]

Death penalty retained for persons convicted of committing murder while serving a life sentence for any offense.

Based on National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 30 (Aug. 1969).

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|408 U.S. 238app2|

APPENDIX II TO OPINION OF MARSHALL, J., CONCURRING

bwm:

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION,

AND NUMBER OF EXECUTIONS IN CERTAIN

AMERICAN STATES: 1920-1955

Year Maine* N.H. Vt. Mass. R.I.* Conn.

Rates Exec. Rates Exec. Rates Exec. Rates Exec.

1920 1.4 1.8 2.3 2.1 1 1.8 3.9 1

1921 2.2 2.2 1.7 2.8 3.1 2.9 2

1922 l.7 1.6 1.1 2.6 2.2 2.9 1

1923 1.7 2.7 1.4 2.8 1 3.5 3.1

1924 1.5 1.6 .6 2.7 1 2.0 3.5

1925 2.2 1.3 .6 2.7 1.8 3.7

1926 1.1 .9 2.2 2.0 1 3.2 2.9 1

1927 1.9 .7 .8 2.1 6 2.7 2.3 2

1928 l.6 1.3 1.4 1.9 3 2.7 2.7

1929 1.0 1.5 1.4 1.7 6 2.3 2.6 1

1930 1.8 .9 1.4 1.8 2.0 3.2 2

1931 1.4 2.1 1.1 1 2.0 2 2.2 2.7

1932 2.0 .2 1.1 2.1 1 l.6 2.9

1933 3.3 2.7 l.6 2.5 1.9 1.8

1934 1.1 1.4 1.9 2.2 4 1.8 2.4

1935 1.4 1.0 .3 1.8 4 1.0 1.9

1936 2.2 1.0 2.1 l.6 2 1.2 2.7 1

1937 1.4 1.8 1.8 1.9 2.3 2.0 1

1938 1.5 1.8 1.3 1.3 3 1.2 2.1 1

1939 1.2 2.3 1 .8 1.4 2 l.6 1.3

1940 1.5 1.4 .8 1.5 1.4 1.8 2

1941 1.1 .4 2.2 1.3 1 .8 2.2

1942 1.7 .2 .9 1.3 2 1.2 2.5

1943 1.7 .9 .6 .9 3 1.5 l.6 2

1944 1.5 1.1 .3 1.4 .6 1.9 1

1945 .9 .7 2.9 1.5 1.1 1.5 1

1946 1.4 .8 1.7 1.4 1 1.5 l.6 3

1947 1.2 .6 1.1 1 l.6 2 1.5 1.9

1948 1.7 1.0 .8 1.4 2.7 1.7 1

1949 1.7 1.5 .5 1.1 .5 1.8

1950 1.5 1.3 .5 1.3 1.5 1.4

1951 2.3 .6 .5 1.0 .9 2.0

1952 1.0 1.5 .5 1.0 1.5 1.7

1953 1.4 .9 .3 1.0 .6 1.5

1954 1.7 .5 l.6 2 1.0 1.3 1.3

1955 1.2 1.1 .5 1.2 1.7 1.3 3

ewm:

* Maine has totally abolished the death penalty, and Rhode Island has severely limited its imposition. Based on ALI, *supra*, <l=|408 u.s.="" 238fn4="" 98|="">n. 98, at 25.</l=|408>

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APPENDIX III TO OPINION OF MARSHALL, J., CONCURRING

bwm:

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION, AND

NUMBER OF EXECUTIONS IN CERTAIN AMERICAN STATES: 1920-1955

Year	Mich.*		Ohio		Ind.		Minn.*		Iowa		Wis.*		N.D.*		S.D.		Neb.	
	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.	Rate	Ex.
1920	5.6	6.9	3	4.7	2	3.1	**	1.7	**	**	***	4.2						
1921	4.7	7.9	10	6.4	4.4	2.2	4.9											
1922	4.3	7.3	12	6.7	2	3.6	3	1.8	4.5									
1923	6.l	7.8	10	6.l	2.9	2.1	2	2.2	4.1									
1924	7.1	6.9	10	7.3	3.2	2.7	1	1.8	2.1	4.4								
1925	7.4	8.1	13	6.6	1	3.8	2.7	2	2.3	2.0	4.0							
1926	10.4	8.0	7	5.8	3	2.2	2.3	2.6	1.8	2.7								
1927	8.2	8.6	8	6.3	1	2.6	2.4	2.6	l.6	3.5								
1928	7.0	8.2	7	7.0	1	2.8	2.3	2.1	1.0	3.7								
1929	8.2	8.3	5	7.0	1	2.2	2.6	2.3	1.2	3.0								
1930	6.7	9.3	8	6.4	1	3.8	3.2	3.1	3.5	1.9	3.5							
1931	6.2	9.0	10	6.5	1	2.9	2.5	1	3.6	2.0	2.3	3.6						
1932	5.7	8.1	7	6.7	2	2.9	2.9	2.8	1.2	l.6	3.7							
1933	6.1	8.2	11	6.6	3	3.6	2.9	1.2	1.7	3.2								
1934	4.2	7.7	7	7.1	4	3.4	2.3	2.4	l.6	3.0	4.4							
1935	4.2	7.1	10	4.4	2	2.6	2.0	3	1.4	2.3	2.0	3.4						
1936	4.0	6.6	6	5.2	2	2.3	1.8	1.7	2.0	1.2	2.5							
1937	4.6	5.7	1	4.7	5	l.6	2.2	2.2	l.6	.1	2.0							
1938	3.4	5.1	12	4.4	8	l.6	1.4	4	2.0	2.4	.9	l.6						
1939	3.1	4.8	10	3.8	3	l.6	1.8	1.4	1.2	2.8								
1940	3.0	4.6	2	3.3	1.2	1.3	1	1.3	1.4	2.2	1.0							
1941	3.2	4.2	4	3.1	1	1.7	1.3	1	1.4	2.3	1.0	2.1						
1942	3.2	4.6	2	3.2	1	1.7	1.2	l.6	1.4	.9	1.8							
1943	3.3	4.4	6	2.8	1.2	1.0	1.1	.6	1.4	2.4								
1944	3.3	3.8	2	2.8	1.4	1.7	1	.9	.9	l.6	1.3							
1945	3.7	4.8	7	4.0	1	1.9	l.6	1	l.6	1.0	2.0	1.2	1					
1946	3.2	5.2	2	3.9	1	l.6	1.8	2	.9	1.5	1.1	2.1						
1947	3.8	4.9	5	3.8	1.2	1.9	1.4	.4	1.0	1	2.2							
1948	3.4	4.5	7	4.2	1.9	1.4	.9	.9	2.0	2.5	1							
1949	3.6	4.4	15	3.2	3	1.1	.9	1	1.3	.7	2.3	1.8						

1950 3.9 4.1 4 3.6 1 1.2 1.3 1.1 .6 1.1 2.9

1951 3.7 3.8 4 3.9 1 1.3 1.5 1.1 .5 .9 1.0

1952 3.3 4.0 4 3.8 1.3 1.5 1 l.6 .8 2.3 l.6 1

1953 4.6 3.6 4 4.0 1.5 1.1 1.2 1.1 1.1 2.0

1954 3.3 3.4 4 3.2 1.0 1.0 1.1 .5 1.5 2.3

1955 3.3 3.1 3.1 1.1 1.2 1.1 .8 1.8 1.3

ewm:

* Michigan, Minnesota, and Wisconsin have completely abolished capital punishment. North Dakota has severely restricted its use.

** Iowa, North Dakota, and South Dakota were not admitted to the national death registration area until 1923, 1924, and 1930, respectively.

*** South Dakota introduced the death penalty in 1939. Based on ALI, *supra*, <l=|408 u.s.="" 238fn4="" 8|="">n. 8, at 28. *See also id.* at 32-34.</l=|408>

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MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

At the outset, it is important to note that only two members of the Court, MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. MR. JUSTICE DOUGLAS has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty. [Footnote 6/1] For the reasons set forth in Parts I-IV of this opinion, I conclude that the constitutional prohibition against "cruel and unusual punishments" cannot be construed to bar the imposition of the punishment of death.

MR. JUSTICE STEWART and MR. JUSTICE WHITE have concluded that petitioners' death sentences must be set aside because prevailing sentencing practices do not comply with the Eighth Amendment. For the reasons set forth in 408 U. S. I believe this approach fundamentally misconceives the nature of the Eighth Amendment guarantee and flies directly in the face of controlling authority of extremely recent vintage.

I

If we were possessed of legislative power, I would either join with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than

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self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Although the Eighth Amendment literally reads as prohibiting only those punishments that are both "cruel" and "unusual," history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.

The most persuasive analysis of Parliament's adoption of the English Bill of Rights of 1689 the unquestioned source of the Eighth Amendment wording — suggests that the prohibition against "cruel and unusual punishments" was included therein out of aversion to severe punishments not legally authorized and not within the jurisdiction of the courts to impose. To the extent that the term

"unusual" had any importance in the English version, it was apparently intended as a reference to illegal punishments. [Footnote 6/2]

From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor. The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers' exclusive concern was the absence of any ban on tortures. [Footnote 6/3] The later inclusion of the "cruel and unusual punishments" clause was in response to these objections. There was no discussion of the interrelationship of the terms "cruel" and "unusual," and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.

The cases decided under the Eighth Amendment are consistent with the tone of the ratifying debates. In *Wilkerson v. Utah*, 99 U. S. 130 (1879), this Court held that execution by shooting was not a prohibited mode of carrying out a sentence of death. Speaking to the meaning

of the Cruel and Unusual Punishments Clause, the Court stated,

"[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

Id. at 99 U. S. 136. The Court made no reference to the role of the term "unusual" in the constitutional guarantee.

In the case of *In re Kemmler*, 136 U. S. 436 (1890), the Court held the Eighth Amendment inapplicable to the States and added the following dictum:

"So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the . . . [prohibition of the New York constitution]. And we think this equally true of the Eighth Amendment, in its application to Congress."

". . . Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life. This language again reveals an exclusive concern with extreme cruelty. The Court made passing reference to the finding of the New York courts that electrocution was an 'unusual' punishment, but it saw no need to discuss the significance of that term as used in the Eighth Amendment."

Opinions in subsequent cases also speak of extreme cruelty as though that were the sum and substance of the constitutional prohibition. *See O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 339-340 (1892) (Field, J., dissenting); *Weems*

v. United States, 217 U. S. 349, 217 U. S. 372-373 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 329 U. S. 464 (1947). As summarized by Mr. Chief Justice Warren in the plurality opinion in *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 100 n. 32 (1958):

"Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. *See Weems v. United States, supra; O'Neil v. Vermont, supra; Wilkerson v. Utah, supra.* These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'"

I do not suggest that the presence of the word "unusual" in the Eighth Amendment is merely vestigial, having no relevance to the constitutionality of any punishment that might be devised. But where, as here, we consider a punishment well known to history, and clearly authorized by legislative enactment, it disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term "unusual" as affecting the outcome of these cases. Instead, I view these cases as turning on the single

question whether capital punishment is "cruel" in the constitutional sense. The term "unusual" cannot be read as limiting the ban on "cruel" punishments, or as somehow expanding the meaning of the term "cruel." For this reason, I am unpersuaded by the facile argument that, since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now "cruel and unusual."

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II

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed "unless on a presentment or indictment of a Grand Jury." The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense. Similarly, the Due Process Clause commands "due process of law" before an accused can be "deprived of life, liberty, or property." Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not "cruel" in the constitutional sense at that time.

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly "cruel" in the constitutional sense. *Wilkerson v. Utah*, 99 U. S. 130 (1879); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 464. *In*

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re Kemmler, 136 U. S. 436 (1890) (dictum). It is only 14 years since Mr. Chief Justice Warren, speaking for four members of the Court, stated without equivocation:

"Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Trop v. Dulles, 356 U.S. at 356 U. S. 99. It is only one year since Mr. Justice Black made his feelings clear on the constitutional issue:

"The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment, because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment."

McGautha v. California, 402 U. S. 183, 402 U. S. 226 (1971) (separate opinion). By limiting its grants of certiorari, the Court has refused even to hear argument on the Eighth Amendment claim on two occasions in the last four years. *Witherspoon v. Illinois*, *cert. granted*, 389 U.S. 1035, *rev'd*, 391 U. S. 510 (1968); *McGautha v. California*, *cert. granted*, 398 U. S. 936 (1970), *aff'd*, 402 U. S. 402 U.S. 183 (1971). In these cases, the Court confined its attention to the procedural aspects of capital trials, it being implicit that the punishment itself could be constitutionally imposed. Nonetheless, the Court has now been asked to hold that a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every

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member of the Court until today, is suddenly so cruel as to be incompatible with the Eighth Amendment.

Before recognizing such an instant evolution in the law, it seems fair to ask what factors have changed that capital punishment should now be "cruel" in the constitutional sense as it has not been in the past. It is apparent that there has been no change of constitutional significance in the nature of the punishment itself. Twentieth century modes of execution surely involve no greater physical suffering than the means employed at the time of the Eighth Amendment's adoption. And although a man awaiting

execution must inevitably experience extraordinary mental anguish, [Footnote 6/4] no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on "death row." To be sure, the ordeal of the condemned man may be thought cruel in the sense that all suffering is thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

However, the inquiry cannot end here. For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. This notion is not

new to Eighth Amendment adjudication. In *Weems v. United States*, 217 U. S. 349(1910), the Court referred with apparent approval to the opinion of the commentators that

"[t]he clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."

217 U.S. at 217 U. S. 378. Mr. Chief Justice Warren, writing the plurality opinion in *Trop v. Dulles*, *supra*, stated, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 356 U. S. 101. Nevertheless, the Court, up to now, has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral consensus.

The Court's quiescence in this area can be attributed to the fact that, in a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. For this reason, early commentators suggested that the "cruel and unusual punishments" clause was an unnecessary constitutional provision. [Footnote 6/5] As acknowledged in the principal brief for petitioners,

"both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. [Footnote 6/6]

Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people, and the legislatures responded to this sentiment."

Beyond any doubt, if we were today called upon to review such punishments, we would find them excessively cruel because we could say with complete assurance that contemporary society universally rejects such bizarre penalties. However, this speculation on the Court's probable reaction to such punishments is not, of itself, significant. The critical fact is that this Court has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency. *Cf. Weems v. United States*, *supra.* Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures. *See, e.g., Jackson v. Bishop*, 404 F.2d 571 (CA8 198); *Wright v. McMann*, 387 F.2d 519 (CA2 1967). The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that, in this country, legislatures have, in fact, been responsive — albeit belatedly at times — to changes in social attitudes and moral values.

I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy, the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.

III

There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. It is not a punishment, such as burning at the stake, that everyone would ineffably find to be repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute books. Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes. [Footnote 6/7] On four occasions in the last 11 years, Congress has added to the list of federal crimes punishable by death. [Footnote 6/8] In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

One conceivable source of evidence that legislatures have abdicated their essentially barometric role with respect to community values would be public opinion polls, of which there have been many in the past decade addressed to the question of capital punishment. Without assessing the reliability of such polls, or intimating that any judicial reliance could ever be placed on them,

it need only be noted that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values. [Footnote 6/9]

Counsel for petitioners rely on a different body of empirical evidence. They argue, in effect, that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced. It cannot be gainsaid that, by the choice of juries — and sometimes judges [Footnote 6/10] — the death penalty is imposed in far fewer than half the cases in which it is available. [Footnote 6/11] To go further and characterize

the rate of imposition as “freakishly rare,” as petitioners insist, is unwarranted hyperbole. And regardless of its characterization, the rate, of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized.

It is argued that, in those capital cases where juries have recommended mercy, they have given expression to civilized values and effectively renounced the legislative authorization for capital punishment. At the same time, it is argued that, where juries have made the awesome decision to send men to their deaths, they have acted arbitrarily and without sensitivity to prevailing standards of decency. This explanation for the infrequency of imposition of capital punishment is unsupported by known facts, and is inconsistent in principle with everything this Court has ever said about the functioning of juries in capital cases.

In *McGautha v. California, supra,* decided only one year ago, the Court held that there was no mandate in the Due Process Clause of the Fourteenth Amendment that juries be given instructions as to when the death penalty should be imposed. After reviewing the autonomy that juries have traditionally exercised in capital cases and noting the practical difficulties of framing manageable instructions, this Court concluded that judicially articulated standards were not needed to insure a responsible decision as to penalty. Nothing in *McGautha* licenses capital juries to act arbitrarily or assumes that they have so acted in the past. On the contrary, the assumption underlying the *McGautha* ruling is that juries “will act with

due regard for the consequences of their decision.” 402 U.S. at 402 U. S. 208.

The responsibility of juries deciding capital cases in our system of justice was nowhere better described than in *Witherspoon v. Illinois, supra:*

“[A] jury that must choose between life imprisonment and capital punishment can do little more — and must do nothing less — than express *the conscience of the community* on the ultimate question of life or death.”

“And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”

391 U.S. at 391 U. S. 519 and n. 15 (emphasis added). The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the

categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims, and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to

assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense, their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon* — that of choosing between life and death in individual cases according to the dictates of community values. [Footnote 6/12]

The rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 States and the Congress have turned their backs on current or evolving standards of decency in continuing to make the death penalty available. For, if selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed. Absent some clear indication that the continued imposition of the death penalty on a selective basis is violative of prevailing standards of civilized conduct, the Eighth Amendment cannot be said to interdict its use.

In two of these cases we have been asked to rule on the narrower question whether capital punishment offends the Eighth Amendment when imposed as the punishment for the crime of forcible rape. [Footnote 6/13] It is true that the death penalty is authorized for rape in fewer States than it is for murder, [Footnote 6/14] and that, even in those States, it is applied more sparingly for rape than for murder. [Footnote 6/15] But for the reasons aptly brought out in the opinion of MR. JUSTICE POWELL, *post* at 408 U. S. 456-461, I do not believe these differences can be elevated to the level of an Eighth Amendment distinction. This blunt constitutional command cannot be sharpened to carve neat distinctions corresponding to the categories of crimes defined by the legislatures.

IV

Capital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims, and is thus "unnecessarily cruel." As a pure policy matter, this approach has much to recommend it, but it seeks to give a dimension to the Eighth Amendment that it was never intended to have and promotes a line of inquiry that this Court has never before pursued.

The Eighth Amendment, as I have noted, was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy. One of the few to speak out against the adoption

of the Eighth Amendment asserted that it is often necessary to use cruel punishments to deter crimes. [Footnote 6/16] But. among those favoring the Amendment, no sentiment was expressed that a punishment of extreme cruelty could ever be justified by expediency. The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them. *Cf. Rochin v. California*, 342 U. S. 165, 342 U. S. 172-173 (1952).

The apparent seed of the "unnecessary cruelty" argument is the following language, quoted earlier, found in *Wilkerson v. Utah*, *supra:*

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . *and all others in the same line of unnecessary cruelty,* are forbidden by that amendment to the Constitution."

99 U.S. at 99 U. S. 135-136 (emphasis added). To lift the italicized phrase from the context of the *Wilkerson* opinion and now view it as a mandate for assessing the value of punishments in achieving the aims of penology is a gross distortion; nowhere are such aims even mentioned in the *Wilkerson* opinion. The only fair reading of this phrase is that punishments similar to torture in their extreme cruelty are prohibited by the Eighth Amendment. In *Louisiana ex rel. Francis v. Resweber,* 329 U.S. at 329 U. S. 463, 329 U. S. 464, the Court made reference to the Eighth Amendment's prohibition against the infliction of "unnecessary pain" in carrying out an execution. The context makes abundantly clear that the Court was disapproving the wanton infliction of physical

pain, and once again not advising pragmatic analysis of punishments approved by legislatures. [Footnote 6/17]

Apart from these isolated uses of the word "unnecessary," nothing in the cases suggests that it is for the courts to make a determination of the efficacy of punishments. The decision in *Weems v. United States, supra,* is not to the contrary. In *Weems,* the Court held that, for the crime of falsifying public documents, the punishment imposed under the Philippine Code of 15 years' imprisonment at hard labor under shackles, followed by perpetual surveillance, loss of voting rights, loss of the right to hold public office, and loss of right to change domicile freely, was violative of the Eighth Amendment. The case is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime; [Footnote 6/18] some view the decision of the Court primarily as

a reaction to the mode of the punishment itself. [Footnote 6/19] Under any characterization of the holding, it is readily apparent that the decision grew out of the Court's overwhelming abhorrence of the imposition of the particular penalty for the particular crime; it was making an essentially moral judgment, not a dispassionate assessment of the need for the penalty. The Court specifically disclaimed "the right to assert a judgment against that of the legislature of the expediency of the laws. . . ." 217 U.S. at 217 U. S. 378. Thus, apart from the fact that the Court in *Weems* concerned itself with the crime committed, as well as the punishment imposed, the case marks no departure from the largely unarticulable standard of extreme cruelty. However intractable that standard may be, that is what the Eighth Amendment is all about. The constitutional provision is not addressed to social utility, and does not command that enlightened principles of penology always be followed.

By pursuing the necessity approach, it becomes even more apparent that it involves matters outside the purview of the Eighth Amendment. Two of the several aims of punishment are generally associated with capital punishment — retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. *See Williams v. New York,* 337 U. S. 241, 337 U. S. 248 (1949); *United States v. Lovett,* 328 U. S. 303, 328 U. S. 324(1946) (Frankfurter, J., concurring). Furthermore, responsible legal thinkers of widely varying

persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other. [Footnote 6/20] It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

The less esoteric but no less controversial question is whether the death penalty acts as a superior deterrent. Those favoring abolition find no evidence that it does. [Footnote 6/21] Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent, and note that there is no convincing evidence that it does not. [Footnote 6/22] Escape from this empirical stalemate is sought by placing the burden of proof on the States and concluding that they have failed to demonstrate that capital punishment is a more effective deterrent than life imprisonment. Numerous justifications have been advanced for shifting the burden, and they

are not without their rhetorical appeal. However, these arguments are not descended from established constitutional principles, but are born of the urge to bypass an unresolved factual question. [Footnote 6/23] Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a $10 parking ticket is a more effective deterrent than a $5 parking ticket. In fact, there are some who go so far as to challenge the notion that any punishments deter crime. [Footnote 6/24] If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as being "cruel and unusual" within the meaning of the Constitution? On the contrary, I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.

V

Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment, nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of MR. JUSTICE STEWART and MR. JUSTICE WHITE, which are necessary to support the judgment setting aside petitioners' sentences, stop

short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past. [Footnote 6/25] This approach — not urged in oral arguments or briefs — misconceives the nature of the constitutional command against "cruel and unusual punishments," disregards controlling case law, and demands a rigidity in capital cases which, if possible of achievement, cannot be regarded as a welcome change. Indeed the contrary seems to be the case.

As I have earlier stated, the Eighth Amendment forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct. The Amendment does not prohibit all punishments the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case. And the Amendment most assuredly does not speak to the power of legislatures to confer sentencing discretion on juries, rather than to fix all sentences by statute.

The critical factor in the concurring opinions of both MR. JUSTICE STEWART and MR. JUSTICE WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence

of capital punishment — the inference that petitioners would have the Court draw — but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are "cruel" because they exceed that which the legislatures have deemed necessary for all cases; [Footnote 6/26] petitioners' sentences are "unusual" because they exceed that which is imposed in most cases. [Footnote 6/27] This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical. For example, by this measure of the Eighth Amendment, the elimination of death-qualified juries in *Witherspoon v. Illinois*, 391 U. S. 510 (1968), can only be seen in retrospect as a setback to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*,356 U.S. at 356 U. S. 101.

This novel formulation of Eighth Amendment principles — albeit necessary to satisfy the terms of our limited grant of certiorari — does not lie at the heart of these concurring opinions. The decisive grievance of the opinions — not translated into Eighth Amendment terms — is that the present system of discretionary sentencing

in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. [Footnote 6/28] This claim of arbitrariness is not only lacking in empirical support, [Footnote 6/29] but also it manifestly fails to establish that the death penalty is a "cruel and unusual" punishment. The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

This ground of decision is plainly foreclosed, as well as misplaced. Only one year ago, in *McGautha v. California*, the Court upheld the prevailing system of sentencing in capital cases. The Court concluded:

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."

402 U.S. at 402 U. S. 207. In reaching this decision, the Court had the benefit of extensive briefing, full oral argument, and six months of careful deliberations. The Court's labors are documented by 130 pages of opinions in the United States Reports. All of the arguments and factual contentions accepted

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in the concurring opinions today were considered and rejected by the Court one year ago. *McGautha* was an exceedingly difficult case, and reasonable men could fairly disagree as to the result. But the Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of law.

Although the Court's decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication. It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law.

While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that, if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. [Footnote 6/30] If such standards can be devised or

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the crimes more meticulously defined, the result cannot be detrimental. However, Mr. Justice Harlan's opinion for the Court in *McGautha* convincingly demonstrates that all past efforts "to identify before the fact" the cases in which the penalty is to be imposed have been "uniformly unsuccessful." 402 U.S. at 402 U. S. 197. One problem is that

"the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula. . . ."

Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, 498, p. 174 (1953). As the Court stated in *McGautha*,

"[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need."

402 U.S. at 402 U. S. 208. But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will

substantially alter the discretionary character of the prevailing system of sentencing in capital cases. That system may fall short of perfection, but it is yet to be shown that a different system would produce more satisfactory results.

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition.

It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution. The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases. I had thought that nothing was clearer in history, as we noted in *McGauthaone* year ago, than the American abhorrence of "the common law rule imposing a mandatory death sentence on all convicted murderers." 402 U.S. at 402 U. S. 198. As the concurring opinion of MR. JUSTICE MARSHALL shows, *ante* at 408 U. S. 339, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. *See Winston v. United States*, 172 U. S. 303 (1899); *cf. Calton v. Utah*, 130 U. S. 83 (1889). *See also Andres v. United States*, 333 U. S. 740, 333 U. S. 753 (1948) (Frankfurter, J., concurring). I do not see how this history can be ignored, and how it can be suggested that the Eighth Amendment demands the elimination of the most sensitive feature of the sentencing system.

As a general matter, the evolution of penal concepts in this country has not been marked by great progress, nor have the results up to now been crowned with significant success. If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for

crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges. This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks.

VI

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough reevaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to a general abolition of the penalty, without adherence to the conceptual strictures of the Eighth Amendment. The legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as affecting the commission of specific types of

crimes. If legislatures come to doubt the efficacy of capital punishment, they can abolish it, either completely or on a selective basis. If new evidence persuades them that they have acted unwisely, they can reverse their field and reinstate the penalty to the extent it is thought warranted. An Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision.

The world-wide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes. [Footnote 6/31] Virtually nowhere has change been wrought by so crude a tool as the Eighth Amendment. The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.

Quite apart from the limitations of the Eighth Amendment itself, the preference for legislative action is justified by the inability of the courts to participate in the

debate at the level where the controversy is focused. The case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. The five opinions in support of the judgments differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data, concerning the manner of imposition and effectiveness of capital punishment in this country. Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits. The "hydraulic pressure[s]" [Footnote 6/32] that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.

[Footnote 6/1]

See <l=|408 u.s.="" 238fn6="" 25|="">n. 25, *infra.*</l=|408>

[Footnote 6/2]

See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 85860 (1969). Earlier drafts of the Bill of Rights used the phrase "cruel and illegal." It is thought that the change to the "cruel and unusual" wording was inadvertent, and not intended to work any change in meaning. *Ibid.* The historical background of the English Bill of Rights is set forth in the opinion of MR. JUSTICE MARSHALL, *ante* at 408 U. S. 316-318.

It is intimated in the opinion of MR. JUSTICE DOUGLAS, *ante* at 408 U. S. 242-245, that the term "unusual" was included in the English Bill of Rights as a protest against the discriminatory application of punishments to minorities. However, the history of capital punishment in England dramatically reveals that no premium was placed on equal justice for all, either before or after the Bill of Rights of 1689. From the time of Richard I until 1826, the death penalty was authorized in England for treason and all felonies except larceny and mayhem, with the further exception that persons entitled to benefit of clergy were subject to no penalty, or, at most, a very lenient penalty upon the commission of a felony. Benefit of clergy grew out of the exemption of the clergy from the jurisdiction of the lay courts. The exemption expanded to include assistants to clergymen, and, by 1689, any male who could read. Although, by 1689, numerous felonies had been deemed "nonclergyable," the disparity in punishments imposed on the educated and uneducated remained for most felonies until the early 18th century. *See* 1 J. Stephen, History of the Criminal Law of England 458 *et seq.* (1883).

[Footnote 6/3]

See 2 J. Elliot's Debates 111 (2d ed. 1876); 3 *id.* at 447-448, 451-452.

[Footnote 6/4]

But see Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Am.J.Psychiatry 393 (1962).

[Footnote 6/5]

See 2 J. Story, On the Constitution § 1903 (5th ed. 1891); 1 T. Cooley, Constitutional Limitations 694 (8th ed. 1927). *See also* Joseph Story on Capital Punishment (ed. by J. Hogan), 43 Calif.L.Rev. 76 (1955).

[Footnote 6/6]

Brief for Petitioner in *Aikens v. California*, No. 68-5027, p. 19 (cert. dismissed, 406 U. S. 813 (1972)). *See post*, at 408 U. S. 443 n. 38. This, plainly, was the foundation of Mr. Justice Black's strong views on this subject expressed most recently in *McGautha v. California*, 402 U. S. 183, 402 U. S. 226 (1971) (separate opinion).

[Footnote 6/7]

See Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 50 (Aug. 1971). Since the publication of the Department of Justice report, capital punishment has been judicially abolished in California, *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972). The States where capital punishment is no longer authorized are Alaska, California, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin.

[Footnote 6/8]

See Act of Jan. 2, 1971, Pub.L. 91-644, Tit. IV, § 15, 84 Stat. 1891, 18 U.S.C. § 351; Act of Oct. 15, 1970, Pub.L. 91-452, Tit. XI, § 1102(a), 84 Stat. 956, 18 U.S.C. § 844(f)(i); Act of Aug. 28, 1965, 79 Stat. 580, 18 U.S.C. § 1751; Act of Sept. 5, 1961, § 1, 75 Stat. 466, 49 U.S.C. § 1472(i). *See also* opinion of MR. JUSTICE BLACKMUN, *post* at 408 U. S. 412-413.

[Footnote 6/9]

A 1966 poll indicated that 42% of those polled favored capital punishment while 47% opposed it, and 11% had no opinion. A 1969 poll found 51% in favor, 40% opposed, and 9% with no opinion. *See* Erskine, The Polls: Capital Punishment, 34 Public Opinion Quarterly 290 (1970).

[Footnote 6/10]

The jury plays the predominant role in sentencing in capital cases in this country. Available evidence indicates that where the judge determines the sentence, the death penalty is imposed with a slightly greater frequency than where the jury makes the determination. H. Kalven & H. Zeisel, The American Jury 436 (1966).

[Footnote 6/11]

In the decade from 1961-1970, an average of 106 persons per year received the death sentence in the United States, ranging from a low of 85 in 1967 to a high of 140 in 1961; 127 persons received the death sentence in 1970. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 9. *See also* Bedau, The Death Penalty in America, 35 Fed.Prob., No. 2, p. 32 (1971). Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized. *See, e.g.*, McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed.Prob., No. 2, pp. 11, 12 (1964); Bedau, Death Sentences in New Jersey 1907-1960, 19 Rutgers L.Rev. 1, 30 (1964); Florida Division of Corrections, Seventh Biennial Report (July 1, 1968, to June 30, 1970) 82 (1970); H. Kalven & H. Zeisel, The American Jury 435-436 (1966). The rate of imposition for rape and the few other crimes made punishable by death in certain States is considerably lower. *See, e.g.*, Florida Division of Corrections, Seventh Biennial Report, *supra*, at 83; Partington, The Incidence of the Death Penalty for Rape in Virginia, 22 Wash. & Lee L.Rev. 43-44, 71-73 (1965).

[Footnote 6/12]

Counsel for petitioners make the conclusory statement that "[t]hose who are selected to die are the poor and powerless, personally ugly and socially unacceptable." Brief for Petitioner in No. 68-5027, p. 51. However, the sources cited contain no empirical findings to undermine the general premise that juries impose the death penalty in the most extreme cases. One study has discerned a statistically noticeable difference between the rate of imposition on blue collar and white collar defendants; the study otherwise concludes that juries do follow rational patterns in imposing the sentence of death. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan.L.Rev. 1297 (1969). *See also* H. Kalven & H. Zeisel, The American Jury 434-449 (1966).

Statistics are also cited to show that the death penalty has been imposed in a racially discriminatory manner. Such statistics suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape. *See, e.g.*,Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132 (1969); Note, Capital Punishment in Virginia, 58 Va.L.Rev. 97 (1972). If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by reference to the race of the defendants, the Equal Protection Clause of the Fourteenth Amendment forbids

continued enforcement of that statute in its existing form. *Cf. Yick Wo v. Hopkins*, 118 U. S. 356(1886); *Gomillion v. Lightfoot*, 364 U. S. 339 (1960).

To establish that the statutory authorization for a particular penalty is inconsistent with the dictates of the Equal Protection Clause, it is not enough to show how it was applied in the distant past. The statistics that have been referred to us cover periods when Negroes were systematically excluded from jury service and when racial segregation was the official policy in many States. Data of more recent vintage are essential. *See Maxwell v. Bishop*, 398 F.2d 138, 148 (CA8 1968), *vacated*,398 U. S. 262 (1970). While no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would have to be made, taking all relevant factors into account.

It must be noted that any equal protection claim is totally distinct from the Eighth Amendment question to which our grant of certiorari was limited in these cases. Evidence of a discriminatory pattern of enforcement does not imply that any use of a particular punishment is so morally repugnant as to violate the Eighth Amendment.

[Footnote 6/13]

Jackson v. Georgia, No. 65030; *Branch v. Texas*, No. 69-5031.

[Footnote 6/14]

Rape is punishable by death in 16 States and in the federal courts when committed within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 2031. The States authorizing capital punishment for rape are Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

[Footnote 6/15]

See <l=|408 u.s.="" 238fn6="" 11|="">n. 11, *supra.*</l=|408>

[Footnote 6/16]

l Annals of Cong. 754 (1789) (remarks of Rep. Livermore).

[Footnote 6/17]

Petitioner Francis had been sentenced to be electrocuted for the crime of murder. He was placed in the electric chair, and the executioner threw the switch. Due to a mechanical difficulty, death did not result. A new death warrant was issued fixing a second date for execution. The Court held that the proposed execution would not constitute cruel and unusual punishment or double jeopardy.

[Footnote 6/18]

There is no serious claim of disproportionality presented in these cases. Murder and forcible rape have always been regarded as among the most serious crimes. It cannot be said that the punishment of death is out of all proportion to the severity of these crimes.

The Court's decision in *Robinson v. California*, 370 U. S. 660 (1962), can be viewed as an extension of the disproportionality doctrine of the Eighth Amendment. The Court held that a statute making it a crime punishable by imprisonment to be a narcotics addict violated the Eighth Amendment. The Court in effect ruled that the status of being an addict is not a criminal act, and that any criminal punishment imposed for addiction exceeds the penal power of the States. The Court made no analysis of the necessity of imprisonment as a means of curbing addiction.

[Footnote 6/19]

See Packer, Making the Punishment Fit the Crime, 77 Harv. L.Rev.1071, 1075 (1964).

[Footnote 6/20]

See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958); H. Packer, The Limits of the Criminal Sanction 37-39 (1968); M. Cohen, Reason and Law 41-44 (1950); Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, 52, pp. 17-18 (1953); Hart, Murder and the Principles of Punishment: England and the United States, 52 NW.U.L.Rev 433, 446-455 (1957); H. L. A. Hart, Law, Liberty and Morality 60-69 (1963).

[Footnote 6/21]

See, e.g., Sellin, Homicides in Retentionist and Abolitionist States, in Capital Punishment 135 *et seq.* (T. Sellin ed. 1967); Schuessler, The Deterrent Influence of the Death Penalty, 284 Annals 54 (1952).

[Footnote 6/22]

See, e.g., Hoover, Statements in Favor of the Death Penalty, in H. Bedau, The Death Penalty in America 130 (1967 rev. ed.); Allen, Capital Punishment: Your Protection and Mine, in The Death Penalty in America, *supra*, at 135. *See also* Hart, 52 NW.U.L.Rev. supra, at 457; Bedau, The Death Penalty in America, *supra*, at 265-266.

[Footnote 6/23]

See Powell v. Texas, 392 U. S. 514, 392 U. S. 531 (1968) (MARSHALL, J.) (plurality opinion).

[Footnote 6/24]

See, e.g., K. Menninger, The Crime of Punishment 206-208 (1968).

[Footnote 6/25]

Much in the concurring opinion of MR. JUSTICE DOUGLAS similarly suggests that it is the sentencing system, rather than the punishment itself, that is constitutionally infirm. However, the opinion also indicates that, in the wake of the Court's decision in *McGautha v. California*, 402 U. S. 183 (1971), the validity of the sentencing process is no longer open to question.

[Footnote 6/26]

See concurring opinion of MR. JUSTICE STEWART, *ante* at 408 U. S. 309-310; concurring opinion of MR. JUSTICE WHITE, *ante* at 408 U. S. 312.

[Footnote 6/27]

See concurring opinion of MR. JUSTICE STEWART, *ante* at 408 U. S. 309-310; *cf.*concurring opinion of MR. JUSTICE WHITE, *ante* at 408 U. S. 312.

[Footnote 6/28]

This point is more heavily emphasized in the opinion of MR. JUSTICE STEWART than in that of MR. JUSTICE WHITE. However, since MR. JUSTICE WHITE allows for statutes providing a mandatory death penalty for "more narrowly defined categories" of crimes, it appears that he, too, is more concerned with a regularized sentencing process than with the aggregate number of death sentences imposed for all crimes.

[Footnote 6/29]

See <l=|408 u.s.="" 238fn6="" 12|="">n. 12, supra.</l=|408>

[Footnote 6/30]

It was pointed out in the Court's opinion in *McGautha* that these two alternatives are substantially equivalent. 402 U.S. at 402 U. S. 206 n. 16.

[Footnote 6/31]

See Patrick, The Status of Capital Punishment: A World Perspective, 56 J.Crim.L.C. & P.S. 397 (1965). In England, for example, 1957 legislation limited capital punishment to murder, treason, piracy with violence, dockyards arson, and some military offenses. The Murder (Abolition of Death Penalty) Act 1965 eliminated the penalty for murder on a five-year trial basis. 2 Pub. Gen. Acts, c. 71, p. 1577 (Nov. 8, 1965). This abolition was made permanent in 1969. *See* 793 Parl.Deb., H.C. (5th ser.) 1294-1298 (1969); 306 Parl.Deb., H.L. (5th ser.) 1317-1322 (1969). Canada has also undertaken limited abolition on a five-year experimental basis. Stats. of Canada 1967-1968, 16 & 17 Eliz. 2, c. 15, p. 145.

[Footnote 6/32]

Northern Securities Co. v. United States, 193 U. S. 197, 193 U. S. 401 (1904) (dissenting opinion).

MR. JUSTICE BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible

with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.

2. Having lived for many years in a State that does not have the death penalty, [Footnote 7/1] that effectively abolished it in 1911, [Footnote 7/2] and that carried out its last execution on February 13, 1906, [Footnote 7/3] capital punishment had never been a part of life for me. In my State, it just did not exist. So far as I can determine, the State, purely from a statistical deterrence point of view, was neither the worse nor the better for its abolition, for, as the concurring opinions observe, the statistics prove little, if anything. But the State and its citizens accepted the fact that the death penalty was not to be in the arsenal of possible punishments for any crime.

3. I, perhaps alone among the present members of the Court, am on judicial record as to this. As a member of the United States Court of Appeals, I first struggled silently with the issue of capital punishment in *Feguer v. United States*, 302 F.2d 214 (CA8 1962), *cert. denied*, 371 U.S. 872 (1962). The defendant in that case may have been one of the last to be executed under federal auspices. I struggled again with the issue, and once more refrained from comment, in my writing for an en banc court in *Pope v. United States*, 372 F.2d 710 (CA8 1967), *vacated* (upon acknowledgment by the Solicitor General of error revealed by the subsequently decided *United States v. Jackson*, 390 U. S. 570 (1968)) *and remanded*, 392 U. S. 651(1968). Finally, in *Maxwell*

v. Bishop, 398 F.2d 138 (CA8 1968), *vacated and remanded, sua sponte, by the Court on grounds not raised below*, 398 U. S. 262 (1970), I revealed, solitarily and not for the panel, my distress and concern. 398 F.2d at 153-154. [Footnote 7/4] And in *Jackson v. Bishop*, 404 F.2d 571 (CA8 1968), I had no hesitancy in writing a panel opinion that held the use of the strap by trusties upon fellow Arkansas prisoners to be a violation of the Eighth Amendment. That, however, was in-prison punishment imposed by inmate-foremen.

4. The several concurring opinions acknowledge, as they must, that, until today, capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U. S. 130, 99 U. S. 134-135, in 1879; of a unanimous Court in *In re Kemmler*, 136 U. S. 436, 136 U. S. 447, in 1890; of the Court in *Weems v. United States*, 217 U. S. 349, in 1910; of all those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 329 U. S. 463-464, 329 U. S. 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, DOUGLAS,

and Whittaker) in *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 99, in 1958; [Footnote 7/5] in the denial of certiorari in *Rudolph v. Alabama*, 375 U. S. 889, in 1963 (where, however, JUSTICES DOUGLAS, BRENNAN, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha v. California*, 402 U. S. 183, 402 U. S. 226, decided only last Term on May 3, 1971. [Footnote 7/6]

Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods. The Court has just decided that it is time to strike down the death penalty. There would have been as much reason to do this

when any of the cited cass were decided. But the Court refrained from that action on each of those occasions.

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishments Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. at 217 U. S. 378. And Mr. Chief Justice Warren, for a plurality of the Court, referred to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. at 356 U. S. 101. Mr. Jefferson expressed the same thought well. [Footnote 7/7]

My problem, however, as I have indicated, is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago.

5. To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts perhaps the rationalizations — that this is the compassionate decision for a maturing society; that this is the moral and the "right" thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we were in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago, in 1971, when *Wilkerson*, *Kemmler*, *Weems*, *Francis*, *Trop*, *Rudolph*, and *McGautha* were, respectively, decided.

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way, and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency as Governor Rockefeller of Arkansas did recently just before he departed from office. There — on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch — is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents.

Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.

6. The Court, in my view, is somewhat propelled toward its result by the interim decision of the California Supreme Court, with one justice dissenting, that the death penalty is violative of that State's constitution. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880 (Feb. 18, 1972). So far as I am aware, that was the first time the death penalty in its entirety has been nullified by judicial decision. *Cf. Ralph v. Warden*, 438 F.2d 786, 793 (CA4 1970), *cert. denied*, *post*, p. 942. California's moral problem was a profound one, for more prisoners were on death row there than in any other State. California, of course, has the right to construe its constitution as it will. Its construction, however, is hardly a precedent for federal adjudication.

7. I trust the Court fully appreciates what it is doing when it decides these cases the way it does today. Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible, I suspect, for, among other crimes, treason, 18 U.S.C. § 2381; or assassination of the President, the Vice President, or those who stand elected to those positions, 18 U.S.C. § 1751; or assassination of a Member or member-elect of Congress, 18 U.S.C. § 351; or espionage, 18 U.S.C. § 794;

or rape within the special maritime jurisdiction, 18 U.S.C. § 2031; or aircraft or motor vehicle destruction where death occurs, 18 U.S.C. § 34; or explosives offenses where death results, 18 U.S.C. §§ 844 (d) and (f); or train wrecking, 18 U.S.C. § 1992; or aircraft piracy, 49 U.S.C. § 1472(i). Also in jeopardy, perhaps, are the death penalty provisions in various Articles of the Uniform

Code of Military Justice. 10 U.S.C. §§ 885, 890, 894, 899, 901, 904, 906, 913, 918, and 920. All these seem now to be discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment, some very recent, and their retention in the face of efforts to repeal them.

8. It is of passing interest to note a few voting facts with respect to recent federal death penalty legislation:

A. The aircraft piracy statute, 49 U.S.C. § 1472(i), was enacted September 5, 1961. The Senate vote on August 10 was 92-0. It was announced that Senators Chavez, Fulbright, Neuberger, and Symington were absent, but that, if present, all four would vote yea. It was also announced, on the other side of the aisle, that Senator Butler was ill and that Senators Beall, Carlson, and Morton were absent or detained, but that those four, if present, would vote in the affirmative. These announcements, therefore, indicate that the true vote was 100-0. 107 Cong.Rec. 15440. The House passed the bill without recorded vote. 107 Cong.Rec. 16849.

B. The presidential assassination statute, 18 U.S.C. § 1751, was approved August 28, 1965, without recorded votes. 111 Cong.Rec. 14103, 18026, and 20239.

C. The Omnibus Crime Control Act of 1970 was approved January 2, 1971. Title IV thereof added the congressional assassination statute that is now 18 U.S.C. § 351. The recorded House vote on October 7, 1970, was 341-26, with 63 not voting and 62 of those paired. 116 Cong.Rec. 35363-35364. The Senate vote on October 8

was 59-0, with 41 not voting, but with 21 of these announced as favoring the bill. 116 Cong.Rec. 35743. Final votes after conference were not recorded. 116 Cong.Rec. 42150, 42199.

It is impossible for me to believe that the many lawyer-members of the House and Senate — including, I might add, outstanding leaders and prominent candidates for higher office — were callously unaware and insensitive of constitutional overtones in legislation of this type. The answer, of course, is that, in 1961, in 1965, and in 1970, these elected representatives of the people — far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity than are we who sit cloistered on this Court — took it as settled that the death penalty then, as it always had been, was not, in itself, unconstitutional. Some of those Members of Congress, I suspect, will be surprised at this Court's giant stride today.

9. If the reservations expressed by my Brother STEWART (which, as I read his opinion, my Brother WHITE shares) were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes struck down today will be reenacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be. This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.

10. It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes

reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. *But see Williams v. New York*, 337 U. S. 241, 337 U. S. 248 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity.

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

[Footnote 7/1]

Minn.Stat. § 609.10 (1971).

[Footnote 7/2]

Minn.Laws 1911, c. 387.

[Footnote 7/3]

See W. Trenerry, Murder in Minnesota 163-167 (1962).

[Footnote 7/4]

"It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion[11] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency, and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U.S.C. § 203; 10 U.S.C. § 920(a)."

The designated footnote observed that my fellow judges did not join in my comment.

[Footnote 7/5]

"At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. . . ."

[Footnote 7/6]

"The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment, because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power."

[Footnote 7/7]

"Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. . . . I know . . . that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors. . . . Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise virtuous, and well-meaning councils. And lastly, let us provide in our Constitution for its revision at stated periods."

Letter to Samuel Kercheval, July 12, 1816, 15 The Writings of Thomas Jefferson 40-42 (Memorial ed. 1904).

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

The Court granted certiorari in these cases to consider whether the death penalty is any longer a permissible form of punishment. 403 U.S. 952 (1971). It is the judgment of five Justices that the death penalty, as customarily prescribed and implemented in this country today, offends the constitutional prohibition against cruel and unusual punishments. The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales. In my view, none of these opinions provides a constitutionally adequate foundation for the Court's decision.

MR. JUSTICE DOUGLAS concludes that capital punishment is incompatible with notions of "equal protection" that he finds to be "implicit" in the Eighth Amendment. *Ante* at 408 U. S. 257. MR. JUSTICE BRENNAN bases his judgment primarily on the thesis that the penalty "does not comport with human dignity."*Ante* at 408 U. S. 270. MR. JUSTICE STEWART concludes that the penalty is applied in a "wanton" and "freakish" manner. *Ante* at 408 U. S. 310. For MR. JUSTICE WHITE, it is the "infrequency" with which the penalty is imposed that renders its use unconstitutional. *Ante* at 408 U. S. 313. MR. JUSTICE MARSHALL finds that capital punishment is an impermissible form of punishment because it is "morally unacceptable" and "excessive." *Ante* at 408 U. S. 360, 408 U. S. 358.

Although the central theme of petitioners' presentations in these cases is that the imposition of the death penalty is *per se* unconstitutional, only two of today's opinions explicitly conclude that so sweeping a determination is mandated by the Constitution. Both MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL call for the abolition of all existing state and federal capital punishment statutes. They intimate as well that no capital statute could be devised in the future that might comport with the Eighth Amendment. While the practical consequences of the other three opinions are less certain, they at least do not purport to render impermissible every possible statutory scheme for the use of capital punishment that legislatures might hereafter devise. [Footnote 8/1] Insofar as these latter opinions fail, at least explicitly,

to go as far as petitioners' contentions would carry them, their reservations are attributable to a willingness to accept only a portion of petitioners' thesis. For the reasons cogently set out in the CHIEF JUSTICE's dissenting opinion (*ante* at 408 U. S. 396-403), and for reasons stated elsewhere in this opinion, I find my Brothers' "less than absolute abolition" judgments unpersuasive. Because those judgments are, for me, not dispositive, I shall focus primarily on the broader ground upon which the petitions in these cases are premised. The foundations of my disagreement with that broader thesis are equally applicable to each of the concurring opinions. I will, therefore, not endeavor to treat each one separately. Nor will I attempt to predict what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today. That difficult task, not performed in any of the controlling opinions, must go unanswered until other cases presenting these more limited inquiries arise.

Whatever uncertainties may hereafter surface, several of the consequences of today's decision are unmistakably clear. The decision is plainly one of the greatest importance.

The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. At least for the present, it also bars the States and the Federal Government from seeking sentences of death for defendants awaiting trial on charges for which capital punishment was heretofore a potential alternative. The happy event for these countable few constitutes, however, only the most visible consequence of this decision. Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint, and — most importantly — separation of powers.

The Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty. The Court also brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment. Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates a staggering number of state and federal laws. The capital punishment laws of no less than 39 States [Footnote 8/2] and the District of Columbia are nullified. In addition, numerous provisions of the Criminal Code of the United States and of the Uniform Code of Military

Justice also are voided. The Court's judgment not only wipes out laws presently in existence, but denies to Congress and to the legislatures of the 50 States the power to adopt new policies contrary to the policy selected by the Court. Indeed, it is the view of two of my Brothers that the people of each State must be denied the prerogative to amend their constitutions to provide for capital punishment even selectively for the most heinous crime.

In terms of the constitutional role of this Court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch — both state and federal — to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make, and for which the judiciary is ill-equipped. Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent. Before turning to address the thesis of petitioners' case against capital punishment — a thesis that has proved, at least in large measure, persuasive to a majority of this Court — I first will set out the principles that counsel against the Court's sweeping decision.

I

The Constitution itself poses the first obstacle to petitioners' argument that capital punishment is *per se* unconstitutional. The relevant provisions are the Fifth,

Eighth, and Fourteenth Amendments. The first of these provides in part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

Thus, the Federal Government's power was restricted in order to guarantee those charged with crimes that the prosecution would have only a single opportunity to seek imposition of the death penalty, and that the death penalty could not be exacted without due process and a grand jury indictment. The Fourteenth Amendment, adopted about 77 years after the Bill of Rights, imposed the due process limitation of the Fifth Amendment upon the States' power to authorize capital punishment.

The Eighth Amendment, adopted at the same time as the Fifth, proscribes "cruel and unusual" punishments. In an effort to discern its meaning, much has been written about its history in the opinions of this Court and elsewhere. [Footnote 8/3] That history need not be restated here since, whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty. *McGautha v.*

California, 402 U. S. 183, 402 U. S. 226 (1971) (separate opinion of Black, J.). As much is made clear by the three references to capital punishment in the Fifth Amendment. Indeed, the same body that proposed the Eighth Amendment also provided, in the first Crimes Act of 1790, for the death penalty for a number of offenses. 1 Stat. 112.

Of course, the specific prohibitions within the Bill of Rights are limitations on the exercise of power; they are not an affirmative grant of power to the Government. I, therefore, do not read the several references to capital punishment as foreclosing this Court from considering whether the death penalty in a particular case offends the Eighth and Fourteenth Amendments. Nor are "cruel and unusual punishments" and "due process of law" static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and to gain meaning through application to specific circumstances, many of which were not contemplated by their authors. While flexibility in the application of these broad concepts is one of the hallmarks of our system of government, the Court is not free to read into the Constitution a meaning that is plainly at variance with its language. Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the death penalty was considered to be a constitutionally permissible punishment. It is, however, within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act. And in making such a judgment in a case before it, a court may consider contemporary standards to the extent they are relevant. While this weighing of a punishment against the Eighth Amendment standard on a case-by-case basis is consonant with history and precedent, it is not what

petitioners demand in these cases. They seek nothing less than the total abolition of capital punishment by judicial fiat.

II

Petitioners assert that the constitutional issue is an open one uncontrolled by prior decisions of this Court. They view the several cases decided under the Eighth Amendment as assuming the constitutionality of the death penalty without focusing squarely upon the issue. I do not believe that the case law can be so easily cast aside. The Court on numerous occasions has both assumed and asserted the constitutionality of capital punishment. In several cases, that assumption provided a necessary foundation for the decision, as the issue was whether a particular means of carrying out a capital sentence would be allowed to stand. Each of those decisions necessarily was premised on the assumption that some method of exacting the penalty was permissible.

The issue in the first capital case in which the Eighth Amendment was invoked, *Wilkerson v. Utah*, 99 U. S. 130 (1879), was whether carrying out a death sentence by public shooting was cruel and unusual punishment. A unanimous Court upheld that form of execution, noting first that the punishment itself, as distinguished from the mode of its infliction, was "not pretended by the counsel of the prisoner" (*id.* at 99 U. S. 137) to be cruel and unusual. The Court went on to hold that:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities . . . are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category. . . ."

Id. at 99 U. S. 134-135.

Eleven years later, in *In re Kemmler*, 136 U. S. 436 (1890), the Court again faced a question involving the

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method of carrying out a capital sentence. On review of a denial of habeas corpus relief by the Supreme Court of New York, this Court was called on to decide whether electrocution, which only very recently had been adopted by the New York Legislature as a means of execution, was impermissibly cruel and unusual in violation of the Fourteenth Amendment. [Footnote 8/4] Chief Justice Fuller, speaking for the entire Court, ruled in favor of the State. Electrocution had been selected by the legislature, after careful investigation, as "the most humane and practical method known to modern science of carrying into effect the sentence of death." *Id.* at 136 U. S. 444. The Court drew a clear line between the penalty itself and the mode of its execution:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death

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is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Id. at 136 U. S. 447.

More than 50 years later, in *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459(1947), the Court considered a case in which, due to a mechanical malfunction, Louisiana's initial attempt to electrocute a convicted murderer had failed. Petitioner sought to block a second attempt to execute the sentence on the ground that to do so would constitute cruel and unusual punishment. In the plurality opinion written by Mr. Justice Reed, concurred in by Chief Justice Vinson and Justices Black and Jackson, relief was denied. Again the Court focused on the manner of execution, never questioning the propriety of the death sentence itself.

"The case before us does not call for an examination into any punishments except that of death. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . . "

". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Id. at 329 U. S. 463-464. Mr. Justice Frankfurter, unwilling to dispose of the case under the Eighth Amendment's specific prohibition, approved the second execution attempt under the Due Process Clause. He concluded that

"a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of

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decency more or less universally accepted, though not when it treats him by a mode about which opinion is fairly divided."

Id. at 329 U. S. 469-470.

The four dissenting Justices, although finding a second attempt at execution to be impermissibly cruel, expressly recognized the validity of capital punishment:

"In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. . . . Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. . . . "

"The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself."

Id. at 474 (original emphasis).

Each of these cases involved the affirmance of a death sentence where its validity was attacked as violating the Eighth Amendment. Five opinions were written in these three cases, expressing the views of 23 Justices. While, in the narrowest sense, it is correct to say that in none was there a frontal attack upon the constitutionality of the death penalty, each opinion went well beyond an unarticulated assumption of validity. The power of the States to impose capital punishment was repeatedly and expressly recognized.

In addition to these cases in which the constitutionality of the death penalty was a necessary foundation for the decision, those who today would have this Court undertake the absolute abolition of the death penalty also must reject the opinions of other cases stipulating or assuming the constitutionality of capital punishment. *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 99, 356 U. S. 100 (1958); *Weems v. United States*, 217 U. S. 349, 217 U. S. 382, 217 U. S. 409 (1910)

(White, J., joined by Holmes, J., dissenting). [Footnote 8/5] *See also McGautha v. California*, 402 U.S. at 402 U. S. 226 (separate opinion of Black, J.); *Robinson v. California*, 370 U. S. 660, 370 U. S. 676 (1962) (DOUGLAS, J., concurring).

The plurality opinion in *Trop v. Dulles*, *supra*, is of special interest, since it is this opinion, in large measure, that provides the foundation for the present attack on the death penalty. [Footnote 8/6] It is anomalous that the standard urged by petitioners — "evolving standards of decency that mark the progress of a maturing society" (356 U.S. at 356 U. S. 101) — should be derived from an opinion that so unqualifiedly rejects their arguments. Chief Justice Warren, joined by Justices Black, DOUGLAS, and Whittaker, stated flatly:

"At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Id. at 356 U. S. 99. The issue in *Trop* was whether forfeiture of citizenship was a cruel and unusual punishment when imposed on

a wartime deserter who had gone "over the hill" for less than a day and had willingly surrendered. In examining the consequences of the relatively novel punishment of denationalization, [Footnote 8/7] Chief Justice Warren drew a line between "traditional" and "unusual" penalties:

"While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

Id. at 356 U. S. 100. The plurality's repeated disclaimers of any attack on capital punishment itself must be viewed as more than offhand dicta since, those views were written in direct response to the strong language in Mr. Justice Frankfurter's dissent arguing that denationalization could not be a disproportionate penalty for a concededly capital offense. [Footnote 8/8]

The most recent precedents of this Court — *Witherspoon v. Illinois*, 391 U. S. 510(1968), and *McGautha v. California*, *supra* — are also premised to a significant degree on the constitutionality of the death penalty. While the scope of review in both cases was limited to questions involving the procedures for selecting juries

and regulating their deliberations in capital cases, [Footnote 8/9] those opinions were "singularly academic exercise[s]" [Footnote 8/10] if the members of this Court were prepared at those times to find in the Constitution the complete prohibition of the death penalty. This is especially true of Mr. Justice Harlan's opinion for the Court in *McGautha*, in which, after a full review of the history of capital punishment, he concluded that

"we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."

Id. at 402 U. S. 207. [Footnote 8/11]

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Perhaps enough has been said to demonstrate the unswerving position that this Court has taken in opinions spanning the last hundred years. On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the Court, until today, has dissented from this consistent reading of the Constitution. The petitioners in these cases now before the Court cannot fairly avoid the weight of this substantial body of precedent merely by asserting that there is no prior decision precisely in point.*Stare decisis*, if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of constitutional interpretation. *Green v. United States*, 356 U. S. 165, 356 U. S. 189-193 (1958) (Frankfurter, J., concurring). While these oft-repeated expressions of unchallenged belief in the constitutionality of capital punishment may not justify a summary disposition of the constitutional question before us, they are views expressed and joined in over the years by no less than 29 Justices of this Court, and therefore merit the greatest respect. [Footnote 8/12] Those who now resolve to set those views aside indeed have a heavy burden.

III

Petitioners seek to avoid the authority of the foregoing cases, and the weight of express recognition in the Constitution itself, by reasoning which will not withstand analysis. The thesis of petitioners' case derives from several opinions in which members of this Court

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have recognized the dynamic nature of the prohibition against cruel and unusual punishments. The final meaning of those words was not set in 1791. Rather, to use the words of Chief Justice Warren speaking for a plurality of the Court in *Trop v. Dulles*, 356 U.S. at 356 U. S. 100-101:

"[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

But this was not new doctrine. It was the approach to the Eighth Amendment taken by Mr. Justice McKenna in his opinion for the Court in *Weems v. United States*,217 U. S. 349 (1910). Writing for four Justices sitting as the majority of the six-man Court deciding the case, he concluded that the clause must be "progressive"; it is not "fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 217 U. S. 378. The same test was offered by Mr. Justice Frankfurter in his separate concurrence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 469. While he rejected the notion that the Fourteenth Amendment made the Eighth Amendment fully applicable to the States, he nonetheless found as a matter of due process that the States were prohibited from "treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted."

Whether one views the question as one of due process or of cruel and unusual punishment, as I do for convenience in this case, the issue is essentially the same. [Footnote 8/13] The fundamental premise upon which either standard is based is that notions of what constitute cruel and unusual punishment or due process do evolve.

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Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears — punishments that were in existence during our colonial era. [Footnote 8/14] Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. *See Jackson v. Bishop*,404 F.2d 571 (CA8 1968). Likewise, no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available

alternatives. Similarly, there may well be a process of evolving attitude with respect to the application of the death sentence for particular crimes. [Footnote 8/15] *See McGautha v. California*, 402 U.S. at 402 U. S. 242 (DOUGLAS, J., dissenting). But we are not asked to consider the permissibility of any of the several methods employed in carrying out the death sentence. Nor are we asked, at least as part of the core submission in these cases, to determine whether the penalty might be a grossly excessive punishment for some specific criminal conduct. Either inquiry would call for a discriminating evaluation of particular means, or of the relationship between particular conduct and its punishment. Petitioners' principal argument goes far beyond the traditional process of case-by-case inclusion and exclusion. Instead the argument insists on an unprecedented constitutional rule of absolute prohibition of capital punishment for any crime, regardless of its depravity and impact on society. In calling for a precipitate and final judicial end to this form of penalty as offensive to evolving standards of decency, petitioners would have this Court abandon the traditional and more refined approach consistently followed in its prior Eighth Amendment precedents. What they are saying, in effect, is that the evolutionary

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process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment under all circumstances, and for all future generations, has somehow been revealed.

The prior opinions of this Court point with great clarity to reasons why those of us who sit on this Court at a particular time should act with restraint before assuming, contrary to a century of precedent, that we now know the answer for all time to come. First, where, as here, the language of the applicable provision provides great leeway, and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.*See Trop v. Dulles*, 356 U.S. at 356 U. S. 103 (Warren, C.J.), 356 U. S. 119-120 (Frankfurter, J., dissenting); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 470-471 (Frankfurter, J., concurring); *Weems v. United States*, 217 U.S. at 217 U. S. 378-379 (McKenna, J.).

The second consideration dictating judicial self-restraint arises from a proper recognition of the respective roles of the legislative and judicial branches. The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. *See, e.g., In re Kemmler*, 136 U.S. at 136 U. S. 447; *Trop v. Dulles*, 356 U.S. at 356 U. S. 103. When asked to encroach on the legislative prerogative we are well counseled to proceed with the utmost reticence. The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as "the gravest and most delicate duty that this Court is called on to perform."*Blodgett v. Holden*, 275 U. S. 142, 275 U. S. 147-148 (1927) (separate opinion).

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How much graver is that duty when we are not asked to pass on the constitutionality of a single penalty under the facts of a single case, but instead are urged to overturn the legislative judgments of 40 state legislatures as well as those of Congress. In so doing, is the majority able to claim, as did the Court in *Weems*,that it appreciates

"to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency?"

217 U.S. at 217 U. S. 379. I think not. No more eloquent statement of the essential separation of powers limitation on our prerogative can be found than the admonition of Mr. Justice Frankfurter, dissenting in *Trop*. His articulation of the traditional view takes on added significance where the Court undertakes to nullify the legislative judgments of the Congress and four-fifths of the States.

"What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation. . . . When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a coordinate branch of the Government while keeping unto itself — as it must under our constitutional system — the final determination of its own power to act. . . . "

"Rigorous observance of the difference between limits of power and wise exercise of power — between questions of authority and questions of prudence — requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily

coalesce. No less does it require a

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disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."

356 U.S. at 356 U. S. 119-120. *See also* Mr. Justice White's dissenting opinion in *Weems v. United States*, 217 U.S. at 382.

IV

Although determining the range of available punishments for a particular crime is a legislative function, the very presence of the Cruel and Unusual Punishments Clause within the Bill of Rights requires, in the context of a specific case, that courts decide whether particular acts of the Congress offend that Amendment. The Due Process Clause of the Fourteenth Amendment imposes on the judiciary a similar obligation to scrutinize state legislation. But the proper exercise of that constitutional obligation in the cases before us today must be founded on a full recognition of the several considerations set forth above — the affirmative references to capital punishment in the Constitution, the prevailing precedents of this Court, the limitations on the exercise of our power imposed by tested principles of judicial self-restraint, and the duty to avoid encroachment on the powers conferred upon state and federal legislatures. In the face of these considerations, only the most conclusive

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of objective demonstrations could warrant this Court in holding capital punishment *per se* unconstitutional. The burden of seeking so sweeping a decision against such formidable obstacles is almost insuperable. Viewed from this perspective, as I believe it must be, the case against the death penalty falls far short.

Petitioners' contentions are premised, as indicated above, on the long-accepted view that concepts embodied in the Eighth and Fourteenth Amendments evolve. They present, with skill and persistence, a list of "objective indicators" which are said to demonstrate that prevailing standards of human decency have progressed to the final point of requiring the Court to hold, for all cases and for all time, that capital punishment is unconstitutional.

Briefly summarized, these proffered indicia of contemporary standards of decency include the following: (i) a worldwide trend toward the disuse of the death penalty; [Footnote 8/16] (ii) the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such treatment; [Footnote 8/17] (iii) the decreasing numbers of executions over the last 40 years, and especially over the last decade; [Footnote 8/18] (iv) the

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small number of death sentences rendered in relation to the number of cases in which they might have been imposed; [Footnote 8/19] and (v) the indication of public abhorrence of

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the penalty reflected in the circumstance that executions are no longer public affairs. [Footnote 8/20] The foregoing is an incomplete summary, but it touches the major bases of petitioners' presentation. Although they are not appropriate for consideration as objective evidence, petitioners strongly urge two additional propositions. They contend, first, that the penalty survives public condemnation only through the infrequency, arbitrariness, and discriminatory nature of its application, and, second, that there no longer exists any legitimate justification for the utilization of the ultimate penalty. These contentions, which have proved persuasive to several of the Justices constituting the majority, deserve separate consideration, and will be considered in the ensuing sections. Before turning to those arguments, I first address the argument based on "objective" factors.

Any attempt to discern contemporary standards of decency through the review of objective factors must take into account several overriding considerations which petitioners choose to discount or ignore. In a democracy,

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the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. MR. JUSTICE MARSHALL's opinion today catalogues the salient statistics. Forty States, [Footnote 8/21] the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes. That number has remained relatively static since the end of World War I. *Ante* at 408 U. S. 339-341. That does not mean, however, that capital punishment has become a forgotten issue in the legislative arena. As recently as January, 1971, Congress approved the death penalty for congressional assassination. 18 U.S.C. § 351. In 1965, Congress added the death penalty for presidential and vice presidential assassinations. 18 U.S.C. § 1751. Additionally, the aircraft piracy statute passed in 1961 also carries the death penalty. 49 U.S.C. § 1472(i). MR. JUSTICE BLACKMUN's dissenting opinion catalogues the impressive ease with which each of these statutes was approved. *Ante* at 408 U. S. 412-413. On the converse side, a bill proposing the abolition of capital punishment for all federal crimes was introduced in 1967, but failed to reach the Senate floor. [Footnote 8/22]

At the state level, New York, among other States, has recently undertaken reconsideration of its capital crimes. A law passed in 1965 restricted the use of capital punishment to the crimes of murder of a police officer and murder by a person serving a sentence of life imprisonment. N.Y.Penal Code § 125.30 (1967).

I pause here to state that I am at a loss to understand

how those urging this Court to pursue a course of *absolute* abolition as a matter of constitutional judgment can draw any support from the New York experience. As is also the case with respect to recent legislative activity in Canada [Footnote 8/23] and Great Britain, [Footnote 8/24] New York's decision to restrict the availability of the death penalty is a product of refined and discriminating legislative judgment, reflecting not the total rejection of capital punishment as inherently cruel, but a desire to limit it to those circumstances in which legislative judgment deems retention to be in the public interest. No such legislative flexibility is permitted by the contrary course petitioners urge this Court to follow. [Footnote 8/25] In addition to the New York experience, a number of other States have undertaken reconsideration of capital punishment in recent years. In four States, the penalty has been put to a vote of the people through public referenda — a means likely to supply objective evidence of community standards. In Oregon, a referendum seeking abolition of capital punishment failed in 1958, but was subsequently approved in 1964. [Footnote 8/26] Two years later, the penalty was approved in Colorado by a wide margin. [Footnote 8/27]

In Massachusetts in 1968, in an advisory referendum, the voters there likewise recommended retention of the penalty. In 1970, approximately 64% of the voters in Illinois approved the penalty. [Footnote 8/28] In addition, the National Commission on Reform of Federal Criminal Laws reports that legislative committees in Massachusetts, Pennsylvania, and Maryland recommended abolition, while committees in New Jersey and Florida recommended retention. [Footnote 8/29] The legislative views of other States have been summarized by Professor Hugo Bedau in his compilation of sources on capital punishment entitled The Death Penalty in America:

"What our legislative representatives think in the two score states which still have the death penalty may be inferred from the fate of the bills to repeal or modify the death penalty filed during recent years in the legislatures of more than half of these states. In about a dozen instances, the bills emerged from committee for a vote. But in none except Delaware did they become law. In those states where these bills were brought to the floor of the legislatures, the vote in most instances wasn't even close. [Footnote 8/30]"

This recent history of activity with respect to legislation concerning the death penalty abundantly refutes the abolitionist position.

The second and even more direct source of information

reflecting the public's attitude toward capital punishment is the jury. In *Witherspoon v. Illinois*, 391 U. S. 510 (1968), MR. JUSTICE STEWART, joined by JUSTICES BRENNAN and MARSHALL, characterized the jury's historic function in the sentencing process in the following terms:

"[T]he jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision."

"A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State, and can thus obey the oath he takes as a juror. . . . Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more — and must do nothing less — than express the conscience of the community on the ultimate question of life or death."

"[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, . . . [Footnote 8/31]"

Any attempt to discern, therefore, where the prevailing standards of decency lie must take careful account of

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the jury's response to the question of capital punishment. During the 1960's, juries returned in excess of a thousand death sentences, a rate of approximately two per week. Whether it is true that death sentences were returned in less than 10% of the cases, as petitioners estimate, or whether some higher percentage is more accurate, [Footnote 8/32] these totals simply do not support petitioners' assertion at oral argument that "the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society." [Footnote 8/33] It is also worthy of note that the annual rate of death sentences has remained relatively constant over the last 10 years, and that the figure for 1970 –127 sentences — is the highest annual total since 1961. [Footnote 8/34] It is true that the sentencing rate might be expected to rise, rather than remain constant, when the number of violent crimes increases as it has in this country. [Footnote 8/35] And it may be conceded that the constancy in these statistics indicates the unwillingness of juries to demand the ultimate penalty in many cases where it might be imposed. But these considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment. [Footnote 8/36]

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One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view — legislative bodies, state referenda and the juries which have the actual responsibility — do not support the contention that evolving standards of decency require total abolition of capital punishment. [Footnote 8/37] Indeed,

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the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery — not the core — of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function.

V

Petitioners seek to salvage their thesis by arguing that the infrequency and discriminatory nature of the actual resort to the ultimate penalty tend to diffuse public opposition. We are told that the penalty is imposed exclusively on uninfluential minorities — "the poor and powerless, personally ugly and socially unacceptable." [Footnote 8/38] It is urged that this pattern of application assures that large segments of the public will be either uninformed or unconcerned, and will have no reason to measure the punishment against prevailing moral standards.

Implicitly, this argument concedes the unsoundness of petitioners' contention, examined above under 408 U. S. that objective evidence shows a present and widespread community rejection of the death penalty. It is now said,

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in effect, not that capital punishment presently offends our citizenry, but that the public would be offended if the penalty were enforced in a nondiscriminatory manner against a significant percentage of those charged with capital crimes, and if the public were thereby made aware of the moral issues surrounding capital punishment. Rather than merely registering the objective indicators on a judicial balance, we are asked ultimately to rest a far-reaching constitutional determination on a prediction regarding the subjective judgments of the mass of our people under hypothetical assumptions that may or may not be realistic.

Apart from the impermissibility of basing a constitutional judgment of this magnitude on such speculative assumptions, the argument suffers from other defects. If, as petitioners urge, we are to engage in speculation, it is not at all certain that the public

would experience deep-felt revulsion if the States were to execute as many sentenced capital offenders this year as they executed in the mid-1930's. [Footnote 8/39] It seems more likely that public reaction, rather than being characterized by undifferentiated rejection, would depend upon the facts and circumstances surrounding each particular case.

Members of this Court know, from the petitions and appeals that come before us regularly, that brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace

in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that in any of these highly publicized murder cases — the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history — the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry, as we all know, has been quite to the contrary. Furthermore, there is little reason to suspect that the public's reaction would differ significantly in response to other less publicized murder. It is certainly arguable that many such murders, because of their senselessness or barbarousness, would evoke a public demand for the death penalty, rather than a public rejection of that alternative. Nor is there any rational basis for arguing that the public reaction to any of these crimes would be muted if the murderer were "rich and powerful." The demand for the ultimate sanction might well be greater, as a wealthy killer is hardly a sympathetic figure. While there might be specific cases in which capital punishment would be regarded as excessive and shocking to the conscience of the community, it can hardly be argued that the public's dissatisfaction with the penalty in particular cases would translate into a demand for absolute abolition.

In pursuing the foregoing speculation, I do not suggest that it is relevant to the appropriate disposition of these cases. The purpose of the digression is to indicate that judicial decisions cannot be founded on such speculations and assumptions, however appealing they may seem.

But the discrimination argument does not rest alone on a projection of the assumed effect on public opinion of more frequent executions. Much also is made of the undeniable fact that the death penalty has a greater impact on the lower economic strata of society, which

include a relatively higher percentage of persons of minority racial and ethnic group backgrounds. The argument drawn from this fact is two-pronged. In part, it is merely an extension of the speculative approach pursued by petitioners, *i.e.*, that public revulsion is suppressed in callous apathy because the penalty does not affect persons from the white middle class which constitutes the majority in this country. This aspect, however, adds little to the infrequency rationalization for public apathy which I have found unpersuasive.

As MR. JUSTICE MARSHALL's opinion today demonstrates, the argument does have a more troubling aspect. It is his contention that if the average citizen were aware of the disproportionate burden of capital punishment borne by the "poor, the ignorant, and the underprivileged," he would find the penalty "shocking to his conscience and sense of justice," and would not stand for its further use. *Ante* at408 U. S. 365-366, 408 U. S. 369. This argument, like the apathy rationale, calls for further speculation on the part of the Court. It also illuminates the quicksands upon which we are asked to base this decision. Indeed, the two contentions seem to require contradictory assumptions regarding the public's moral attitude toward capital punishment. The apathy argument is predicated on the assumption that the penalty is used against the less influential elements of society, that the public is fully aware of this, and that it tolerates use of capital punishment only because of a callous indifference to the offenders who are sentenced. MR. JUSTICE MARSHALL's argument, on the other hand, rests on the contrary assumption that the public does not know against whom the penalty is enforced, and that, if the public were educated to this fact, it would find the punishment intolerable. *Ante* at 408 U. S. 369. Neither assumption can claim to be an entirely accurate portrayal of public attitude; for some, acceptance of capital punishment might be a consequence

of hardened apathy based on the knowledge of infrequent and uneven application, while for others, acceptance may grow only out of ignorance. More significantly, however, neither supposition acknowledges what, for me, is a more basic flaw.

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer

constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms. The Due Process Clause admits of no distinction between the deprivation of "life" and the deprivation of "liberty." If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from the penalties imposed for criminal conduct, but from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no "poor," no "minorities" and no "underprivileged." [Footnote 8/40]

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The causes underlying this problem are unrelated to the constitutional issue before the Court.

Finally, yet another theory for abolishing the death penalty — reflected in varying degrees in each of the concurring opinions today — is predicated on the discriminatory impact argument. Quite apart from measuring the public's acceptance or rejection of the death penalty under the "standards of decency" rationale, MR. JUSTICE DOUGLAS finds the punishment cruel and unusual because it is "arbitrarily" invoked. He finds that "the basic theme of equal protection is implicit" in the Eighth Amendment, and that the Amendment is violated when jury sentencing may be characterized as arbitrary or discriminatory. *Ante* at 408 U. S. 249. While MR. JUSTICE STEWART does not purport to rely on notions of equal protection, he also rests primarily on what he views to be a history of arbitrariness.*Ante* at 408 U. S. 309-310. [Footnote 8/41] Whatever may be the facts with respect to jury sentencing, this argument calls for a reconsideration of the "standards" aspects of the Court's decision in *McGautha v. California*, 402 U. S. 183 (1971). Although that is the unmistakable thrust of these opinions today, I see no reason to reassess the standards question considered so carefully in Mr. Justice Harlan's opinion for the Court

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last Term. Having so recently reaffirmed our historic dedication to entrusting the sentencing function to the jury's "untrammeled discretion" (*id.* at 402 U. S. 207), it is difficult to see how the Court can now hold the entire process constitutionally defective under the Eighth Amendment. For all of these reasons, I find little merit in the various discrimination arguments, at least in the several lights in which they have been cast in these cases.

Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established. This was the contention made in *Maxwell v. Bishop*, 398 F.2d 138 (CA8 1968), *vacated and remanded on other grounds*, 398 U. S. 262 (1970), in which the Eighth Circuit was asked to issue a writ of habeas corpus setting aside a death sentence imposed on a Negro defendant convicted of rape. In that case, substantial statistical evidence was introduced tending to show a pronounced disproportion in the number of Negroes receiving death sentences for rape in parts of Arkansas and elsewhere in the South. That evidence was not excluded, but was found to be insufficient to show discrimination in sentencing in Maxwell s trial. MR. JUSTICE BLACKMUN, then sitting on the Court of Appeals for the Eighth Circuit, concluded:

"The petitioner's argument is an interesting one, and we are not disposed to say that it could not have some validity and weight in certain situations. Like the trial court, however . . . we feel that the argument does not have validity and pertinent application to Maxwell's case."

"* * * *

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"We are not yet ready to condemn and upset the result reached in every case of a Negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. . . ."

"* * * *"

"We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But . . . improper state practice of the past does not automatically invalidate a procedure of the present. . . ."

Id. at 147-148.

I agree that discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against. But Maxwell does point the way to a means of raising the equal protection challenge that is more consonant with precedent and the Constitution's mandates than the several courses pursued by today's concurring opinions.

A final comment on the racial discrimination problem seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have "evolved" in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

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VI

Petitioner in *Branch v. Texas*, No. 69-5031, and, to a lesser extent, the petitioners in the other cases before us today, urge that capital punishment is cruel and unusual because it no longer serves any rational legislative interests. Before turning to consider whether any of the traditional aims of punishment justify the death penalty, I should make clear the context in which I approach this aspect of the cases.

First, I find no support — in the language of the Constitution, in its history, or in the cases arising under it — for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology. While the cases affirm our authority to prohibit punishments that are cruelly inhumane (*e.g.*, *Wilkerson v. Utah*, 99 U.S. at 99 U. S. 135-136; *In re Kemmler*,136 U.S. at 136 U. S. 447), and punishments that are cruelly excessive in that they are disproportionate to particular crimes (*see* 408 U. S. *infra*), the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious.

Secondly, if we were free to question the justifications for the use of capital punishment, a heavy burden would rest on those who attack the legislatures' judgments to prove the lack of rational justifications. This Court has long held that legislative decisions in this area, which lie within the special competency of that branch, are entitled to a presumption of validity. *See, e.g.*, *Trop v. Dulles*, 356 U.S. at356 U. S. 103; *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 470(Frankfurter, J., concurring); *Weems v. United States*, 217 U.S. at 217 U. S. 378-379; *In re Kemmler*, 136 U.S. at 136 U. S. 449.

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I come now to consider, subject to the reservation above expressed, the two justifications most often cited for the retention of capital punishment. The concept of retribution — though popular for centuries — is now criticized as unworthy of a civilized people. Yet this Court has acknowledged the existence of a retributive element in criminal sanctions, and has never heretofore found it impermissible. In *Williams v. New York*, 337 U. S. 241 (1949), Mr. Justice Black stated that,

"Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

Id. at 337 U. S. 248. It is clear, however, that the Court did not reject retribution altogether. The record in that case indicated that one of the reasons why the trial judge imposed the death penalty was his sense of revulsion at the "shocking details of the crime." *Id.* at 337 U. S. 244. Although his motivation was clearly retributive, the Court upheld the trial judge's sentence. [Footnote 8/42] Similarly, MR. JUSTICE MARSHALL noted in his plurality opinion in *Powell v. Texas*, 392 U. S. 514, 392 U. S. 530 (1968), that this Court

"has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects. [Footnote 8/43] "

While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized. Lord Justice Denning, now Master of the Rolls of the Court of Appeal in England, testified on this subject before the British Royal Commission on Capital Punishment:

"Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrongdoing, and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive, and nothing else. If this were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving; but would public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not. [Footnote 8/44]"

The view expressed by Lord Denning was cited approvingly in the Royal Commission's Report, recognizing "a

strong and widespread demand for retribution." [Footnote 8/45] MR. JUSTICE STEWART makes much the same point in his opinion today when he concludes that expression of man's retributive instincts in the sentencing process "serves an important purpose in promoting the stability of a society governed by law." *Ante* at408 U. S. 308. The view, moreover, is not without respectable support in the jurisprudential literature in this country, [Footnote 8/46] despite a substantial body of opinion to the contrary. [Footnote 8/47] And it is conceded on all sides that, not infrequently, cases arise that are so shocking or offensive that the public demands the ultimate penalty for the transgressor.

Deterrence is a more appealing justification, although opinions again differ widely. Indeed, the deterrence issue lies at the heart of much of the debate between the abolitionists and retentionists. [Footnote 8/48] Statistical studies, based primarily on trends in States that have abolished the penalty, tend to support the view that the death penalty has not been proved to be a superior deterrent. [Footnote 8/49] Some dispute the validity of this conclusion, [Footnote 8/50] pointing

out that the studies do not show that the death penalty has no deterrent effect on any categories of crimes. On the basis of the literature and studies currently available, I find myself in agreement with the conclusions drawn by the Royal Commission following its exhaustive study of this issue:

"The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie*, the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective, and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty. [Footnote 8/51]"

Only recently, this Court was called on to consider the deterrence argument in relation to punishment by fines for public drunkenness. *Powell v. Texas*, 392 U. S. 514 (1968). The Court was unwilling to strike down the Texas statute on grounds that it lacked a rational foundation. What MR. JUSTICE MARSHALL said there would seem to have equal applicability in this case:

"The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any

particular group of people who are able to appreciate the consequences of their acts. . . ."

Id. at 392 U. S. 531.

As I noted at the outset of this section, legislative judgments as to the efficacy of particular punishments are presumptively rational, and may not be struck down under the Eighth Amendment because this Court may think that some alternative sanction would be more appropriate. Even if such judgments were within the judicial prerogative, petitioners have failed to show that there exist no justifications for the legislative enactments challenged in these cases. [Footnote 8/52] While the evidence and arguments advanced by petitioners might have proved profoundly persuasive if addressed to a legislative body, they do not approach the showing traditionally required before a court declares that the legislature has acted irrationally.

VII

In two of the cases before us today, juries imposed sentences of death after convictions for rape. [Footnote 8/53] In these cases, we are urged to hold that, even if capital punishment is permissible for some crimes, it is a cruel and unusual punishment for this crime. Petitioners in these cases rely on the Court's opinions holding that the Eighth Amendment, in addition to prohibiting punishments

deemed barbarous and inhumane, also condemns punishments that are greatly disproportionate to the crime charged. This reading of the Amendment was first expressed by Mr. Justice Field in his dissenting opinion in *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 337 (1892), a case in which a defendant charged with a large number of violations of Vermont's liquor laws received a fine in excess of $6,600, or a 54-year jail sentence if the fine was not paid. The majority refused to consider the question on the ground that the Eighth Amendment did not apply to the States. The dissent, after carefully examining the history of that Amendment and the Fourteenth, concluded that its prohibition was binding on Vermont and that it was directed against "all punishments which, by their excessive length or severity, are greatly disproportioned to the offences charged." *Id.* at 144 U. S. 339-340. [Footnote 8/54]

The Court, in *Weems v. United States*, 217 U. S. 349 (1910), adopted Mr. Justice Field's view. The defendant in *Weems*, charged with falsifying Government documents, had been sentenced to serve 15 years in *cadena temporal*, a punishment which included carrying chains at the wrists and ankles and the perpetual loss of the right to vote and hold office. Finding the sentence grossly excessive in length and condition of imprisonment, the Court struck it down. This notion of disproportionality — that particular sentences may be cruelly excessive for particular crimes — has been cited with approval in more recent decisions of this Court. *See Robinson v. California*, 370 U.S. at 370 U. S. 667; *Trop v. Dulles*, 356 U.S. at 356 U. S. 100; *see also Howard v. Fleming*, 191 U. S. 126, 191 U. S. 135-136 (1903).

These cases, while providing a rationale for gauging the constitutionality of capital sentences imposed for rape,

also indicate the existence of necessary limitations on the judicial function. The use of limiting terms in the various expressions of this test found in the opinions — *grossly* excessive, *greatly* disproportionate — emphasizes that the Court's power to strike down punishments as excessive must be exercised with the greatest circumspection. As I have noted earlier, nothing in the history of the Cruel and Unusual Punishments Clause indicates that it may properly be utilized by the judiciary to strike down punishment authorized by legislatures and imposed by juries — in any but the extraordinary case. This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.

Operating within these narrow limits, I find it quite impossible to declare the death sentence grossly excessive for all rapes. Rape is widely recognized as among the most serious of violent crimes, as witnessed by the very fact that it is punishable by death in 16 States and by life imprisonment in most other States. [Footnote 8/55] The several reasons why rape stands so high on the list of serious crimes are well known: it is widely viewed as the most atrocious of intrusions upon the privacy and dignity of the victim; never is the crime committed accidentally; rarely can it be said to be unpremeditated;

often the victim suffers serious physical injury; the psychological impact can often be as great as the physical consequences; in a real sense, the threat of both types of injury is always present. [Footnote 8/56] For these reasons, and for the reasons arguing against abolition of the death penalty altogether, the excessiveness rationale provides no basis for rejection of the penalty for rape in all cases.

The argument that the death penalty for rape lacks rational justification because less severe punishments might be viewed as accomplishing the proper goals of penology is as inapposite here as it was in considering *per se* abolition. *See* 408 U. S. @ The state of knowledge with respect to the deterrent value of the sentence for this crime is inconclusive. [Footnote 8/57] Moreover, what has been said about the concept of retribution applies with equal force where the crime is rape. There are many cases in which the sordid, heinous nature of a particular crime, demeaning. humiliating, and often physically or psychologically traumatic, will call for public condemnation. In a period in our country's history when the frequency of this crime is increasing alarmingly, [Footnote 8/58] it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains.

Other less sweeping applications of the disproportionality concept have been suggested. Recently the Fourth Circuit struck down a death sentence in *Ralph v. Warden*, 438 F.2d 786 (1970), holding that the death penalty was an appropriate punishment for rape

only where life is "endangered." Chief Judge Haynsworth, who joined in the panel's opinion, wrote separately in denying the State of Maryland's petition for rehearing in order to make clear the basis for his joinder. He stated that, for him, the appropriate test was not whether life was endangered, but whether the victim in fact suffered "grievous physical or psychological harm." *Id.* at 794. *See Rudolph v. Alabama*, 375 U. S. 88 (1963) (dissent from the denial of certiorari).

It seems to me that both of these tests depart from established principles and also raise serious practical problems. How are those cases in which the victim's life is endangered to be distinguished from those in which no danger is found? The threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of violence. Certainly that test would provide little comfort for either of the rape defendants in the cases presently before us. Both criminal acts were accomplished only after a violent struggle. Petitioner Jackson held a scissors blade against his victim's neck. Petitioner Branch had less difficulty subduing his 65-year-old victim. Both assailants threatened to kill their victims. *See* MR. JUSTICE DOUGLAS' opinion, *ante*at 408 U. S. 252-253. The alternate test, limiting the penalty to cases in which the victim suffers physical or emotional harm, might present even greater problems of application. While most physical effects may be seen and objectively measured, the emotional impact may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to the date of trial.

While I reject each of these attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping

toward what is for me the appropriate application of the Eighth Amendment. While, in my view, the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category. Specific rape cases (and specific homicides as well) can be imagined in which the conduct of the accused would render the ultimate penalty a grossly excessive punishment. Although this case-by-case approach may seem painfully slow and inadequate to those who wish the Court to assume an activist legislative role in reforming criminal punishments, it is the approach dictated both by our prior opinions and by a due recognition of the limitations of judicial power. This approach, rather than the majority's more pervasive and less refined judgment, marks for me the appropriate course under the Eighth Amendment.

VIII

I now return to the overriding question in these cases: whether this Court, acting in conformity with the Constitution, can justify its judgment to abolish capital punishment as heretofore known in this country. It is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future except in a manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition.

Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people expressed through ballot referenda (as in Massachusetts, Illinois, and Colorado), [Footnote 8/59] is now shut off.

The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process, and to revision and change: mistaken judgments may be corrected and refinements perfected. In England [Footnote 8/60] and Canada, [Footnote 8/61] critical choices were made after studies canvassing all competing views, and in those countries revisions may be made in light of experience. [Footnote 8/62] As recently as 1967, a presidential commission did consider, as part of an overall study of crime in this country, whether the death penalty should be abolished.

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The commission's unanimous recommendation was as follows:

"The question whether capital punishment is an appropriate sanction is a policy decision to be made by each State. Where it is retained, the types of offenses for which it is available should be strictly limited, and the law should be enforced in an evenhanded and nondiscriminatory manner, with procedures for review of death sentences that are fair and expeditious. When a State finds that it cannot administer the penalty in such a manner, or that the death penalty is being imposed but not carried into effect, the penalty should be abandoned. [Footnote 8/63]"

The thrust of the Commission's recommendation, as presently relevant, is that this question "is a policy decision to be made by each State." There is no hint that this decision could or should be made by the judicial branch.

The National Commission on Reform of Federal Criminal Laws also considered the capital punishment issue. The introductory commentary of its final report states that "a sharp division [existed] within the Commission on the subject of capital punishment," although a

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majority favored its abolition. [Footnote 8/64] Again, consideration of the question was directed to the propriety of retention or abolition as a legislative matter. There was no suggestion that the difference of opinion existing among commission members, and generally across the country, could or should be resolved in one stroke by a decision of this Court. [Footnote 8/65] Similar activity was, before today, evident at the state level with reevaluation having been undertaken by special legislative committees in some States and by public ballot in others. [Footnote 8/66]

With deference and respect for the views of the Justices who differ, it seems to me that all these studies — both in this country and elsewhere — suggest that, as a matter of policy and precedent, this is a classic case for the exercise of our oft-announced allegiance to judicial restraint. I know of no case in which greater gravity and delicacy have attached to the duty that this Court is called on to perform whenever legislation — state or federal — is challenged on constitutional grounds. [Footnote 8/67] It seems to me that the sweeping judicial action undertaken today reflects a

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basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. Rarely has there been a more appropriate opportunity for this Court to heed the philosophy of Mr. Justice Oliver Wendell Holmes. As Mr. Justice Frankfurter reminded the Court in *Trop:*

"[T]he whole of [Mr. Justice Holmes'] work during his thirty years of service on this Court should be a constant reminder that the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment."

356 U.S. at 356 U. S. 128.

[Footnote 8/1]

MR. JUSTICE DOUGLAS holds only that

"the Eighth Amendment [requires] legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and [requires] judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."

Ante at 408 U. S. 256. The import of this rationale is that, while all existing laws must fall, it remains theoretically possible for a State or Congress to devise a statute capable of withstanding a claim of discriminatory application. MR. JUSTICE STEWART, in addition to reserving judgment on at least four presently existing statutes (*ante* at 408 U. S. 307), indicates that statutes making capital punishment mandatory for any category of crime, or providing some other means of assuring against "wanton" and "freakish" application (*ante* at 408 U. S. 310), would present a difficult question that he does not reach today. MR. JUSTICE WHITE, for somewhat different reasons, appears to come to the conclusion that a mandatory system of punishment might prove acceptable. *Ante* p. 408 U. S. 310.

The brief and selective references, in my opinion above and in this note, to the opinions of other Justices obviously do not adequately summarize the thoughtful and scholarly views set forth in their full opinions. I have tried merely to select what seem to me to be the respective points of primary emphasis in each of the majority's opinions.

[Footnote 8/2]

While statutes in 40 States permit capital punishment for a variety of crimes, the constitutionality of a very few mandatory statutes remains undecided. *See*concurring opinions by MR. JUSTICE STEWART and MR. JUSTICE WHITE. Since Rhode Island's only capital statute — murder by a life term prisoner — is mandatory, no law in that State is struck down by virtue of the Court's decision today.

[Footnote 8/3]

For a thorough presentation of the history of the Cruel and Unusual Punishment Clause *see* MR. JUSTICE MARSHALL's opinion today, *ante* at 408 U. S. 316-328. *See also Weems v. United States*, 217 U. S. 349, 217 U. S. 389-409 (1910) (White, J., dissenting); *O'Neil v. Vermont*, 144 U. S. 323, 144 U. S. 337 (1892) (Field, J., dissenting); Cranucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839 (1969).

[Footnote 8/4]

The Court pointed out that the Eighth Amendment applied only to the Federal Government, and not to the States. The Court's power in relation to state action was limited to protecting privileges and immunities and to assuring due process of law, both within the Fourteenth Amendment. The standard — for purposes of due process — was held to be whether the State had exerted its authority, "within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 136 U.S. at 136 U. S. 448. The State of Georgia, in No. 69-5003 and No. 69-5030, has placed great emphasis on this discussion in *In re Kemmler*, 136 U. S. 436 (1890), and has urged that the instant cases should all be decided under the more expansive tests of due process, rather than under the Cruel and Unusual Punishments Clause *per se*. Irrespective whether the decisions of this Court are viewed as "incorporating" the Eighth Amendment (*see Robinson v. California*, 370 U. S. 660 (1962); *Powell v. Texas*, 392 U. S. 514 (1968)), it seems clear that the tests for applying these two provisions are fundamentally identical. *Compare* Mr. Justice Frankfurter's test in *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459, 329 U. S. 470 (1947) (concurring opinion), *with* Mr. Chief Justice Warren's test in *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 100-101 (1958).

[Footnote 8/5]

Mr. Justice White stated:

"Death was a well-known method of punishment prescribed by law, and it was, of course, painful, and, in that sense, was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death."

217 U.S. at 217 U. S. 409.

[Footnote 8/6]

See 408 U. S. *infra*.

[Footnote 8/7]

In footnote 32, at 356 U. S. 100-101, the plurality opinion indicates that denationalization "was never explicitly sanctioned by this Government until 1940, and never tested against the Constitution until this day."

[Footnote 8/8]

"It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"

Id. at 125.

[Footnote 8/9]

398 U. S. 936 (1970); 402 U.S. at 402 U. S. 306 (BRENNAN, J., dissenting). While the constitutionality *per se* of capital punishment has been assumed almost without question, recently members of this Court have expressed the desire to consider the constitutionality of the death penalty with respect to its imposition for specific crimes. *Rudolph v. Alabama*, 375 U. S. 889 (1963) (dissent from the denial of certiorari).

[Footnote 8/10]

Brief for Respondent in *Branch v. Texas*, No. 69-5031, p. 6.

[Footnote 8/11]

While the implicit assumption in *McGautha v. California*, 402 U. S. 183 (1971), of the acceptability of death as a form of punishment must prove troublesome for those who urge total abolition, it presents an even more severe problem of *stare decisis*for those Justices who treat the Eighth Amendment essentially as a process prohibition. MR. JUSTICE DOUGLAS, while stating that the Court is "now imprisoned in . . . *McGautha*" (*ante* at 408 U. S. 248), concludes that capital punishment is unacceptable precisely because the procedure governing its imposition is arbitrary and discriminatory. MR. JUSTICE STEWART, taking a not dissimilar tack on the merits, disposes of *McGautha* in a footnote reference indicating that it is not applicable because the question there arose under the Due Process Clause. *Ante* at 408 U. S. 310 n. 12. MR. JUSTICE WHITE, who also finds the death penalty intolerable because of the process for its implementation, makes no attempt to distinguish *McGautha's* clear holding. For the reasons expressed in the CHIEF JUSTICE's opinion, *McGautha* simply cannot be distinguished. *Ante* at 408 U. S. 399-403. These various opinions would, in fact, overrule that recent precedent.

[Footnote 8/12]

This number includes all the Justices who participated in *Wilkerson v. Utah*, 99 U. S. 130 (1879), *Kemmler*, and *Louisiana ex rel. Francis* as well as those who joined in the plurality and dissenting opinions in *Trop* and the dissenting opinion in *Weems*.

[Footnote 8/13]

See <l=|408 u.s.="" 238fn8="" 4|="">n. 4, *supra*.</l=|408>

[Footnote 8/14]

See, e.g., Ex parte Wilson, 114 U. S. 417, 114 U. S. 427-428 (1885).

[Footnote 8/15]

See 408 U. S. *infra*.

[Footnote 8/16]

See, e.g., T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959); United Nations, Department of Economic and Social Affairs, Capital Punishment (1968); 2 National Commission on Reform of Federal Criminal Laws, Working Papers, 1351 n. 13 (1970).

[Footnote 8/17]

The literature on the moral question is legion. Representative collections of the strongly held views on both sides may be found in H. Bedau, The Death Penalty in America (1967 rev. ed.), and in Royal Commission on Capital Punishment, Minutes of Evidence (1949-1953).

[Footnote 8/18]

Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970 (Aug. 1971) (191 executions during the 1960's; no executions since June 2, 1967); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 143 (1967) ("[t]he most salient characteristic of capital punishment is that it is infrequently applied").

Petitioners concede, as they must, that little weight can be given to the lack of executions in recent years. A *de facto* moratorium has existed for five years now while cases challenging the procedures for implementing the capital sentence have been reexamined by this Court. *McGautha v. California*, 402 U. S. 183 (1971); *Witherspoon v. Illinois*, 391 U. S. 510 (1968). The infrequency of executions during the years before the moratorium became fully effective may be attributable in part to decisions of this Court giving expanded scope to the criminal procedural protections of the Bill of Rights, especially under the Fourth and Fifth Amendments. *E.g.*, *Miranda v. Arizona*, 384 U. S. 436 (1966); *Mapp v. Ohio*, 367 U. S. 643 (1961). Additionally, decisions of the early 1960's amplifying the scope of the federal habeas corpus remedy also may help account for a reduction in the number of executions. *E.g.*, *Fay v. Noia*, 372 U. S, 391 (1963); *Townsend v. Sain*, 372 U. S. 293 (1963). The major effect of either expanded procedural protections or extended collateral remedies may well have been simply to postpone the date of execution for some capital offenders, thereby leaving them ultimately in the moratorium limbo.

[Footnote 8/19]

An exact figure for the number of death sentences imposed by the sentencing authorities — judge or jury — in the various jurisdictions is difficult to determine. But the National Prisoner Statistics (hereafter NPS) show the numbers of persons received at the state and federal prisons under sentence of death. This number, however, does not account for those who may have been sentenced and retained in local facilities during the pendency of their appeals. Accepting with this reservation the NPS figures as a minimum, the most recent statistics show that at least 1,057 persons were sentenced to death during the decade of the 1960's. NPS, *supra*, <l=|408 u.s.="" 238fn8="" 18|="">n. 18, at 9.</l=|408>

No fully reliable statistics are available on the nationwide ratio of death sentences to cases in which death was a statutorily permissible punishment. At oral argument, counsel for petitioner in No. 69-5003 estimated that the ratio is 12 or 13 to one. Tr. of Oral Arg. in *Furman v. Georgia*, No. 69-5003, p. 11. Others have found a higher correlation. *See* McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed. Prob., No. 2, pp. 11, 12 (1964) (one out of every five, or 20%, of persons convicted of murder received the death penalty in California); Bedau, Death Sentences in New Jersey 1907-1960, 19 Rutgers L.Rev. 1 (1964) (between 1916 and 1955, 157 out of 652 persons charged with murder received the death sentence in New Jersey — about 20%; between 1956 and 1960, 13 out of 61 received the death sentence — also about 20%); H. Kalven & H. Ziesel, The American Jury 435-436 (1966) (21 of 111 murder cases resulted in death sentences during three representative years during the mid-1950's); *see also* Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132 (1969).

[Footnote 8/20]

See, e.g., *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972); Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1783 (1970). *But see* F. Frankfurter, Of Law and Men 97-98 (1956) (reprint of testimony before the Royal Commission on Capital Punishment).

[Footnote 8/21]

Nine States have abolished capital punishment without resort to the courts. *See* H. Bedau, *supra*, <l=|408 u.s.="" 238fn8="" 17|="">n. 17, at 39. California has been the only State to abolish capital punishment judicially. *People v. Anderson*, *supra*. </l=|408>

[Footnote 8/22]

Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

[Footnote 8/23]

Canada has recently undertaken a five-year experiment — similar to that conducted in England — abolishing the death penalty for most crimes. Stats. of Canada 1967-1968, 16 & 17 Eliz. 2, c. 15, p. 145. However, capital punishment is still prescribed for some

crimes, including murder of a police officer or corrections official, treason, and piracy.

[Footnote 8/24]

Great Britain, after many years of controversy over the death penalty, undertook a five-year experiment in abolition in 1965. Murder (Abolition of Death Penalty) Act 1965, 2 Pub.Gen.Acts, c. 71, p. 1577. Although abolition for murder became final in 1969, the penalty was retained for several crimes, including treason, piracy, and dockyards arson.

[Footnote 8/25]

See <l=|408 u.s.="" 238fn8="" 62|="">n. 62, *infra.*</l=|408>

[Footnote 8/26]

See Bedau, *supra*, <l=|408 u.s.="" 238fn8="" 17|="">n. 17, at 233.</l=|408>

[Footnote 8/27]

Ibid. (approximately 65% of the voters approved the death penalty).

[Footnote 8/28]

See Bedau, The Death Penalty in America, 35 Fed.Prob., No. 2, pp. 32, 34 (1971).

[Footnote 8/29]

National Commission, *supra*, <l=|408 u.s.="" 238fn8="" 16|="">n. 16, at 1365.</l=|408>

[Footnote 8/30]

Bedau, *supra*, <l=|408 u.s.="" 238fn8="" 17|="">n. 17, at 232. *See, e.g., State v. Davis*, 158 Conn. 341, 356-359, 260 A.2d 587, 595-596 (1969), in which the Connecticut Supreme Court pointed out that the state legislature had considered the question of abolition during the 1961, 1963, 1965, 1967, and 1969 sessions, and had "specifically declined to abolish the death penalty" every time.</l=|408>

[Footnote 8/31]

391 U.S. at 391 U. S. 519 and n. 15. *See also McGautha v. California*, 402 U.S. at 402 U. S. 201-202; *Williams v. New York*, 337 U. S. 241, 253 (1949) (Murphy, J., dissenting) ("[i]n our criminal courts, the jury sits as the representative of the community"); W. Douglas, We the Judges 389 (1956); Holmes, Law in Science and Science in Law, 12 Harv.L.Rev. 443, 460 (1899).

[Footnote 8/32]

See <l=|408 u.s.="" 238fn8="" 19|="">n. 19, *supra.*</l=|408>

[Footnote 8/33]

Tr. of Oral Arg. in *Aikens v. California*, No. 68-5027, p. 21. Although the petition for certiorari in this case was dismissed after oral argument, *Aikens v. California*, 406 U. S. 813 (1972), the same counsel argued both this case and *Furman.* He stated at the outset that his argument was equally applicable to each ease.

[Footnote 8/34]

National Prisoner Statistics, *supra*, <l=|408 u.s.="" 238fn8="" 18|="">n. 18.</l=|408>

[Footnote 8/35]

FBI, Uniform Crime Reports — 1970, pp. 7-14 (1971).

[Footnote 8/36]

Public opinion polls, while of little probative relevance, corroborate substantially the conclusion derived from examining legislative activity and jury sentencing — opinion on capital punishment is "fairly divided." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 470 (Frankfurter, J., concurring). *See, e.g., Witherspoon v. Illinois*, 391 U.S. at 391 U. S. 520 n. 16 (1966 poll finding 42% in favor of the death penalty and 47% opposed); Goldberg & Dershowitz, *supra*, <l=|408 u.s.="" 238fn8="" 20|="">n.

20, at 1781 n. 39 (1969 poll shows 51% in favor of retention — the same percentage as in 1960); H. Bedau, The Death Penalty in America 231-241 (1967 rev. ed.); Bedau, The Death Penalty in America, 35 Fed. Prob., No. 2, pp. 32, 34-35 (1971).</l=|408>

[Footnote 8/37]

If, as petitioners suggest, the judicial branch itself reflects the prevailing standards of human decency in our society, it may be relevant to note the conclusion reached by state courts in recent years on the question of the acceptability of capital punishment. In the last five years alone, since the *de facto* "moratorium" on executions began (*see* <l=|408 u.s.="" 238fn8="" 18|="">n. 18, *supra*), the appellate courts of 26 States have passed on the constitutionality of the death penalty under the Eighth Amendment and under similar provisions of most state constitutions. Every court, except the California Supreme Court, *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972), has found the penalty to be constitutional. Those States, and the year of the most recent decision on the issue, are: Alabama (1971); Arizona (1969); Colorado (1967); Connecticut (1969); Delaware (1971); Florida (1969); Georgia (1971); Illinois (1970); Kansas (1968); Kentucky (1971); Louisiana (1971); Maryland (1971); Missouri (1971); Nebraska (1967); Nevada (1970); New Jersey (1971); New Mexico (1969); North Carolina (1972); Ohio (1971); Oklahoma (1971); South Carolina (1970); Texas (1971); Utah (1969); Virginia (1971); Washington (1971). While the majority of these state court opinions do not give the issue more than summary exposition, many have considered the question at some length, and, indeed, some have considered the issue under the "evolving standards" rubric. *See, e.g., State v. Davis*, 158 Conn. 341, 356-359, 260 A.2d 587, 595-596 (1969); *State v. Crook*, 253 La. 961, 967-970, 221 So.2d 473, 475-476 (1969); *Bartholomey v. State*, 260 Md. 504, 273 A.2d 164 (1971); *State v. Alvarez*, 182 Neb. 358, 366-367, 154 N.W.2d 746, 751752 (1967); *State v. Pace*, 80 N. M. 364, 371-372, 456 P.2d 197, 204-205 (1969). Every federal court that has passed on the issue has ruled that the death penalty is not *per se* unconstitutional. *See, e.g., Ralph v. Warden*,438 F.2d 786, 793 (CA4 1970); *Jackson v. Dickson*, 325 F.2d 573, 575 (CA9 1963), *cert. denied*, 377 U.S. 957 (1964).</l=|408>

[Footnote 8/38]

Brief for Petitioner in No. 68-5027, p. 51. Although the Aikens case is no longer before us (*see* <l=|408 u.s.="" 238fn8="" 33|="">n. 33, supra), the petitioners in *Furman* and *Jackson* have incorporated petitioner's brief in *Aikens* by reference. *See* Brief for Petitioner in No. 69-5003, pp. 11-12; Brief for Petitioner in No. 69-5030, pp. 11-12.</l=|408>

[Footnote 8/39]

In 1935, available statistics indicate that 184 convicted murderers were executed. That is the highest, annual total for any year since statistics have become available. NPS, *supra*, <l=|408 u.s.="" 238fn8="" 18|="">n. 18. The year 1935 is chosen by petitioners in stating their thesis:</l=|408>

"If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is."

Brief for Petitioner in No. 68-5027, p. 26 (*see* <l=|408 u.s.="" 238fn8="" 38|="">n. 38, *supra*).</l=|408>

[Footnote 8/40]

Not all murders, and certainly not all crimes, are committed by persons classifiable as "underprivileged." Many crimes of violence are committed by professional criminals who willingly choose to prey upon society as an easy and remunerative way of life. Moreover, the terms "underprivileged," the "poor" and the "powerless" are relative and inexact, often conveying subjective connotations which vary widely depending upon the viewpoint and purpose of the user.

[Footnote 8/41]

Similarly, MR. JUSTICE WHITE exhibits concern for a lack of any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Ante* at 408 U. S. 313. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL treat the arbitrariness question in the same manner that it is handled by petitioners — as an element of the approach calling for total abolition.

[Footnote 8/42]

In *Morissette v. United States*, 342 U. S. 246 (1952), Mr. Justice Jackson spoke of the "tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution." *Id.* at 342 U. S. 251. He

also noted that the penalties for invasions of the rights of property are high as a consequence of the "public demand for retribution." *Id.* at 342 U. S. 260.

[Footnote 8/43]

See also Massiah v. United States, 377 U. S. 201, 377 U. S. 207 (1964) (WHITE, J., dissenting) (noting the existence of a "profound dispute about whether we should punish, deter, rehabilitate or cure"); *Robinson v. California*, 370 U.S. at 370 U. S. 674(DOUGLAS, J., concurring); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 329 U. S. 470-471 (Mr. Justice Frankfurter's admonition that the Court is not empowered to act simply because of a "feeling of revulsion against a State's insistence on its pound of flesh"); *United States v. Lovett*, 328 U. S. 303, 328 U. S. 324 (1946) (Frankfurter, J., concurring) ("[p]unishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted").

[Footnote 8/44]

Royal Commission on Capital Punishment, Minutes of Evidence 207 (1949-1953).

[Footnote 8/45]

Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶ 53, p. 18.

[Footnote 8/46]

M. Cohen, Reason and Law 50 (1950); H. Packer, The Limits of the Criminal Sanction 11-12 (1968); Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

[Footnote 8/47]

The authorities are collected in Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1297-1301 (1968). The competing contentions are summarized in the Working Papers of the National Commission on Reform of Federal Criminal Laws, *supra*, <l=|408 u.s.="" 238fn8="" 16|="">n. 16, at 1358-1359. *See also* the persuasive treatment of this issue by Dr. Karl Menninger in The Crime of Punishment 190-218 (1966).</l=|408>

[Footnote 8/48]

See, e.g., H. Bedau, The Death Penalty in America 260 (1967 rev. ed.); National Commission, *supra*, <l=|408 u.s.="" 238fn8="" 16|="">n. 16, at 1352.</l=|408>

[Footnote 8/49]

See Sellin, *supra*, <l=|408 u.s.="" 238fn8="" 16|="">n. 16, at 152.</l=|408>

[Footnote 8/50]

The countervailing considerations, tending to undercut the force of Professor Sellin's statistical studies, are collected in National Commission, *supra*, <l=|408 u.s.="" 238fn8="" 16|="">n. 16, at 1354; Bedau, *supra*, <l=|408 u.s.="" 238fn8="" 48|="">n. 48, at 265-266; Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw.U.L.Rev. 433, 455-460 (1957). </l=|408></l=|408>

[Footnote 8/51]

Report of the Royal Commission, *supra*, <l=|408 u.s.="" 238fn8="" 45|="">n. 45, ¶ 68, at 24.</l=|408>

[Footnote 8/52]

It is worthy of note that the heart of the argument here — that there are no legitimate justifications — was impliedly repudiated last Term by both the majority and dissenting opinions in *McGautha v. California*, 402 U. S. 183 (1971). The argument in that case centered on the proposition that due process requires that the standards governing the jury's exercise of its sentencing function be elucidated. As MR. JUSTICE BRENNAN's dissent made clear, whatever standards might be thought to exist arise out of the list of justifications for the death penalty — retribution, deterrence, etc. *Id.* at 402 U. S. 284. If no such standards exist, the controversy last Term was a hollow one indeed.

[Footnote 8/53]

Jackson v. Georgia, No. 69-5030; *Branch v. Texas*, No. 69-5031.

[Footnote 8/54]

Mr. Justice Harlan, joined by Mr. Justice Brewer, dissented separately, but agreed that the State had inflicted a cruel and unusual punishment. *Id.* at 144 U. S. 371.

[Footnote 8/55]

In addition to the States in which rape is a capital offense, statutes in 28 States prescribe life imprisonment as a permissible punishment for at least some category of rape. Also indicative of the seriousness with which the crime of rape is viewed, is the fact that, in nine of the 10 States that have abolished death as a punishment for any crime, the maximum term of years for rape is the same as for first-degree murder. Statistical studies have shown that the average prison term served by rapists is longer than for any category of offense other than murder. J. MacDonald, Rape — Offenders and Their Victims 298 (1971).

[Footnote 8/56]

Id. at 63-64; Packer, Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1077 (1964).

[Footnote 8/57]

See MacDonald, *supra*, <l=|408 u.s.="" 238fn8="" 55|="">n. 55, at 314; Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 Wis.L.Rev. 703.</l=|408>

[Footnote 8/58]

FBI, Uniform Crime Report — 1970, p. 14 (1971) (during the 1960's, the incidence of rape rose 121%).

[Footnote 8/59]

See text accompanying nn. 27 & 28, *supra.*

[Footnote 8/60]

See <l=|408 u.s.="" 238fn8="" 24|="">n. 24, *supra.*</l=|408>

[Footnote 8/61]

See <l=|408 u.s.="" 238fn8="" 23|="">n. 23, *supra.*</l=|408>

[Footnote 8/62]

Recent legislative activity in New York State serves to underline the preferability of legislative action over constitutional adjudication. New York abolished the death penalty for murder in 1965, leaving only a few crimes for which the penalty is still available. *See* text accompanying <l=|408 u.s.="" 238fn8="" 25|="">n. 25, *supra*. On April 27, 1972, a bill that would have restored the death penalty was considered by the State Assembly. After several hours of heated debate, the bill was narrowly defeated by a vote of 65 to 59. N.Y. Times, Apr. 28, 1972, p. 1, col. 1. After seven years of disuse of the death penalty, the representatives of the people in that State had not come finally to rest on the question of capital punishment. Because the 1965 decision had been the product of the popular will, it could have been undone by an exercise of the same democratic process. No such flexibility is permitted when abolition, even though not absolute, flows from constitutional adjudication.</l=|408>

[Footnote 8/63]

President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 143 (1967) (chaired by Nicholas Katzenbach, then Attorney General of the United States). The text of the Report stated, among other things, that the abolition of the death penalty "is being widely debated in the States"; that it is "impossible to say with certainty whether capital punishment significantly reduces the incidence of heinous crimes"; that "[w]hatever views one may have on the efficacy of the death penalty as a deterrent, it clearly has an undesirable impact on the administration of criminal justice"; and that "[a]ll members of the Commission agree that the present situation in the administration of the death penalty in many States is intolerable." *Ibid.* As a member of this Presidential Commission I subscribed then, and do now, to the recommendations and views above quoted.

[Footnote 8/64]

Final Report of the National Commission on Reform of Federal Criminal Laws 310 (1971).

[Footnote 8/65]

The American Law Institute, after years of study, decided not to take an official position on the question of capital punishment, although the Advisory Committee favored abolition by a vote of 18-2. The Council was more evenly divided, but all were in agreement that many States would undoubtedly retain the punishment and that, therefore, the Institute's efforts should be directed toward providing standards for its implementation. ALI, Model Penal Code 65 (Tent. draft No. 9, 1959).

[Footnote 8/66]

See text accompanying nn. <l=|408 u.s.="" 238fn8="" 26|="">26 through 30, supra.</l=|408>

[Footnote 8/67]

Blodgett v. Holden, 275 U. S. 142, 275 U. S. 148 (1927) (separate opinion of Holmes, J.). *See also Trop v. Dulles*, 356 U.S. at 356 U. S. 128 (Frankfurter, J., dissenting):

"The awesome power of this Court to invalidate . . . legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers DOUGLAS, BRENNAN, and MARSHALL would, at one fell swoop, invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. My Brothers STEWART and WHITE, asserting reliance on a more limited rationale — the reluctance of judges and juries actually to impose the death penalty in the majority of capital

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cases — join in the judgments in these cases. Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people coexist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury v. Madison,* 1 Cranch 137 (1803). An oft-told story since then, it bears summarization once more. Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people.

The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

The courts in cases properly before them have been entrusted under the Constitution with the last word, short of constitutional amendment, as to whether a law passed

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by the legislature conforms to the Constitution. But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone dissenting in *United States v. Butler* must be constantly borne in mind:

"[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

297 U. S. 297 U.S. 1, 297 U. S. 78-79 (1936).

Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires. This is doubtless why nearly two centuries of judicial precedent from this Court counsel the sparing use of that power. The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. The Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill when he observed:

"The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power."

On Liberty 28 (1885).

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A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote, at best.

The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes. For the reasons well stated in the opinions of THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL, I conclude that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will. It completely ignores the strictures of Mr. Justice Holmes, writing more than 40 years ago in *Baldwin v. Missouri:*

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly

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any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course, the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

281 U. S. 281 U.S. 586, 281 U. S. 595 (1930) (dissenting opinion).

More than 20 years ago, Justice Jackson made a similar observation with respect to this Court's restriction of the States in the enforcement of their own criminal laws:

"The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation."

Ashcraft v. Tennessee, 322 U. S. 143, 322 U. S. 174 (1944) (dissenting opinion).

If there can be said to be one dominant theme in the Constitution, perhaps more fully articulated in the Federalist Papers than in the instrument itself, it is the notion of checks and balances. The Framers were well aware of the natural desire of office holders as well as others to seek to expand the scope and authority of their

particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others.

This philosophy of the Framers is best described by one of the ablest and greatest of their number, James Madison, in Federalist No. 51:

“In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place, oblige it to controul itself.”

Madison’s observation applies to the Judicial Branch with at least as much force as to the Legislative and Executive Branches. While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. The Due Process and Equal Protection Clauses of the Fourteenth Amendment were “never intended to destroy the States’ power to govern themselves.” Black, J., in *Oregon v. Mitchell*, 400 U. S. 112, 400 U. S. 126(1970).

The very nature of judicial review, as pointed out by Justice Stone in his dissent in the *Butler* case, makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court’s holding in these cases has been reached, I believe, in complete disregard of that implied condition.

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10.3: Coker v. Georgia – 433 US 584 (1977)

U.S. Supreme Court

Coker v. Georgia, 433 U.S. 584 (1977)

Coker v. Georgia

No. 75-5444

Argued March 28, 1977

Decided June 29, 1977

433 U.S. 584

CERTIORARI TO THE SUPREME COURT OF GEORGIA

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from a Georgia prison and, in the course of committing an armed robbery and other offenses, raped an adult woman. He was convicted of rape, armed robbery, and the other offenses and sentenced to death on the rape charge, when the jury found two of the aggravating circumstances present for imposing such a sentence, *viz.*, that the rape was committed (1) by a person with prior capital felony convictions and (2) in the course of committing another capital felony, armed robbery. The Georgia Supreme Court affirmed both the conviction and sentence.

Held: The judgment upholding the death sentence is reversed, and the case is remanded. Pp. 433 U. S. 591-600; 433 U. S. 600; 433 U. S. 600-601; 433 U. S. 601.

234 Ga. 555, 216 S.E.2d 782, reversed and remanded.

MR JUSTICE WHITE, joined by MR JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. Pp. 433 U. S. 591-600.

(a) The Eighth Amendment bars not only those punishments that are "barbaric," but also those that are "excessive" in relation to the crime committed, and a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Pp. 433 U. S. 591-592.

(b) That death is a disproportionate penalty for rape is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty, it appearing that Georgia is currently the only State authorizing the death sentence for rape of an adult woman, that it is authorized for rape in only two other States, but only when the victim is a child, and that, in the vast majority (9 out of 10) of rape convictions in Georgia since 1973, juries have not imposed the death sentence. Pp. 433 U. S. 593-597.

(c) Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life. Pp. 433 U. S. 597-598.

(d) The conclusion that the death sentence imposed on petitioner is disproportionate punishment for rape is not affected by the fact that the jury found the aggravating circumstances of prior capital felony convictions and occurrence of the rape while committing armed robbery, a felony for which the death sentence is also authorized, since the prior convictions do not change the fact that the rape did not involve the taking of life, and since the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstances of prior capital felony convictions. Pp. 433 U. S. 598-599.

(e) That, under Georgia law, a deliberate killer cannot be sentenced to death, absent aggravating circumstances, argues strongly against the notion that, with or without such circumstances, a rapist who does not take the life of his victim should be punished more severely than the deliberate killer. P. 433 U. S. 600.

MR. JUSTICE BRENNAN concluded that the death penalty is, in all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. P. 433 U. S. 600.

MR. JUSTICE MARSHALL concluded that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. Pp. 433 U. S. 600-601.

MR. JUSTICE POWELL concluded that death is disproportionate punishment for the crime of raping an adult woman where, as here, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. P. 433 U. S. 601.

WHITE, J., announced the Court's judgment and delivered an opinion, in which STEWART, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., *post*, p. 433 U. S. 600, and MARSHALL, J., *post*, p. 433 U. S. 600, filed statements concurring in the judgment. POWELL, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 433 U. S. 601. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 433 U. S. 604.

MR. JUSTICE WHITE announced the judgment of the Court and filed an opinion in which MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, joined.

Georgia Code Ann. § 26-2001 (1972) provides that

"[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. [Footnote 1]"

Punishment is determined by a jury in a separate sentencing proceeding in which at least one of the statutory aggravating circumstances must be found before the death penalty may be imposed. [Footnote 2] Petitioner Coker was convicted of rape and sentenced to death. Both the conviction and the sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari, 429 U.S. 815, limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth Amendment, which proscribes "cruel and unusual punishments" and which must be observed by the States as well as the Federal Government. *Robinson v. California*, 370 U. S. 660 (1962).

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga. on September 2, 1974. At approximately 11 o'clock that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a "board," he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying "you know what's going to happen to you if you try anything, don't you," Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was charged with escape, armed robbery, motor vehicle theft, kidnaping, and rape. Counsel was appointed to represent him. Having been found competent to stand trial, he was tried. The jury returned a verdict of guilty, rejecting his general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in *Gregg v. Georgia*, 428 U. S. 153 (1976), where this Court sustained the death penalty for murder when imposed pursuant to the statutory procedures. [Footnote 3] The jury was instructed that it could consider as aggravating circumstances whether the rape had been committed by a person with a prior record of conviction for a capital felony and whether the rape had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that, even if aggravating circumstances were present, the death penalty need not be imposed if the jury found they were outweighed by mitigating circumstance, that is, circumstances not constituting justification or excuse for the offense in question, "but which, in fairness and mercy, may be considered as extenuating or reducing the degree" of moral culpability or punishment. App. 300. The jury's verdict on the rape count was death by electrocution. Both aggravating circumstances on which the court instructed were found to be present by the jury.

II

Furman v. Georgia, 408 U. S. 238 (1972), and the Court's decisions last Term in *Gregg v. Georgia*, 428 U. S. 153 (1976); *Proffitt v. Florida*, 428 U. S. 242 (1976); *Jurek v. Texas*,428 U. S. 262 (1976); *Woodson v. North Carolina*, 428 U. S. 280 (1976); and *Roberts v. Louisiana*, 428 U. S. 325 (1976), make unnecessary the recanvassing of certain critical aspects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at

least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman v. Georgia*, *supra*.

In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases, *Furman v. Georgia*, *supra; Robinson v. California*, 370 U. S. 660 (1962); *Trop v. Dulles*,356 U. S. 86 (1958); and *Weems v. United States*, 217 U. S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are "barbaric," but also those that are "excessive" in relation to the crime committed. Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. In *Gregg*, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes. 428 U.S. at 428 U. S. 187 n. 35.

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape, and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. [Footnote 4]

A

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female. [Footnote 5] By 1971, just prior to the decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government. [Footnote 6] *Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of *Furman* or of being satisfied with life imprisonment as the ultimate punishment for any offense. Thirty-five States immediately reinstituted the death penalty for at least limited kinds of crime. *Gregg v. Georgia*, 428 U.S. at 428 U. S. 179 n. 23. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman*legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*, *supra* at 428 U. S. 179-182.

But if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," *Gregg v. Georgia*, *supra* at 428 U. S. 179-180, it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy *Furman's*mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statute — Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they reenacted the death penalty for murder but not for rape; none of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment. [Footnote 7]

Georgia argues that 11 of the 16 States that authorized death for rape in 1972 attempted to comply with *Furman* by enacting arguably mandatory death penalty legislation, and that it is very likely that, aside from Louisiana and North Carolina, these States

simply chose to eliminate rape as a capital offense rather than to require death for each and every instance of rape. [Footnote 8] The argument is not without force, but 4 of the 16 States did not take the mandatory course, and also did not continue rape of an adult woman as a capital offense. Further, as we have indicated, the legislatures of 6 of the 11 arguably mandatory States have revised their death penalty laws since *Woodson* and *Roberts* without enacting a new death penalty for rape. And this is to say nothing of 19 other States that enacted nonmandatory, post-*Furman* statutes and chose not to sentence rapists to death.

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult. [Footnote 9] The Tennessee statute has since been invalidated because the death sentence was mandatory. *Collins v. State*, 550 S.W.2d 643 (Tenn 1977). The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman. [Footnote 10]

B

It was also observed in *Gregg* that "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," 428 U.S. at 428 U. S. 181, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. As far as execution for rape is concerned, this is now true only in Georgia and in Florida; and in the latter State, capital punishment is authorized only for the rape of children.

According to the factual submissions in this Court, out of all rape convictions in Georgia since 1973 — and that total number has not been tendered — 63 cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, 6 involved a death sentence, 1 of which was set aside, leaving 5 convicted rapists now under sentence of death in the State of Georgia. Georgia juries have thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that, as a practical matter, juries simply reserve the extreme sanction for extreme cases of rape, and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that, in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that, in the end, our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." [Footnote 11] It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. [Footnote 12] Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape, by definition, does not include the death of or even the serious injury to another person. [Footnote 13] The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over, and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. at 428 U. S. 187, is an excessive penalty for the rapist who, as such, does not take human life.

This does not end the matter, for, under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga.Code § 26-3102 (1977); *Gregg v. Georgia*, *supra* at 428 U. S. 165-166. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape, but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape

"was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. [Footnote 14]"

Here, the first two of these aggravating circumstances were alleged and found by the jury.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies — rape, murder, and kidnaping — but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

It is also true that the present rape occurred while Coker was committing armed robbery, a felony for which the Georgia statutes authorize the death penalty. [Footnote 15] But Coker was tried for the robbery offense as well as for rape, and received a separate life sentence for this crime; the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstance, which was stipulated, that Coker had been convicted of a prior capital crime. [Footnote 16]

We note finally that, in Georgia, a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when, in the commission of a felony, he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim. The judgment of the Georgia Supreme Court upholding the death sentence is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

[Footnote 1]

The section defines rape as having

"carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ."

[Footnote 2]

See n 3, *infra.*

[Footnote 3]

Ga.Code § 23102 (1977):

"*Capital offenses; jury verdict and sentence*"

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga.Code § 27-2302 (1977):

"*Recommendation to mercy*"

"In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge."

Ga.Code § 27-2534.1 (1977):

"*Mitigating and aggravating circumstances; death penalty*"

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case."

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:"

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions."

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person."

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value."

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty."

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person."

"(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties."

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga.Code § 27-2537 (1977):

"*Review of death sentences*"

"(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia."

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal."

"(c) With regard to the sentence, the court shall determine:"

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and"

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and"

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court."

"(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:"

"(1) Affirm the sentence of death; or"

"(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration."

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant."

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence."

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes."

"(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

[Footnote 4]

Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment, and therefore is not invalid for its failure to do so. We observe that, in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.

[Footnote 5]

See Bye, Recent History and Present Status of Capital Punishment in the United States, 17 J.Crim. L. & C. 234, 241-242 (1926).

[Footnote 6]

Ala.Code, Tit. 14, § 395 (1958); Ark.Stat.Ann. § 41-3403 (1964); Fla.Stat.Ann. § 794.01 (1965); Ga.Code § 26-2001 (1977); Ky.Rev.Stat.Ann. §§ 435.080-435.090 (1962); La.Rev.Stat.Ann. § 14:42 (1950); Md.Ann.Code, Art. 27, § 461 (1957); Miss.Code Ann. § 2358 (1957); Mo.Rev.Stat. § 559.260 (1969); Nev.Rev.Stat. § 200.360 (1963) (rape with substantial bodily harm); N.C.Gen.Stat. § 14-21 (1969); Okla.Stat.Ann., Tit. 21, § 1115 (1958); S.C.Code Ann. §§ 16-72, 180 (1962); Tenn.Code Ann. § 39-3702 (1955); Tex.Penal Code § 1189 (1961); Va.Code Ann. § 18.1-44 (1960); 18 U.S.C. § 2031.

[Footnote 7]

1976 Okla.Sess.Laws, c. 1, p. 627; 1976 La.Acts, Nos. 657, 694; 1976 Ky.Acts, c. 15 (Ex.Sess.); 1977 Wyo.Sess.Laws, c. 122. Recent legislative action has taken place in North Carolina, Virginia, Maryland, California, and New Jersey. The legislation has

been signed into law in North Carolina and Virginia, N.C.Sess.Laws (May 19, 1977); 1977 Va.Acts, c. 492 (Mar. 29, 1977), and has been vetoed in Maryland and California, Washington Post, May 27, 1977, p. A1, col. 1; N.Y. Times, May 28, 1977, p. 8, col. 6. The Governor of New Jersey apparently has not yet acted on the legislation in that State.

[Footnote 8]

The legislation that respondent places in this category is as follows:

Ky.Rev.Stat. § 507.020 (1975); La.Rev.Stat.Ann. § 14:30 (1974); Md.Code Ann., Art. 27, § 413(b) (Supp. 1976); Miss.Code Ann. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Supp. 1975); Mo.Rev.Stat. §§ 559.005, 559.009 (Supp. 1975); Nev.Rev.Stat. § 200.030 (1975); N.C.Gen.Stat. §§ 14-17, 14-21 (Supp. 1975); Okla.Stat.Ann., Tit. 21, §§ 701.1-701.3 (Supp. 1975); S.C.Code Ann. § 16-52 (Supp. 1975); Tenn.Code Ann. §§ 39-2402, 39-2406, 39-3702 (1975); Va.Code Ann. §§ 18.210, 18.2-31 (1975). Brief for Respondent 19 n. 38.

[Footnote 9]

Fla.Stat.Ann. § 794.011(2) (1976); Miss.Code Ann. § 9765 (Supp. 1976); Tenn.Code Ann. § 39-3702 (1974).

[Footnote 10]

In *Trop v. Dulles*, 356 U. S. 86, 356 U. S. 102 (1958), the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that, out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).

[Footnote 11]

U.S. Dept. of Justice, Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies 1 (1975), quoting Bard & Ellison, Crisis Intervention and Investigation of Forcible Rape, The Police Chief (May 1974), reproduced as Appendix I-B to the Report.

[Footnote 12]

See Note, The Victim In a Forcible Rape Case; A Feminist View, 11 Am.Crim.L.Rev. 335, 338 (1973); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif.L.Rev. 919, 922-923 (1973).

[Footnote 13]

See 433 U. S. 1, *supra*, for the Georgia definition of rape.

[Footnote 14]

There are other aggravating circumstances provided in the statute, *see* 433 U. S. 3, *supra*, but they are not applicable to rape.

[Footnote 15]

In *Gregg v. Georgia*, the Georgia Supreme Court refused to sustain a death sentence for armed robbery because, for one reason, death had been so seldom imposed for this crime in other cases that such a sentence was excessive, and could not be sustained under the statute. As it did in this case, however, the Georgia Supreme Court apparently continues to recognize armed robbery as a capital offense for the purpose of applying the aggravating circumstances provisions of the Georgia Code.

[Footnote 16]

Where the accompanying capital crime is murder, it is most likely that the defendant would be tried for murder, rather than rape; and it is perhaps academic to deal with the death sentence for rape in such a circumstance. It is likewise unnecessary to consider the rape-felony murder — a rape accompanied by the death of the victim which was unlawfully but nonmaliciously caused by the defendant.

Where the third aggravating circumstance mentioned in the text is present — that the rape is particularly vile or involves torture or aggravated battery — it would seem that the defendant could very likely be convicted, tried, and appropriately punished for this additional conduct.

MR. JUSTICE BRENNAN, concurring in the judgment.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 428 U. S. 227 (1976) (dissenting opinion), I concur in the judgment of the Court setting aside the death sentence imposed under the Georgia rape statute.

MR. JUSTICE MARSHALL, concurring in the judgment.

In *Gregg v. Georgia*, 428 U. S. 153, 428 U. S. 231 (1976) (dissenting opinion), I stated:

"In *Furman v. Georgia*, 408 U. S. 238, 408 U. S. 314 (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view. "

I then explained in some detail my reasons for reaffirming my position. I continue to adhere to those views in concurring in the judgment of the Court in this case.

MR. JUSTICE POWELL, concurring in the judgment in part and dissenting in part.

I concur in the judgment of the Court on the facts of this case, and also in the plurality's reasoning supporting the view that, ordinarily, death is disproportionate punishment for the crime of raping an adult woman. Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. The plurality, however, does not limit its holding to the case before us, or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment *always* — regardless of the circumstances — is a disproportionate penalty for the crime of rape.

The Georgia statute, sustained in *Gregg v. Georgia*, 428 U. S. 153 (1976), specifies aggravating circumstances that may be considered by the jury when appropriate. With respect to the crime of rape, only three such circumstances are specified: (i) the offense was committed by a person with a prior record of conviction for a capital felony; (ii) the offense was committed while the offender was engaged in another capital felony or in aggravated battery; and (iii) the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Ante* at 433 U. S. 588-589, n. 3. Only the third circumstance describes in general the offense of aggravated rape, often identified as a separate and more heinous offense than rape. *See, e.g.*, ALI, Model Penal Code § 207.4, Comment, p. 246 (Tent.Draft No. 4, 1955); ALI, Model Penal Code § 213.1 (Prop.Off.Draft, 1962); Nev.Rev.Stat. § 200.363 (1975). That third circumstance was not submitted to the jury in this case, as the evidence would not have supported such a finding. It is therefore quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death. [Footnote 2/1]

In accord with our decisions last Term, the plurality opinion states:

"[T]he death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed."

Ante at 433 U. S. 591. Thus, capital punishment may be imposed on those sentenced in accordance with the procedures identified in *Gregg* and *Woodson v. North Carolina*, 428 U. S. 280 (1976), at least when the offender is convicted of murder, the crime involved in all five of last Term's capital cases.

Today, in a case that does not require such an expansive pronouncement, the plurality draws a bright line between murder and all rapes — regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate. As noted *in Snider v. Peyton*,356 F.2d 626, 627 (CA4 1966), "[t]here is extreme variation in the degree of culpability of rapists." The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim. The plurality opinion says that

"[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."

Ante at 433 U. S. 598. But there is indeed "extreme variation" in the crime of rape. Some victims are so grievously injured physically or psychologically that life is beyond repair.

Thus, it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's "evolving standards of decency," particularly legislative enactments and the responses of juries in capital cases. [Footnote 2/2] *See Gregg v. Georgia*, *supra* at 428 U. S. 173-182 (joint opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson v. North Carolina*, *supra* at 428 U. S. 294-295 (plurality opinion); *Furman v. Georgia*, 408 U. S. 238, 408 U. S. 436-443 (1972) (POWELL, J., dissenting). The plurality properly examines these indicia, which do support the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury. But it has not been shown that society finds the penalty disproportionate for all rapes. In a proper case, a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudge the issue. To this extent, I respectfully dissent.

[Footnote 2/1]

It is not this Court's function to formulate the relevant criteria that might distinguish aggravated rape from the more usual case, but perhaps a workable test would embrace the factors identified by Georgia: the cruelty or viciousness of the offender, the circumstances and manner in which the offense was committed, and the consequences suffered by the victim. *See also Ralph v. Warden*, 438 F.2d 786 (CA4 1970), *cert. denied*, 408 U.S. 942 (1972); 438 F.2d at 794 (opinion of Haynsworth, C.J.). The legislative task of defining, with appropriate specificity, the elements of the offense of aggravated rape would not be easy, *see Furman v. Georgia*, 408 U. S. 238, 408 U. S. 460 (1972) (POWELL, J., dissenting), but certainly this Court should not assume that the task is impossible.

The dissent of THE CHIEF JUSTICE, relying on selected excerpts from my opinion in *Furman*, seeks to buttress the view that, for sentencing purposes, meaningful distinctions cannot be drawn between rapes regardless of the circumstances and effect upon the victim. *Post* at 433 U. S. 607-608, n. 2. The dissent emphasizes the difficulties of proof. But the jury system is designed and operates successfully to resolve precisely this type of factual issue. The law of negligence, for example, is replete with issues requiring the jury to determine degrees of culpability and the extent or permanency of physical and psychological injury.

I am complimented by the frequency with which THE CHIEF JUSTICE, in his dissent, cites and quotes from my opinion in *Furman.* That opinion, however, did not prevail, and — as with most of the writing in *Furman* — it now must be read in light of *Gregg* and *Woodson v. North Carolina*, 428 U. S. 280 (1976), which have established the controlling general principles. But, contrary to implications in THE CHIEF JUSTICE's dissent, my opinion in *Furman* did emphasize that the proportionality test as to rape should be applied on a case-by-case basis, noting that, in some cases, the death sentence would be "grossly excessive." 408 U.S. at408 U. S. 461. I remain in disagreement with the simplistic all-or-nothing views of the plurality opinion and the dissenting opinion of THE CHIEF JUSTICE.

[Footnote 2/2]

These objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment — as the plurality notes, *ante* at 433 U. S. 597 — must be decided on the basis of our own judgment in light of the precedents of this Court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

In a case such as this, confusion often arises as to the Court's proper role in reaching a decision. Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature. I accept that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes. But rape is not a minor crime; hence the Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States. Since I cannot agree that Georgia lacked the constitutional power to impose the penalty of death for rape, I dissent from the Court's judgment.

(1)

On December 5, 1971, the petitioner, Ehrlich Anthony Coker, raped and then stabbed to death a young woman. Less than eight months later, Coker kidnaped and raped a second young woman. After twice raping this 16-year-old victim, he stripped her,

severely beat her with a club, and dragged her into a wooded area where he left her for dead. He was apprehended and pleaded guilty to offenses stemming from these incidents. He was sentenced by three separate courts to three life terms, two 20-year terms, and one 8-year term of imprisonment. [Footnote 3/1] Each judgment specified that the sentences it imposed were to run consecutively, rather than concurrently. Approximately 1 1/2 years later, on September 2, 1974, petitioner escaped from the state prison where he was serving these sentences. He promptly raped another 16-year-old woman in the presence of her husband, abducted her from her home, and threatened her with death and serious bodily harm. It is this crime for which the sentence now under review was imposed.

The Court today holds that the State of Georgia may not impose the death penalty on Coker. In so doing, it prevents the State from imposing any effective punishment upon Coker for his latest rape. The Court's holding, moreover, bars Georgia from guaranteeing its citizens that they will suffer no further attacks by this habitual rapist. In fact, given the lengthy sentences Coker must serve for the crimes he has already committed, the Court's holding assures that petitioner — as well as others in his position — will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself. To what extent we have left States "elbowroom" to protect innocent persons from depraved human beings like Coker remains in doubt.

(2)

My first disagreement with the Court's holding is its unnecessary breadth. The narrow issue here presented is whether the State of Georgia may constitutionally execute this petitioner for the particular rape which he has committed, in light of all the facts and circumstances shown by this record. The plurality opinion goes to great lengths to consider societal mores and attitudes toward the generic crime of rape and the punishment for it; however, the opinion gives little attention to the special circumstances which bear directly on whether imposition of the death penalty is an appropriate societal response to Coker's criminal acts: (a) On account of his prior offenses, Coker is already serving such lengthy prison sentences that imposition of additional periods of imprisonment would have no incremental punitive effect; (b) by his life pattern, Coker has shown that he presents a particular danger to the safety, welfare, and chastity of women, and, on his record, the likelihood is therefore great that he will repeat his crime at the first opportunity; (c) petitioner escaped from prison only a year and a half after he commenced serving his latest sentences; he has nothing to lose by further escape attempts; and (d) should he again succeed in escaping from prison, it is reasonably predictable that he will repeat his pattern of attacks on women — and with impunity, since the threat of added prison sentences will be no deterrent.

Unlike the plurality, I would narrow the inquiry in this case to the question actually presented: does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime, and who has not hesitated to escape confinement at the first available opportunity? Whatever one's view may be as to the State's constitutional power to impose the death penalty upon a rapist who stands before a court convicted for the first time, this case reveals a chronic rapist whose continuing danger to the community is abundantly clear.

MR. JUSTICE POWELL would hold the death sentence inappropriate in this case because

"there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury."

Ante at 433 U. S. 601. [Footnote 3/2] Apart from the reality that rape is inherently one of the most egregiously brutal acts one human being can inflict upon another, there is nothing in the Eighth Amendment that so narrowly limits the factors which may be considered by a state legislature in determining whether a particular punishment is grossly excessive. Surely recidivism, especially the repeated commission of heinous crimes, is a factor which may properly be weighed as an aggravating circumstance, permitting the imposition of a punishment more severe than for one isolated offense. For example, as a matter of national policy, Congress has expressed its will that a person who has committed two felonies will suffer enhanced punishment for a third one, 18 U.S.C. § 3575(e)(1); Congress has also declared that a second conviction for assault on a mail carrier may be punished more seriously than a first such conviction, 18 U.S.C. § 2114. Many States provide an increased penalty for habitual criminality. *See, e.g.,* Wis.Stat.Ann. § 939.62 (1958); *see also* Annot., 58 A.L.R. 20 (1929); 82 A.L.R. 345 (1933); 79 A.L.R.2d 826 (1961). [Footnote 3/3] As a factual matter, the plurality opinion is correct in stating that Coker's "prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life," *ante* at 433 U. S. 599; however, it cannot be disputed that the existence of these prior convictions makes Coker a substantially more serious menace to society than a first-time offender: [Footnote 3/4]

"There is a widely held view that those who present the strongest case for severe measures of incapacitation are not murderers as a group (their offenses often are situational), *but rather those who have repeatedly engaged in violent, combative behavior.* A well demonstrated propensity for life-endangering behavior is thought to provide a more solid basis for infliction of the most severe measures of incapacitation than does the fortuity of a single homicidal incident."

Packer, Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1080 (1964). (Emphasis added.)

In my view, the Eighth Amendment does not prevent the State from taking an individual's "well demonstrated propensity for life-endangering behavior" into account in devising punitive measures which will prevent inflicting further harm upon innocent victims. *See Gregg v. Georgia*, 428 U. S. 153, 428 U. S. 183 n. 28 (1976). Only one year ago, MR. JUSTICE WHITE succinctly noted: "[D]eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not." *Roberts v. Louisiana*, 428 U. S. 325, 428 U. S. 354 (1976) (dissenting opinion); *see also Furman v. Georgia*, 408 U.S. at 408 U. S. 311 (WHITE, J., concurring).

In sum, once the Court has held that "the punishment of death does not invariably violate the Constitution," *Gregg v. Georgia*, *supra* at 428 U. S. 169, it seriously impinges upon the State's legislative judgment to hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare, safety, personal integrity and human worth of others, and who seemingly cannot be deterred from continuing such conduct. [Footnote 3/5] I therefore would hold that the death sentence here imposed is within the power reserved to the State, and leave for another day the question of whether such sanction would be proper under other circumstances. The dangers which inhere whenever the Court casts its constitutional decisions in terms sweeping beyond the facts of the case presented, are magnified in the context of the Eighth Amendment. In *Furman v. Georgia*, *supra* at 408 U. S. 431, MR. JUSTICE POWELL, in dissent, stated:

"[W]here, as here, the language of the applicable [constitutional] provision provides great leeway, and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. *It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.*"

(Emphasis added.) Since the Court now invalidates the death penalty as a sanction for all rapes of adults at all times under all circumstances, [Footnote 3/6] I reluctantly turn to what I see as the broader issues raised by this holding.

(3)

The plurality, *ante* at 433 U. S. 597-598, acknowledges the gross nature of the crime of rape. A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological, as well as physical, harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack — it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this, in turn, may have a serious detrimental effect upon her husband and any children she may have. I therefore wholly agree with MR. JUSTICE WHITE's conclusion as far as it goes — that, "[s]hort of homicide, [rape] is the *ultimate violation of self.*'" *Ante at 433 U. S. 597. Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery. To speak blandly, as the plurality does, of rape victims who are "unharmed," or to classify the human outrage of rape, as does MR. JUSTICE POWELL, in terms of "excessively brutal," ante at 433 U. S. 601, versus "moderately brutal," takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.*

Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that "the death penalty . . . is an excessive penalty" for the perpetrator of this heinous offense. [Footnote 3/7] This, the Court holds, is true even though, in Georgia, the death penalty may be imposed only where the rape is coupled with one or more aggravating circumstances. The process by which this conclusion is reached is as startling as it is disquieting. It represents a clear departure from precedent by making this Court,

"under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility in diverse areas of the criminal law, throughout the country."

Powell v. Texas, 392 U. S. 514, 392 U. S. 533 (1968) (opinion of MARSHALL, J.). [Footnote 3/8] This seriously strains and distorts our federal system, removing much of the flexibility from which it has drawn strength for two centuries.

The analysis of the plurality opinion is divided into two parts: (a) an "objective" determination that most American jurisdictions do not presently make rape a capital offense, and (b) a subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim. I take issue with each of these points.

(a)

The plurality opinion bases its analysis, in part, on the fact that

"Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman."

Ante at 433 U. S. 595-596. Surely, however, this statistic cannot be deemed determinative, or even particularly relevant. As the opinion concedes, *ante* at 433 U. S. 594, two other States — Louisiana and North Carolina — have enacted death penalty statutes for adult rape since this Court's 1972 decision in *Furman v. Georgia*, 408 U. S. 238. If the Court is to rely on some "public opinion" process, does this not suggest the beginning of a "trend"?

More to the point, however, it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court's *Furman* decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain *any* statute imposing death as a criminal sanction. [Footnote 3/9] Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today's holding

In any case, when considered in light of the experience since the turn of this century, where more than one-third of American jurisdictions have consistently provided the death penalty for rape, the plurality's focus on the experience of the immediate past must be viewed as truly disingenuous. Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems "cruel and unusual" to look solely to what legislatures have *refrained* from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment? Far more representative of societal mores of the 20th century is the accepted practice in a substantial number of jurisdictions preceding the *Furman* decision. "[The] problem . . . is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago." *Furman v. Georgia*, *supra*at 408 U. S. 410 (BLACKMUN, J., dissenting). *Cf. Rudolph v. Alabama*, 375 U. S. 889(1963).

However, even were one to give the most charitable acceptance to the plurality's statistical analysis, it still does not, to my mind, support its conclusion. The most that can be claimed is that, for the past year, Georgia has been the only State whose adult rape death penalty statute has not otherwise been invalidated; two other state legislatures had enacted rape death penalty statutes in the last five years, but these were invalidated for reasons unrelated to rape under the Court's decisions last Term. *Woodson v. North Carolina*, 428 U. S. 280 (1976); *Roberts v. Louisiana*, 428 U. S. 325 (1976). Even if these figures could be read as indicating that no other States view the death penalty as an appropriate punishment for the rape of an adult woman, it would not necessarily follow that Georgia's imposition of such sanction violates the Eighth Amendment.

The Court has repeatedly pointed to the reserve strength of our federal system, which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. *See, e.g., Whalen v. Roe*, 429 U. S. 589, 429 U. S. 597-598, and n. 22 (1977); *Johnson v. Louisiana*, 406 U. S. 356, 406 U. S. 376 (1972) (opinion of POWELL, J.); *California v. Green*, 399 U. S. 149, 399 U. S. 184-185 (1970) (Harlan, J., concurring); *Fay v. New York*, 332 U. S. 261,332 U. S. 296 (1947). Various provisions of the Constitution, including the Eighth Amendment and the Due Process Clause, of course, place substantive limitations on the type of experimentation a State may undertake. However, as the plurality admits, the crime of rape is second perhaps only to murder in its gravity. It follows then that Georgia did not approach such substantive constraints by enacting the statute here in question. *See also infra*at 433 U. S. 619-622.

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives –those of the victims of undeterred criminal conduct. *See infra* at 433

U. S. 620. Our concern for the accused ought not foreclose legislative judgments showing a modicum of consideration for the potential victims.

Three state legislatures have, in the past five years, determined that the taking of human life and the devastating consequences of rape will be minimized if rapists may, in a limited class of cases, be executed for their offenses. [Footnote 3/10] That these States are presently a minority does not, in my view, make their judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent. In this area, the choices for legislatures are, at best, painful and difficult, and deserve a high degree of deference. Only last Term, MR. JUSTICE WHITE observed:

"It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment *with which the judiciary should be most reluctant to interfere.*"

Roberts v. Louisiana, *supra* at 428 U. S. 355 (dissenting opinion). (Emphasis added.)

The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect. [Footnote 3/11] It may well be that rape victims would become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty; or perhaps they would be reluctant to cooperate in the prosecution of rapists if they knew that a conviction might result in the imposition of the death penalty. Quite possibly, the occasional well publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives; [Footnote 3/12] or, on the contrary, it may be that members of a civilized community will suffer the pangs of a heavy conscience because such punishment will be perceived as excessive. [Footnote 3/13] We cannot know which among this range of possibilities is correct, but today's holding forecloses the very exploration we have said federalism was intended to foster. It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.

In order for Georgia's legislative program to develop, it must be given time to take effect, so that data may be evaluated for comparison with the experience of States which have not enacted death penalty statutes. Today, the Court repudiates the State's solemn judgment on how best to deal with the crime of rape before anyone can know whether the death penalty is an effective deterrent for one of the most horrible of all crimes. And this is done a few short years after MR. JUSTICE POWELL's excellent statement:

"In a period in our country's history when the frequency of [rape] is increasing alarmingly, it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains."

Furman v. Georgia, 408 U.S. at 408 U. S. 459 (dissenting opinion) (footnote omitted). To deprive States of this authority as the Court does, on the basis that

"[t]he current judgment with respect to the death penalty for rape . . . weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman,"

ante at 433 U. S. 596, is impermissibly rash. The current judgment of some Members of this Court has undergone significant change in the short time since *Furman.* [Footnote 3/14] Social change on great issues generally reveals itself in small increments, and the "current judgment" of many States could well be altered on the basis of Georgia's experience, were we to allow its statute to stand. [Footnote 3/15]

(b)

The subjective judgment that the death penalty is simply disproportionate to the crime of rape is even more disturbing than the "objective" analysis discussed *supra*. The plurality's conclusion on this point is based upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not.*Ante* at 433 U. S. 598-599, 433 U. S. 600. However, no Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational — nor

constitutionally impermissible — for a legislature to make the penalty more severe than the criminal act it punishes [Footnote 3/16] in the hope it would deter wrongdoing:

"We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."

Gregg v. Georgia, 428 U.S. at 428 U. S. 175. *Accord*, *Furman v. Georgia*, *supra* at 408 U. S. 451 (POWELL, J., dissenting).

It begs the question to state, as does the plurality opinion:

"Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."

Ante at 433 U. S. 598.

Until now; the issue under the Eighth Amendment has not been the state of any particular victim after the crime, but rather whether the punishment imposed is grossly disproportionate to the evil committed by the perpetrator. *See Gregg v. Georgia*, *supra* at 428 U. S. 173; *Furman v. Georgia*, *supra* at 408 U. S. 458 (POWELL, J., dissenting). As a matter of constitutional principle, that test cannot have the primitive simplicity of "life for life, eye for eye, tooth for tooth." Rather, States must be permitted to engage in a more sophisticated weighing of values in dealing with criminal activity which consistently poses serious danger of death or grave bodily harm. If innocent life and limb are to be preserved, I see no constitutional barrier in punishing by death all who engage in such activity, regardless of whether the risk comes to fruition in any particular instance. *See* Packer, 77 Harv.L.Rev. at 1077-1079.

Only one year ago, the Court held it constitutionally permissible to impose the death penalty for the crime of murder, provided that certain procedural safeguards are followed. *Compare Gregg v. Georgia*, *supra; Proffitt v. Florida*, 428 U. S. 242 (1976), *and Jurek v. Texas*, 428 U. S. 262 (1976), *with Roberts v. Louisiana*, 428 U. S. 325 (1976), *and Woodson v. North Carolina*, 428 U. S. 280 (1976). Today, the plurality readily admits that "[s]hort of homicide, [rape] is the *ultimate violation of self.'" Ante at 433 U. S. 597. Moreover, as stated by MR. JUSTICE POWELL:*

"The threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of violence."

Furman v. Georgia, *supra* at 408 U. S. 460 (dissenting opinion). Rape thus is not a crime "light years" removed from murder in the degree of its heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims — apart from the devastating psychic consequences. It would seem to follow therefore that, affording the States proper leeway under the broad standard of the Eighth Amendment, [Footnote 3/17] if murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.

The Court's conclusion to the contrary is very disturbing indeed. The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e.g.*, treason, airplane hijacking, and kidnaping. In that respect, today's holding does even more harm than is initially apparent. We cannot avoid taking judicial notice that crimes such as airplane hijacking, kidnaping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies — including possibly imposition of the penalty of death — to prevent and deter such crimes.

Some sound observations, made only a few years ago, deserve repetition:

"Our task here, as must so frequently be emphasized and reemphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible."

Furman v. Georgia, 408 U.S. at 408 U. S. 411 (BLACKMUN, J., dissenting).

Whatever our individual views as to the wisdom of capital punishment, I cannot agree that it is constitutionally impermissible for a state legislature to make the "solemn judgment" to impose such penalty for the crime of rape. Accordingly, I would leave to the States the task of legislating in this area of the law.

[Footnote 3/1]

On March 12, 1973, the Superior Court of Richmond County, Ga. sentenced Coker to 20 years' imprisonment for the kidnaping of petitioner's second victim, and to life imprisonment for one act of rape upon her. On May 28, 1973, the Superior Court of Taliaferro County, Ga. sentenced Coker to eight years' imprisonment for aggravated assault upon the same victim, and to life imprisonment for the second rape upon her. On April 6, 1973, the Superior Court of Clayton County, Ga. sentenced Coker to 20 years' imprisonment for the rape of petitioner's first victim, and to life imprisonment for her murder. App. 307-312.

[Footnote 3/2]

The position today adopted by Mr. JUSTICE POWELL constitutes a disquieting shift from the view he embraced several Terms ago in *Furman v. Georgia*, 408 U. S. 238,408 U. S. 460-461 (1972) (dissenting opinion), where he stated:

"While I reject each of [petitioners'] attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping toward what is, for me, the appropriate application of the Eighth Amendment. While, in my view, *the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category.*"

(Emphasis added.)

While MR. JUSTICE POWELL purports to dissent from the broadest sweep of the Court's holding, I cannot see that his view differs materially from that of the plurality. He suggests two situations where it might be proper to execute rapists: (1) where the "offense [is] committed with excessive brutality"; and (2) where "the victim sustained serious or lasting injury." The second part of this test was rejected by MR. JUSTICE POWELL himself in *Furman*, and with good reason:

"[T]he emotional impact [upon the rape victim] may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to the date of trial."

Id. at 408 U. S. 460. Can any Member of the Court state with confidence that a 16-year-old woman who is raped in the presence of her husband three weeks after giving birth to a baby "sustained [no] serious or lasting injury"? This bifurcation of rape into categories of harmful and nonharmful eludes my comprehension.

The difficulty with the first part of MR. JUSTICE POWELL's test is that rape is inherently an aggravated offense; in MR. JUSTICE POWELL's own words, "the threat of both [physical and psychological] injury is always present." *Id.* at 408 U. S. 459. Therefore, the "excessive brutality" requirement must refer to something more, I assume, than the force normally associated with physically coercing or overpowering the will of another. Rather, what must be meant is that the rapist has engaged in torture or has committed an aggravated battery upon the victim.*See ante* at 433 U. S. 601-602, and n. 1. However, torture and aggravated battery are offenses separate from rape, and ordinarily are punished separately. The clear negative inference of MR. JUSTICE POWELL's analysis therefore appears to be that, where rape alone is committed, *i.e.*, rape unaccompanied by any other criminal conduct, the death penalty may never be imposed.

[Footnote 3/3]

This Court has consistently upheld the constitutional validity of such punishment-enhancing statutes. *See, e.g., Spencer v. Texas*, 385 U. S. 554, 385 U. S. 559-560 (1967):

"No claim is made here that recidivist statutes are . . . unconstitutional, nor could there be under our cases. Such statutes and other enhanced sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well. . . . Such statutes . . . have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post* facto laws, *cruel and unusual punishment*, due process, equal protection, and privileges and immunities."

(Footnote and citations omitted; emphasis added.) *Accord, Oyler v. Boles*, 368 U. S. 448, 368 U. S. 451 (1962).

[Footnote 3/4]

This special danger is demonstrated by the very record in this case. After tying and gagging the victim's husband, and raping the victim, petitioner sought to make his getaway in their automobile. Leaving the. victim's husband tied and gagged in his bathroom, Coker took the victim with him. As he started to leave, he brandished the kitchen knife he was carrying and warned the husband that,

"if he would get pulled over or the police was following him in any way, that he would kill — he would kill my wife. *He said he didn't have nothing to lose — that he was in prison for the rest of his life, anyway. . . .*"

Testimony of the victim's husband, App. 121 (emphasis added).

[Footnote 3/5]

Professor Packer addressed this:

"What are we to do with those whom we cannot reform, and, in particular, those who, by our failure, are thought to remain menaces to life? Current penal theories admit, indeed insist upon, the need for permanent incapacitation in such cases. Once this need is recognized, the death penalty as a means of incapacitation for the violent psychopath can hardly be objected to on grounds that will survive rational scrutiny, *if the use of the death penalty in any situation is to be permitted.* And its use in rape cases as a class, while inept, is no more so than its use for any other specific offense involving danger to life and limb."

Making the Punishment Fit the Crime, 77 Harv.L.Rev. 1071, 1081 (1964). (Emphasis added.)

[Footnote 3/6]

I find a disturbing confusion as to this issue in the plurality opinion. The issue is whether Georgia can, under any circumstances and for any kind of rape — "mild" or "gross" — impose the death penalty. Yet the plurality opinion opens its discussion, apparently directed at demonstrating that this was not an "aggravated" rape, saying that, following the rape and kidnaping, "Mrs. Carver was unharmed."*Ante* at 433 U. S. 587. If the Court is holding that no rape can ever be punished by death, why is it relevant whether Mrs. Carver was "unharmed"?

[Footnote 3/7]

While only three Justices have joined MR. JUSTICE WHITE in this portion of his opinion, *see* separate opinion of MR. JUSTICE POWELL, *ante*, p. 433 U. S. 601, I take this to be the view of the Court in light of MR. JUSTICE BRENNANS and MR. JUSTICE MARSHALL's statements joining the judgment.

[Footnote 3/8]

Only last Term, in *Gregg v. Georgia*, 428 U. S. 153 (1976), MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS warned that "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts," and noted that "we may not act as judges as we might as legislators," *id.* at 428 U. S. 174-175. *Accord*, *Roberts v. Louisiana*, 428 U. S. 325, 428 U. S. 355-356 (1976) (WHITE, J., dissenting). MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS further noted that

"[t]he deference we owe to decisions of the state legislatures under our federal system, [*Furman v. Georgia*, 408 U.S.] at 408 U. S. 465-470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, for '*these are peculiarly questions of legislative policy.*' *Gore v. United States*, 357 U. S. 386,357 U. S. 393 (1958)."

428 U.S. at 428 U. S. 176. (Emphasis added.)

[Footnote 3/9]

I take no satisfaction in my predictive caveat in *Furman:*

"Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress."

408 U.S. at 408 U. S. 403 (dissenting opinion).

[Footnote 3/10]

The statute here in question does not provide the death penalty for any and all rapes. Rather, the jury must find that at least one statutorily defined aggravated circumstance is present. Ga.Code §§ 23102, 27-2534.1(b)(1), (2), and (7) (1977).

[Footnote 3/11]

"The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman v. Georgia*, [408 U.S.] at 408 U. S. 403-405 (BURGER, C.J., dissenting)."

Gregg v. Georgia, 428 U.S. at 428 U. S. 186 (joint opinion of STEWART, POWELL, and STEVENS, JJ.).

[Footnote 3/12]

"There are many cases in which the sordid, heinous nature of a particular [rape], demeaning, humiliating, and often physically or psychologically traumatic, will call for public condemnation."

Furman v. Georgia, 408 U.S. at 408 U. S. 459 (POWELL, J., dissenting).

[Footnote 3/13]

Obviously I have no special competence to make these judgments, but, by the same token, no other Member of the Court is competent to make a contrary judgment. This is why our system has, until now, left these difficult policy choices to the state legislatures, which may be no wiser, but surely are more attuned to the mores of their communities, than are we.

[Footnote 3/14]

Indeed as recently as 1971 — a year before *Furman* — a majority of this Court appeared to have no doubt about the constitutionality of the death penalty. *See McGautha v. California*, 402 U. S. 183 (1971).

[Footnote 3/15]

To paraphrase MR. JUSTICE POWELL,

"[w]hat [the Court is] saying, in effect, is that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment [for adult rape] under all circumstances, and for all future generations, has somehow been revealed."

Furman v. Georgia, *supra* at 408 U. S. 430-431 (dissenting opinion).

[Footnote 3/16]

For example, hardly any thief would be deterred from stealing if the only punishment upon being caught were return of the money stolen.

[Footnote 3/17]

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, in *Gregg v. Georgia*, noted:

"[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure [of the Eighth Amendment], we presume its validity. . . . *[A] heavy burden rests on those who would attack the judgment of the representatives of the people.*"

428 U.S. at 428 U. S. 175 (emphasis added). *Accord*, *Furman v. Georgia*, *supra* at 408 U. S. 451 (POWELL, J., dissenting).

The reason for this special deference to state legislative enactments was described:

"This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society, legislatures, not courts, are constituted to respond to the will, and, consequently, the moral values, of the people.' *Furman v. Georgia*, [408 U.S.] at 408 U. S. 383 (BURGER, C. J., dissenting). 428 U.S. at 428 U. S. 175-176."

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10.4: Kennedy v. Louisana – 554 US 407 (2008)

OCTOBER TERM, 2007
KENNEDY V. LOUISIANA

SUPREME COURT OF THE UNITED STATES

KENNEDY *v*. LOUISIANA

certiorari to the supreme court of louisiana

No. 07–343. Argued April 16, 2008—Decided June 25, 2008

Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, rejecting petitioner's reliance on *Coker* v. *Georgia*, 433 U. S. 584, which barred the use of the death penalty as punishment for the rape of an adult woman but left open the question which, if any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The court acknowledged that petitioner would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more States had capitalized child rape since 1995 and at least eight others had authorized death for other nonhomicide crimes, as well as that, under *Roper* v. *Simmons*, 543 U. S. 551, and *Atkins* v. *Virginia*, 536 U. S. 304, it is the direction of change rather than the numerical count that is significant, the court held petitioner's death sentence to be constitutional.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. Pp. 8–36.

1. The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101. The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." *Furman* v. *Georgia*, 408 U. S. 238, 382. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " *Roper, supra,* at 568. Applying this principle, the Court held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. The Court also has found the death penalty disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, *e.g., Coker, supra; Enmund* v. *Florida*, 458 U. S. 782. In making its determination, the Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper, supra,* at 563. Consensus is not dispositive, however. Whether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. Pp. 8–10.

2. A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Pp. 11–23.

(a) The Court follows the approach of cases in which objective indicia of consensus demonstrated an opinion against the death penalty for juveniles, see *Roper, supra,* mentally retarded offenders, see *Atkins, supra,* and vicarious felony murderers, see *Enmund, supra*. Thirty-seven jurisdictions—36 States plus the Federal Government—currently impose capital punishment, but only six States authorize it for child rape. In 45 jurisdictions, by contrast, petitioner could not be executed for child rape of any kind. That number surpasses the 30 States in *Atkins*and *Roper* and the 42 in *Enmund* that prohibited the death penalty under the circumstances those cases considered. Pp. 11–15.

(b) Respondent's argument that *Coker*'s general discussion contrasting murder and rape, 433 U. S., at 598, has been interpreted too expansively, leading some States to conclude that *Coker* applies to child rape when in fact it does not, is unsound. *Coker*'s holding

was narrower than some of its language read in isolation indicates. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment, *id.*, at 592, and it repeated the phrase "adult woman" or "adult female" eight times in discussing the crime or the victim. The distinction between adult and child rape was not merely rhetorical; it was central to *Coker*'s reasoning, including its analysis of legislative consensus. See, *e.g.*, *id.*, at 595–596. There is little evidence to support respondent's contention that state legislatures have understood *Coker* to state a broad rule that covers minor victims, and state courts have uniformly concluded that *Coker* did not address that crime. Accordingly, the small number of States that have enacted the death penalty for child rape is relevant to determining whether there is a consensus against capital punishment for the rape of a child. Pp. 15–20.

(c) A consistent direction of change in support of the death penalty for child rape might counterbalance an otherwise weak demonstration of consensus, see, *e.g.*, *Atkins*, 536 U. S., at 315, but no showing of consistent change has been made here. That five States may have had pending legislation authorizing death for child rape is not dispositive because it is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted. Indeed, since the parties submitted their briefs, the legislation in at least two of the five States has failed. Further, evidence that, in the last 13 years, six new death penalty statutes have been enacted, three in the last two years, is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *id.*, at 314–315. Respondent argues that this case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. See 543 U. S., at 565. But the *Roper* Court emphasized that the slow pace of abolition was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See *id.*, at 566–567. Here, the fact that only six States have made child rape a capital offense is not an indication of a trend or change in direction comparable to the one in *Roper.* The evidence bears a closer resemblance to that in *Enmund*, where the Court found a national consensus against death for vicarious felony murder despite eight jurisdictions having authorized it. See 458 U. S., at 789, 792. Pp. 20–22.

(d) Execution statistics also confirm that there is a social consensus against the death penalty for child rape. Nine States have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 *Furman*decision and today; yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963. Louisiana is the only State since 1964 that has sentenced an individual to death for child rape, and petitioner and another man so sentenced are the only individuals now on death row in the United States for nonhomicide offenses. Pp. 22–23.

3. Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape. Pp. 23–35.

(a) The Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment. See, *e.g.*, *Coker, supra*, at 597. Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape. The constitutional prohibition against excessive or cruel and unusual punishments mandates that punishment "be exercised within the limits of civilized standards." *Trop*, 356 U. S., at 99–100. Evolving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty, especially where no life was taken in the commission of the crime. See, *e.g.*, *Coker,* 433 U. S., at 597–598; *Enmund*, 458 U. S., at 797. Consistent with those evolving standards and the teachings of its precedents, the Court concludes that there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," they cannot compare to murder in their "severity and irrevocability," *id*, at 598. The Court finds significant the substantial number of executions that would be allowed for child rape under respondent's approach. Although narrowing aggravators might be used to ensure the death penalty's restrained application in this context, as they are in the context of capital murder, all such standards have the potential to result in some inconsistency of application. The Court, for example, has acknowledged that the requirement of general rules to ensure consistency of treatment, see, *e.g.*, *Godfrey*v. *Georgia*, 446 U. S. 420, and the insistence that capital sentencing be individualized, see, *e.g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, have resulted in tension and imprecision. This approach might be sound with respect to capital murder but it should not be introduced into the justice system where death has not occurred. The Court has spent more than 32 years developing a foundational jurisprudence for capital murder to guide the States and juries in imposing the death penalty. Beginning the same process for crimes for which no one has been executed in more than 40 years

would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of death. Pp. 24–30.

(b) The Court's decision is consistent with the justifications offered for the death penalty, retribution and deterrence, see, *e.g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 183. Among the factors for determining whether retribution is served, the Court must look to whether the death penalty balances the wrong to the victim in nonhomicide cases. Cf. *Roper*, *supra*, at 571. It is not at all evident that the child rape victim's hurt is lessened when the law permits the perpetrator's death, given that capital cases require a long-term commitment by those testifying for the prosecution. Society's desire to inflict death for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. There are also relevant systemic concerns in prosecuting child rape, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. Cf. *Atkins*, *supra*, at 321. As to deterrence, the evidence suggests that the death penalty may not result in more effective enforcement, but may add to the risk of nonreporting of child rape out of fear of negative consequences for the perpetrator, especially if he is a family member. And, by in effect making the punishment for child rape and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim. Pp. 30–35.

4. The concern that the Court's holding will effectively block further development of a consensus favoring the death penalty for child rape overlooks the principle that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U. S., at 101. Confirmed by the Court's repeated, consistent rulings, this principle requires that resort to capital punishment be restrained, limited in its instances of application, and reserved for the worst of crimes, those that, in the case of crimes against individuals, take the victim's life. P. 36.

957 So. 2d 757, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined.

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10.5: Miller v. Alabama 567 US ___ (2012)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES

MILLER v. ALABAMA

certiorari to the court of criminal appeals of alabama

No. 10–9646. Argued March 20, 2012—Decided June 25, 2012 [1]

In each of these cases, a 14-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. In No. 10−9647, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14-year-old violates the Eighth Amendment. Disagreeing, the court granted the State's motion to dismiss. The Arkansas Supreme Court affirmed.

In No. 10−9646, petitioner Miller, along with a friend, beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole. The Alabama Court of Criminal Appeals affirmed, holding that Miller's sentence was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the Eighth Amendment.

Held: The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders. Pp. 6−27.

(a) The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." Roper v. Simmons, 543 U. S. 551 . That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. Ibid.

Two strands of precedent reflecting the concern with proportionate punishment come together here. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See, e.g., Kennedy v. Louisiana, 554 U. S. 407 . Several cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, Roper v. Simmons held that the Eighth Amendment bars capital punishment for children, and Graham v. Florida, 560 U. S. ___, concluded that the Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a nonhomicide offense. Graham further likened life without parole for juveniles to the death penalty, thereby evoking a second line of cases. In those decisions, this Court has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death. See, e.g., Woodson v. North Carolina, 428 U. S. 280 (plurality opinion). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life without parole for juveniles violates the Eighth Amendment.

As to the first set of cases: Roper and Graham establish that children are constitutionally different from adults for sentencing purposes. Their " 'lack of maturity' " and " 'underdeveloped sense of responsibility' " lead to recklessness, impulsivity, and heedless risk-taking. Roper, 543 U. S., at 569. They "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And because a child's character is not as "well formed" as an adult's, his traits are "less fixed" and his actions are less likely to be "evidence of irretrievabl[e] deprav[ity]." Id., at 570. Roper and Graham emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.

While Graham's flat ban on life without parole was for nonhomicide crimes, nothing that Graham said about children is crime-specific. Thus, its reasoning implicates any life-without-parole sentence for a juvenile, even as its categorical bar relates only to nonhomicide offenses. Most fundamentally, Graham insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. The mandatory penalty schemes at issue here, however, prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes Graham's (and also Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Graham also likened life-without-parole sentences for juveniles to the death penalty. That decision recognized that life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences." 560 U. S., at ___. And it treated life without parole for juveniles like this Court's cases treat the death penalty, imposing a categorical bar on its imposition for nonhomicide offenses. By likening life-without-parole sentences for juveniles to the death penalty, Graham makes relevant this Court's cases demanding individualized sentencing in capital cases. In particular, those cases have emphasized that sentencers must be able to consider the mitigating qualities of youth. In light of Graham's reasoning, these decisions also show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Pp. 6−17.

(b) The counterarguments of Alabama and Arkansas are unpersuasive. Pp. 18–27.

(1) The States first contend that Harmelin v. Michigan, 501 U. S. 957 , forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Harmelin declined to extend the individualized sentencing requirement to noncapital cases "because of the qualitative difference between death and all other penalties." Id., at 1006 (Kennedy, J., concurring in part and concurring in judgment). But Harmelin had nothing to do with children, and did not purport to apply to juvenile offenders. Indeed, since Harmelin, this Court has held on multiple occasions that sentencing practices that are permissible for adults may not be so for children. See Roper, 543 U. S. 551 ; Graham, 560 U. S ___.

The States next contend that mandatory life-without-parole terms for juveniles cannot be unconstitutional because 29 jurisdictions impose them on at least some children convicted of murder. In considering categorical bars to the death penalty and life without parole, this Court asks as part of the analysis whether legislative enactments and actual sentencing practices show a national consensus against a sentence for a particular class of offenders. But where, as here, this Court does not categorically bar a penalty, but instead requires only that a sentencer follow a certain process, this Court has not scrutinized or relied on legislative enactments in the same way. See, e.g., Sumner v. Schuman, 483 U. S. 66 .

In any event, the "objective indicia of society's standards," Graham, 560 U. S., at ___, that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. Fewer States impose mandatory life-without-parole sentences on juvenile homicide offenders than authorized the penalty (life-without-parole for nonhomicide offenders) that this Court invalidated in Graham. And as Graham and Thompson v. Oklahoma, 487 U. S. 815 , explain, simply counting legislative enactments can present a distorted view. In those cases, as here, the relevant penalty applied to juveniles based on two separate provisions: One allowed the transfer of certain juvenile offenders to adult court, while another set out penalties for any and all individuals tried there. In those circumstances, this Court reasoned, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). The same is true here. Pp. 18–25.

(2) The States next argue that courts and prosecutors sufficiently consider a juvenile defendant's age, as well as his background and the circumstances of his crime, when deciding whether to try him as an adult. But this argument ignores that many States use mandatory transfer systems. In addition, some lodge the decision in the hands of the prosecutors, rather than courts. And even where judges have transfer-stage discretion, it has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense. Finally, because of the limited sentencing options in some juvenile courts, the transfer decision may present a choice between a light sentence as a juvenile and standard sentencing as an adult. It cannot substitute for discretion at post-trial sentencing. Pp. 25−27.

No. 10−9646, 63 So. 3d 676, and No. 10−9647, 2011 Ark. 49, ___ S. W. 3d ___, reversed and remanded.

Kagan, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Breyer, J., filed a concurring opinion, in which Sotomayor, J., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined. Alito, J., filed a dissenting opinion, in which Scalia, J., joined.

Notes

1 Together with No. 10–9647, Jackson v. Hobbs, Director, Arkansas Department of Correction, on certiorari to the Supreme Court of Arkansas.

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10.6: Ex Parte Hull – 312 US 546 (1941)

U.S. Supreme Court

Ex parte Hull, 312 U.S. 546 (1941)

Ex parte Hull

No. ___, original

Decided March 3, 1941

312 U.S. 546

ON MOTION FOR LEAVE TO FILE

PETITION FOR WRIT OF HABEAS CORPUS

1. A state prison rule abridging or impairing a prisoner's right to apply to the federal courts for a writ of habeas corpus is invalid. P. 548.

2. A petition for habeas corpus attached as an exhibit to petitioner's response to a warden's return to an order to show cause is treated in this case as a motion for leave to file a petition for the writ. P. 312 U. S. 549.

3. A petition for a writ of habeas corpus to test the validity of a conviction for a second offense, committed while the petitioner was under sentence for a first offense but on parole, and sentence for which has not begun to be served, *held*not premature when revocation of the parole was due to the second conviction. P.312 U. S. 549.

4. A motion for leave to file a petition for a writ of habeas corpus *held* not sufficient to require answer. P. 312 U. S. 550.

The petition was based on a variance between pleading and proof with respect to the date of the offense. The petitioner was represented by counsel throughout the trial, yet his petition did not say that any objection to evidence, claim of surprise, or motion for continuance was made because of such variance, or that he had an alibi for any other date. The petition did not make clear the extent of any variance, and no transcript of the trial was furnished.

Motion for leave to file a petition for writ of habeas corpus denied.

HomePage 312 U. S. 547

MR. JUSTICE MURPHY delivered the opinion of the Court.

In January, 1936, petitioner was convicted of a statutory sex offense and was sentenced to the Michigan state prison at Jackson, Michigan, for an indeterminate term of six months to ten years. About ten months later, he was paroled. In October, 1937, he was convicted of another sex offense, and was returned to the same prison to serve a sentence of two and one-half to five years from entry of the second judgment. Apparently for the sole reason that the second conviction was regarded as a violation of his parole, petitioner was given a hearing before the state parole board and was passed indefinitely toward the maximum sentence for the first offense. *See* Michigan Statutes Annotated, 1940 supplement, § 28.2108.

In November, 1940, petitioner prepared a petition for writ of habeas corpus and exhibits to file in this Court. He took the papers to a prison official and requested him to notarize them. The official refused, and informed petitioner that the papers and a registered letter to the clerk of this Court concerning them would not be accepted for mailing. Although the papers were not notarized, petitioner then delivered them to his father for mailing outside the prison, but guards confiscated them. Several days later, petitioner again attempted to mail a letter concerning his case to the clerk of this Court. It was intercepted and sent to the legal investigator for the state parole board. [Footnote 1] Apparently neither of the letters was returned to the petitioner, [Footnote 2] and the papers taken from his father were not returned until late in December.

Petitioner then prepared another document which he somehow managed to have his father, as "agent," file with the clerk of this Court on December 26, 1940. In this document, petitioner detailed his efforts to file the papers confiscated by prison officials, contended that he was therefore unlawfully restrained, and prayed that he be released.

On January 6, 1941, we issued a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted. The warden filed a return to the rule setting forth the circumstances of the two convictions, the proceedings of the parole board, and numerous exhibits. In justification of the action preventing petitioner from filing his papers or communicating with this Court, the warden alleged that, in November, 1940, he had published a regulation providing that:

"All legal documents, briefs, petitions, motions, habeas corpus proceedings, and appeals will first have to be submitted to the institutional welfare office, and, if favorably acted upon, be then referred to Perry A. Maynard, legal investigator to the Parole Board, Lansing, Michigan.

Documents submitted to Perry A Maynard, if in his opinion are properly drawn, will be directed to the court designated or will be referred back to the inmate."

In answer, petitioner filed a "Response to the Return" which again challenged the validity of this regulation and which contained numerous exhibits. One of the exhibits was the petition for writ of habeas corpus taken from petitioner's father. In brief, this petition assailed the legality of petitioner's imprisonment under the second conviction on the ground that he had been denied procedural due process.

The first question concerns the effect of the regulation quoted in the warden's return.

The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.*Compare First National Bank v. Anderson*, 269 U. S. 341, 269 U. S. 346; *Erie Railroad v. Purdy*, 185 U. S. 148, 185 U. S. 152; *Carter v. Texas*, 177 U. S. 442, 177 U. S. 447; *see Ex parte Sharp*, 33 F.Supp. 464.

However, the invalidity of the prison regulation does not compel petitioner's release. For that reason it is necessary to examine the petition annexed to the response. Although it is here as an exhibit to the response, it may be considered as a motion for leave to file a petition for writ of habeas corpus inasmuch as the warden has not had an opportunity to answer it. The next question, therefore, is whether this petition is premature.

The petition is not premature. *Compare McNally v. Hill*, 293 U. S. 131; *In Re Bonner*,151 U. S. 242. Despite the fact that petitioner is now in prison under the sentence for the first offense, he was at liberty on parole at the time he was arrested and charged with the second offense. True, parole regulations obligated him to stay within Jackson County, but that is not the imprisonment present in the *McNally* case. Moreover, petitioner's parole was revoked, and he was ordered to serve out his first sentence only because of the second conviction. *See* Michigan Statutes Annotated, *supra*. There is no reason to suppose that he can compel the parole board to review the record of the second conviction, or to make a declaratory ruling that, if that conviction is void, his parole will be reinstated. Thus, the last question is whether the petition, treated as a motion for leave to file a petition for writ of habeas corpus, is sufficient to necessitate an order requiring the warden to answer.

At bottom, petitioner's case is this: that, in the second trial, there was a variance between pleading and proof with respect to the date when the offense was committed, and that petitioner thus was denied the fair notice of the charge guaranteed by the due process clause. From exhibits and rather vague statements in the petition, the following appears: that, in his opening statement and throughout the trial, the prosecutor insisted that the offense occurred on the date charged in the information; that petitioner's defense was that he was elsewhere at the time in question; that some of the testimony tended to fix the date of the offense about a week earlier than that charged in the indictment; that, at the close of all the evidence, petitioner's counsel moved for a directed verdict on the ground that there was no evidence to prove that the offense was committed on the date charged in the information; that the trial judge denied this motion and charged the jury that the precise date was immaterial, it being sufficient to show that the offense occurred during the month previous; that the trial judge entered judgment on the jury's verdict of guilty and denied petitioner's motion for a new trial on the same ground urged in the motion for directed verdict, and that the Michigan Supreme Court subsequently denied certiorari.

We conclude that the showing made by the petition and exhibits is insufficient to compel an order requiring the warden to answer. Petitioner was represented by counsel throughout the second trial. Yet there is no claim in the petition that he objected to evidence tending to establish a different date for commission of the offense, or that he claimed surprise, or that he moved for a continuance to enable him to secure other witnesses. He does not allege that, at the time of the trial, he had an alibi for any other date, nor does

he make clear the actual extent of any variance. Furthermore, ascertainment of these facts is impossible, since petitioner has not furnished the transcript taken at the second trial. Accordingly, it would be improper to inquire whether petitioner was denied procedural due process in the second trial. *Compare Hardy v. United States*, 186 U. S. 224, 186 U. S. 225; *Ledbetter v. United States*, 170 U. S. 606, 170 U. S. 612; *Hodgson v. Vermont*, 168 U. S. 262, 168 U. S. 271; *Matthews v. United States*, 161 U. S. 500.

The motion for leave to file a petition for writ of habeas corpus is therefore denied.

Motion denied.

[Footnote 1]

About a week later, petitioner received the following reply from the legal investigator:

"Your letter of November 18, 1940, addressed to the Clerk of the United States Supreme Court, has been referred to the writer for reply. In the first place, your application in its present form would not be acceptable to that court. You must file a petition for whatever relief you are seeking and state your reasons therefor, together with a memorandum brief. Your petition must be verified under oath and supported by proper affidavits, if any you have. Your letter was, no doubt, intercepted for the reason that it was deemed to be inadequate, and which undoubtedly accounts for the fact that it found its way to my desk."

Apparently the legal investigator serves as attorney and advisor to the state parole board. His functions with respect to legal documents of prison inmates appear more fully from the prison regulation quoted hereafter.

[Footnote 2]

Neither of the letters reached the clerk of this Court. On December 12, 1940, petitioner requested the prison superintendent of mail to trace the registered letter, since he had not received the return receipt which accompanied it. The assistant superintendent replied: "This was mailed thru Perry Maynard by orders from Warden." Apparently the legal investigator made no reply.

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10.7: In Re Bonner – 151 US 242 (1894)

U.S. Supreme Court

In re Bonner, 151 U.S. 242 (1894)

In re Bonner

No. 8, Original

Argued November 27-28, 1893

Decided January 15, 1894

151 U.S. 242

ORIGINAL

Syllabus

When a person accused of crime is convicted in a court of the United States and is sentenced by the court, under Rev.Stat. § 5356, to imprisonment for one year and the payment of a fine, the court is without jurisdiction to further adjudge that that imprisonment shall take place in a state penitentiary under Rev.Stat. § 5546, and the prisoner, if sentenced to be confined in a state penitentiary, is entitled to a writ of habeas corpus directing his discharge from the custody of the warden of the state penitentiary, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.

Where a conviction is correct, and where the error or excess of jurisdiction is the ordering the prisoner to be confined in a penitentiary where the law does not allow the court to send him, there is no good reason why jurisdiction of the prisoner should not he reassumed by the court that imposed the sentence in order that its defect may be corrected.

The court discharging the prisoner in such case on habeas corpus should delay his discharge for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, in order that the defects in the former judgment for want of jurisdiction, which are the subjects of complaint, may be corrected.

The petitioner, John Bonner, a citizen of the United States, represents that he is now and has been since the 23d of May, 1893, unlawfully deprived of his liberty by one P. W. Madden, as warden of the penitentiary of Iowa situated in Anamosa, in that state. He sets forth as the cause of his restrain and detention that at the October term, 1892, of the United States Court for the Third Judicial Division of the Indian Territory, he was indicted for the larceny, in May previous, in the Chickasaw Nation, within the Indian Territory, of four head of cattle, of the value of fifty dollars, the property of one Robert Williams, who was not a member of any Indian tribe; that during that month, he was arraigned before the same court and pleaded not guilty to the indictment, and was tried and found guilty. The statute under which the indictment was found is contained in section 5356 of the Revised Statutes, and is as follows:

"Every person who, upon the high seas, or in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to steal or purloin, the personal goods of another shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment."

The court, by its judgment, sentenced the petitioner to imprisonment in the penitentiary at Anamosa, in the State of Iowa, for the term of one year, and to the payment of a fine of $1,000. It also added that the marshal of the court, to whose custody he was then committed, should safely keep and convey the petitioner, and deliver him to the custody of the warden of the penitentiary, who would receive and keep him in prison for the period of one year in execution of the sentence. The petitioner also sets forth that the warden of the penitentiary has no other authority to hold him than the said judgment and order of commitment.

The petitioner alleges that the said sentence and order of commitment are void; that the court was without power or jurisdiction under the law to render the judgment, and that he had applied to the United States judge of the Northern District of Iowa for a writ of habeas corpus to be released from confinement, and that the writ was denied to him. He

therefore prays that this Court will issue the writ of habeas corpus to the said warden to appear before this Court and show what authority, if any, he has for restraining the petitioner of his liberty, and that upon final hearing he may be discharged.

An order was issued from this Court in October last to the warden to show cause why the writ should not be granted as prayed. The warden returns answer that he holds the prisoner by virtue of a warrant of commitment issued upon the judgment and sentence of the United States court as above stated, of which a copy is annexed to the petition, and that at the time of the petitioner's conviction and of the judgment and sentence, there was no penitentiary or jail suitable for the confinement of convicts, or available therefor, in the Indian Territory, and that the state penitentiary at Anamosa had been duly designated by the Attorney General, under section 5546 of the Revised Statutes of the United States, as the place of confinement for prisoners convicted of crime by that court, and that the order of the court for the confinement of the petitioner in that penitentiary under its sentence of imprisonment was in pursuance of that designation.

So much of section 5546 of the Revised Statutes as bears upon the question under consideration in this case is as follows:

"All persons who have been or who may hereafter be convicted of crime by any court of the United States whose punishment is imprisonment in a district or territory where, at the time of conviction, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor shall be confined during the term for which they have been or may be sentenced in some suitable jail or penitentiary in a convenient state or territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred. "

MR. JUSTICE FIELD, after stating the facts in the foregoing language, delivered the opinion of the Court.

The petitioner asks for the issue of the writ of habeas corpus in order that he may be thereby set at liberty, on the ground that his imprisonment in the penitentiary at Anamosa, in Iowa, is in pursuance of a judgment of a court which possessed no authority under the law to pass sentence upon him of imprisonment in the state penitentiary, upon his conviction of the offense for which he was indicted and tried. That is a sentence which can only be imposed where it is specifically prescribed, or where the imprisonment ordered is for a period longer than one year, or at hard labor. To an imprisonment for that period or at hard labor in a state penitentiary infamy is attached, and a taint of that character can be cast only in the cases mentioned.

Section 5356 of the Revised Statutes of the United States, under which the defendant was indicted and convicted, prescribes as a punishment for the offenses designated fine or imprisonment — the fine not to exceed $1,000, and the imprisonment not more than one year — or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation, being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes provides that:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

And section 5542 provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. It follows

that the court had no jurisdiction to order an imprisonment when the place is not specified in the law, to be executed in a penitentiary, when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in *In re Mills*, 135 U. S. 263, 135 U. S. 270, which in one part of it presents features in all respects similar to those of the present case.

There, the petitioner, Mills, was detained by the warden of the state penitentiary in Columbus, Ohio, pursuant to two judgments of the District Court of the United States for the Western District of Arkansas sentencing him in each case to confinement in the penitentiary of that state. Application was made by the prisoner for a writ of habeas corpus on the ground that the court by which he was tried had no jurisdiction of the offenses with which he was charged, and on the further ground that his detention in the penitentiary under the sentences, neither of which was for a longer period than one year, was contrary to the laws of the United States. The first position was not considered tenable, but the second was deemed sufficient to authorize the issue of the writ. The Court held that, apart from any question as to whether the court below had jurisdiction to try the offense charged, the detention of the petitioner in the penitentiary upon sentences neither of which was for imprisonment longer than one year was in violation of the laws of the United States, and that he was therefore entitled to be discharged from the custody of the warden of the institution. "A sentence simply of *imprisonment,'" said the Court,*

"in the case of a person convicted of an offense against the United States where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary cannot be executed by confinement in that institution except in cases where

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the sentence is 'for a period longer than one year.' There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary in one case for a year and in the other for six months was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void."

The Court added: "This is not a case of mere error, but one in which the court below transcended its power," citing *Ex Parte Lange,* 18 Wall. 163, 85 U. S. 176; *Ex Parte Parks*, 93 U. S. 18, 93 U. S. 23; *Ex Parte Virginia*, 100 U. S. 339, 100 U. S. 343; *Ex Parte Rowland*, 104 U. S. 604, 104 U. S. 612; *In re Coy*, 127 U. S. 731, 127 U. S. 738, and *Hans Nielson, Petitioner,* 131 U. S. 176, 131 U. S. 182.

Counsel for the government admits that upon the authority of that case, construing the Revised Statutes, the petitioner should not have been sentenced to imprisonment in the penitentiary, but he claims that the judgment and sentence are not for that cause void, so as to entitle the petitioner to a writ of habeas corpus for his discharge, and he asks the Court to reconsider the doctrine announced, contending that neither the reason of the law nor the authorities sustain the position. According to his argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a penitentiary, to which place it is expressly forbidden to order it. It would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guard house of a fort, or the hulks of a prison ship, or in any other place not specified in the law.

We are unable to agree with the learned counsel, but are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings, and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said

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and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities, we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction, and when, in taking custody of the accused and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: in order that a court may take jurisdiction of a criminal case, the law must in the first instance authorize it to act upon a particular class of offenses within which the one presented is embraced. Then comes the mode of the presentation of the offense to the court. That is specifically prescribed. If the offense be a felony, the accusation in the federal court must be made by a grand

jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin v. United States*, 117 U. S. 348, the accusation may be made by indictment of the grand jury, or by information of the public prosecutor. An information is a formal charge against the accused of the offense, with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused, to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end in

either case that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict, and the law, in prescribing the punishment either as to the extent or the mode or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized. It cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering by its solitary character or other attending circumstances. Death might be inflicted by torture or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible if the doctrine asserted by him can be maintained.

A question of some difficulty arises which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges, perhaps with the majority, such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that therefore the writ of habeas corpus cannot be

invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punishment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of habeas corpus in such a case is a virtual suspension of it, and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source — equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals.

The law of our country takes care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments, as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which in most cases would be unavailing to give relief In the case before us, had an appeal been taken from the judgment of the United States Court of the Indian Territory, it would hardly have reached a determination before the period of the sentence would have expired and the wrong caused by the imprisonment in the penitentiary have been inflicted.

Much complaint is made that persons are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment, or in enforcing it in a different mode or place than that provided by the law. But in such cases, there need not be any failure of justice, for where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected.

The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle, or any denial of the petitioner's right, in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. It is true, where there are also errors on the trial of the case affecting the judgment not trenching upon its jurisdiction, the mere remanding the prisoner to the original court that imposed the sentence to correct the judgment in those particulars for which the writ is issued would not answer, for his relief would only come upon a new trial, and his remedy for such errors must be sought by appeal or writ of error. But in a vast majority of cases, the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be, while relieved from any excess committed by the court, of which he complains. In such case, the original court would only set aside what it had no authority to do, and substitute directions required by the law to be done upon the conviction of the offender.

Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment — in its extent or mode, or place of punishment — the conviction being in all respects regular. In *Beale v. Commonwealth*, 25 Penn.St. 11, 22, the Supreme Court of Pennsylvania said:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether because the court committed error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. "

It is true that this language was used in a case pending in the supreme court of a state on writ of error, but if then the court would send the case back to have the error, not touching the verdict, corrected and justice enforced, there is the same reason why such correction should be made when the prisoner is discharged on habeas corpus for alleged defects of jurisdiction in the rendition of the judgment under which he is held. The end sought by him — to be relieved from the defects in the judgment rendered to his injury — is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him.

The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus. Section 761 of the Revised Statutes, on this subject provides that:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It would seem that in the interest of justice and to prevent its defeat, this Court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects, for want of jurisdiction, which are the subject of complaint in that judgment may be corrected. *Medley, Petitioner*, 134 U. S. 160, 134 U. S. 174.

In the case of *Coleman v. Tennessee*, 97 U. S. 509, a party who had been convicted of a capital offense, and the judgment had been confirmed by the Supreme Court of that state, was discharged by judgment of this Court because it was held that the state court had no jurisdiction to try a soldier of the army of the United States for a military offense committed by him while in the military service, and subject to the articles of war. But as it appeared that the prisoner had been tried by a court martial regularly convened in the army for the same offense, and sentenced to be shot, and had afterwards escaped, this Court, in reversing the judgment of the Supreme Court of Tennessee, stated that that court could turn the prisoner over to the military authorities of the United States. He was so turned

over, and the punishment was commuted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

In some cases, it is true that no correction can be made of the judgment, as where the court had, under the law, no jurisdiction of the case — that is, no right to take cognizance of the offense alleged — and the prisoner must then be entirely discharged; but those

cases will be rare, and much of the complaint that is made for discharging on habeas corpus persons who have been duly convicted will be thus removed.

Ordered that the writ of habeas corpus issue, and that the petitioner be discharged from the custody of the warden of the penitentiary at Anamosa, in the State of Iowa, but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.

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10.8: 11.7-

U.S. Supreme Court

Price v. Johnston, 334 U.S. 266 (1948)

Price v. Johnston

No. 111

Argued December 16, 1947

Decided May 24, 1948

334 U.S. 266

Syllabus

1. Under § 262 of the Judicial Code, a circuit court of appeals has power, exercisable in the sound discretion of the court, to issue an order, in the nature of a writ of habeas corpus, commanding that a prisoner be brought before the court for the purpose of arguing his own appeal in a case involving his life or liberty. Pp.278-286.

(a) An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in the nature of a writ of habeas corpus; and, as such, clearly falls within the scope of § 262. P. 334 U. S. 279.

(b) Such an order satisfies the basic requirement of § 262 that it be necessary to the complete exercise by the court of an appellate jurisdiction already existing. P.334 U. S. 279.

(c) A writ of habeas corpus of this nature is not limited to circumstances where "necessary" in the sense that the court could not otherwise physically discharge its appellate duties, but is available in those exceptional cases where its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice. P. 334 U. S. 279.

(d) Since ordinarily a court can not designate counsel for a prisoner who has no lawyer and who desires that none be appointed to represent him, an arrangement in such case for the prisoner's presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." P. 334 U. S. 280.

(e) The forms of the habeas corpus writ authorized by § 262 are not only those which were recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. P. 334 U. S. 282.

(f) Where production of a prisoner before an appellate court is essential to proper disposition of the case on appeal, issuance of a writ of habeas corpus for that purpose is "agreeable to the usages and principles of law" within the meaning of § 262. Pp. 334 U. S. 281-284.

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2. The power to issue such a writ is discretionary, and this discretion is to be exercised with the best interests of both the prisoner and the Government in mind. P. 334 U. S. 284.

3. The right given by § 272 of the Judicial Code to parties in all the courts of the United States to "plead and manage their causes personally" is not unqualified as to prisoners desiring to conduct their own oral arguments in appellate courts, and may be circumscribed as to them where reasonable necessity so dictates. Pp. 334 U. S. 285-286.

4. After three unsuccessful attempts by habeas corpus proceedings to secure release from allegedly unlawful imprisonment, petitioner instituted a fourth proceeding, alleging for the first time that the prosecution had knowingly used false testimony to obtain his conviction. Without denying this allegation or questioning its sufficiency, the Government asked that the fourth petition be denied, apparently on the ground that the issues raised were known to the petitioner when he filed the earlier petitions and that the fourth petition was an abuse of the writ of habeas corpus. Without a hearing and without stating any reasons for its action, the District Court dismissed the fourth petition. *Held:* it erred in so doing, and the cause is remanded to it for further proceedings. Pp. 334 U. S. 269-278, 334 U. S. 286-294.

(a) Since the three prior applications did not raise the issue as to the prosecution's knowingly using false testimony to obtain petitioner's conviction, the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Salinger v. Loisel*, 265 U. S. 224, and *Wong Doo v. United States*, 265 U. S. 239, distinguished. Pp. 334 U. S. 287-290.

(b) Although the record in the proceeding upon petitioner's first petition for habeas corpus indicates that petitioner then had knowledge of the facts which form the basis, at least in part, of the due process allegation made in the fourth petition, it can not be assumed that petitioner has acquired no new or additional information since the time of the first proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. P. 334 U. S. 290.

(c) Whether petitioner does or does not have any new information is a matter which should be determined in the first instance by the District Court, and on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. P. 334 U. S. 291.

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(d) Assuming that petitioner did have prior knowledge of all the facts upon which the allegation in question is based, it does not necessarily follow that the fourth petition should be dismissed, since he may have excuse for failure previously to assert his rights. P. 291.

(e) The burden was not on the petitioner to allege affirmatively in the first instance that he had acquired new information, or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Pp. 334 U. S. 291-292.

(f) There can not be imposed on unlearned prisoners who act as their own counsel in habeas corpus proceedings the same high standards of the legal art which may be demanded of members of the legal profession, especially where the imposition of such standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. P. 334 U. S. 292.

(g) If the Government chooses not to deny the allegation or to question its sufficiency, and desires instead to claim that the prisoner had abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. P. 334 U. S. 292.

(h) Once a particular abuse of the writ has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ; and if the answer is inadequate, the court may dismiss the petition without further proceedings. P. 334 U. S. 292.

(i) If there is a substantial conflict, a hearing may be necessary to determine the facts, and appropriate findings and conclusions of law can then be made. In this way, an adequate record may be established so that appellate courts can determine the precise basis of the District Court's action, and the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition. P.334 U. S. 292.

(j) The procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ, and did not give petitioner a fair opportunity to meet this important issue. P. 334 U. S. 293.

159 F. 2d 234 and 161 F. 2d 705 reversed.

Petitioner's fourth petition for a writ of habeas corpus was denied by the District Court. On appeal, the Circuit Court of Appeals en banc denied petitioner's motion

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for an order directing his appearance for the purpose of orally arguing his case, 159 F.2d 234, and affirmed the judgment of the District Court, 161 F.2d 705. This Court granted certiorari. 331 U.S. 804. *Reversed and remanded*, p. 334 U. S. 294.

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10.9: Ruffin v. Commmonwealth – 62 Va 790 (1871)

Rights of Prisoners

Rights of Prisoners.—Until relatively recently the view prevailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."[1122] This view is not now the law, and may never have been wholly correct.[1123] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights";[1124] "many," indicated less than "all," and it was clear that the due process and equal protection clauses to some extent do apply to prisoners.[1125] More direct acknowledgment of constitutional protection came in 1972: "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances …"[1126] However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.[1127]

[1122] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[1123] *Cf.* In re Bonner, 151 U.S. 242 (1894).

[1124] Price v. Johnston, 334 U.S. 266, 285 (1948).

[1125] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

Save for challenges to conditions of confinement of pretrial detainees,[1128] the Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment,[1129] while challenges to particular incidents and practices are pursued under the due process clause[1130] or more specific provisions, such as the First Amendment speech and religion clauses.[1131] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[1132] They have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[1133] and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[1134] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

[1126] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (invalidating state prison mail censorship regulations).

[1127] Bell v. Wolfish, 441 U.S. 520, 545-548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351-352 (1981).

[1128] Bell v. Wolfish, 441 U.S. 520 (1979). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. However, the Court limited its concept of punishment to practices intentionally inflicted by prison authorities and to practices which were arbitrary or purposeless and unrelated to legitimate institutional objectives.

[1129] *See* "Prisons and Punishment," supra.

[1130] *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308(1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210(1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[1131] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977). On religious practices and ceremonies, *see* Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319(1972).

[1132] Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after *Turner v. Safley*, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In *Johnson v. California*, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509-13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[1133] Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim.

[1134] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973). *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the State "enable [a] prisoner to discover grievances, and to litigate effectively").

In *Turner v. Safley*,[1135] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[1136] Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness.[*] A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.[1137]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions," hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[1138] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[1139] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[1140] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[1141]

[1135] 482 U.S. 78 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

[1136] 482 U.S. at 89. *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children over whom a prisoner's parental rights have been terminated, and all regular visitation for a period following a prisoner's violation of substance abuse rules).

[*] For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[1137] 482 U.S. at 91.

[1138] Hudson v. Palmer, 468 U.S. 517, 526 (1984); Block v. Rutherford, 468 U.S. 576(1984) (holding also that prison security needs support a rule prohibiting pre-trial detainees contact visits with spouses, children, relatives, and friends).

[1139] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[1140] Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not "unauthorized").

[1141] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344(1986).

In *Wolff v. McDonnell*,[1142] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a

defendant is not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[1143] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. The Court held in *Wolff* that the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the action taken; also, the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests.[1144]Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose.[1145] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[1146]

[1142] 418 U.S. 539 (1974).

[1143] 418 U.S. at 557. This analysis, of course tracks the interest analysis discussed under "The Interests Protected: "Life, Liberty and Property"," supra.

[1144] However, the Court later ruled, reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[1145] 418 U.S. at 561-72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496-97 (1980), and id. at 497- 500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[1146] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Since the State had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[1147] The same principles govern interstate prison transfers.[1148]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[61] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must be preceded by a hearing for two alternative reasons. First, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[1149]

What *kind* of a hearing is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in *Washington v. Harper*.[1150]There the Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

[1147] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236(1976).

[1148] Olim v. Wakinekona, 461 U.S. 238 (1983).

[61] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-

level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219-20.

[1149] Vitek v. Jones, 445 U.S. 480 (1980).

[1150] 494 U.S. 210 (1990).

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10.10: Price v. Johnston – 334 US 266 (1948)

U.S. Supreme Court

Price v. Johnston, 334 U.S. 266 (1948)

Price v. Johnston

No. 111

Argued December 16, 1947

Decided May 24, 1948

334 U.S. 266

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

1. Under § 262 of the Judicial Code, a circuit court of appeals has power, exercisable in the sound discretion of the court, to issue an order, in the nature of a writ of habeas corpus, commanding that a prisoner be brought before the court for the purpose of arguing his own appeal in a case involving his life or liberty. Pp.278-286.

(a) An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in the nature of a writ of habeas corpus; and, as such, clearly falls within the scope of § 262. P. 334 U. S. 279.

(b) Such an order satisfies the basic requirement of § 262 that it be necessary to the complete exercise by the court of an appellate jurisdiction already existing. P.334 U. S. 279.

(c) A writ of habeas corpus of this nature is not limited to circumstances where "necessary" in the sense that the court could not otherwise physically discharge its appellate duties, but is available in those exceptional cases where its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice. P. 334 U. S. 279.

(d) Since ordinarily a court can not designate counsel for a prisoner who has no lawyer and who desires that none be appointed to represent him, an arrangement in such case for the prisoner's presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." P. 334 U. S. 280.

(e) The forms of the habeas corpus writ authorized by § 262 are not only those which were recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. P. 334 U. S. 282.

(f) Where production of a prisoner before an appellate court is essential to proper disposition of the case on appeal, issuance of a writ of habeas corpus for that purpose is "agreeable to the usages and principles of law" within the meaning of § 262. Pp. 334 U. S. 281-284.

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2. The power to issue such a writ is discretionary, and this discretion is to be exercised with the best interests of both the prisoner and the Government in mind. P. 334 U. S. 284.

3. The right given by § 272 of the Judicial Code to parties in all the courts of the United States to "plead and manage their causes personally" is not unqualified as to prisoners desiring to conduct their own oral arguments in appellate courts, and may be circumscribed as to them where reasonable necessity so dictates. Pp. 334 U. S. 285-286.

4. After three unsuccessful attempts by habeas corpus proceedings to secure release from allegedly unlawful imprisonment, petitioner instituted a fourth proceeding, alleging for the first time that the prosecution had knowingly used false testimony to obtain his conviction. Without denying this allegation or questioning its sufficiency, the Government asked that the fourth petition be denied, apparently on the ground that the issues raised were known to the petitioner when he filed the earlier petitions and that the fourth petition was an abuse of the writ of habeas corpus. Without a hearing and without stating any reasons for its action, the District Court dismissed the fourth petition. *Held:* it erred in so doing, and the cause is remanded to it for further proceedings. Pp. 334 U. S. 269-278, 334 U. S. 286-294.

(a) Since the three prior applications did not raise the issue as to the prosecution's knowingly using false testimony to obtain petitioner's conviction, the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Salinger v. Loisel*, 265 U. S. 224, and *Wong Doo v. United States*, 265 U. S. 239, distinguished. Pp. 334 U. S. 287-290.

(b) Although the record in the proceeding upon petitioner's first petition for habeas corpus indicates that petitioner then had knowledge of the facts which form the basis, at least in part, of the due process allegation made in the fourth petition, it can not be assumed that petitioner has acquired no new or additional information since the time of the first proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. P. 334 U. S. 290.

(c) Whether petitioner does or does not have any new information is a matter which should be determined in the first instance by the District Court, and on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. P. 334 U. S. 291.

(d) Assuming that petitioner did have prior knowledge of all the facts upon which the allegation in question is based, it does not necessarily follow that the fourth petition should be dismissed, since he may have excuse for failure previously to assert his rights. P. 291.

(e) The burden was not on the petitioner to allege affirmatively in the first instance that he had acquired new information, or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Pp. 334 U. S. 291-292.

(f) There can not be imposed on unlearned prisoners who act as their own counsel in habeas corpus proceedings the same high standards of the legal art which may be demanded of members of the legal profession, especially where the imposition of such standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. P. 334 U. S. 292.

(g) If the Government chooses not to deny the allegation or to question its sufficiency, and desires instead to claim that the prisoner had abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. P. 334 U. S. 292.

(h) Once a particular abuse of the writ has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ; and if the answer is inadequate, the court may dismiss the petition without further proceedings. P. 334 U. S. 292.

(i) If there is a substantial conflict, a hearing may be necessary to determine the facts, and appropriate findings and conclusions of law can then be made. In this way, an adequate record may be established so that appellate courts can determine the precise basis of the District Court's action, and the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition. P.334 U. S. 292.

(j) The procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ, and did not give petitioner a fair opportunity to meet this important issue. P. 334 U. S. 293.

159 F. 2d 234 and 161 F. 2d 705 reversed.

Petitioner's fourth petition for a writ of habeas corpus was denied by the District Court. On appeal, the Circuit Court of Appeals en banc denied petitioner's motion for an order directing his appearance for the purpose of orally arguing his case, 159 F.2d 234, and affirmed the judgment of the District Court, 161 F.2d 705. This Court granted certiorari. 331 U.S. 804. *Reversed and remanded*, p. 334 U. S. 294.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. But, in recent years, the increased use of this writ, especially in federal courts, has created many procedural problems which are not easy of solution. This case involves some of those problems. Because of the importance of the writ and the necessity that it not lose its effectiveness in a procedural morass, we have deemed it wise to deal with this case at length, and to set forth fully and explicitly the answers to the matters at issue.

In 1938, petitioner was convicted in a federal district court in Michigan under a four-count indictment charging violations of the federal bank robbery statute. [Footnote 1] He was sentenced to imprisonment for 65 years, and was committed to the United States Penitentiary at Alcatraz, California. His efforts to prosecute an appeal from his conviction proved futile. [Footnote 2]

Since his confinement at Alcatraz, petitioner has made four separate applications for writs of habeas corpus in the United States District Court for the Northern District of California. The instant proceeding involves the fourth of these applications. Inasmuch as the problems in this case can best be understood in light of the issues raised in the earlier proceedings, it becomes necessary to examine the various applications in some detail.

1. The first application was prepared and filed in 1940 by petitioner, who is not a lawyer. He sought release mainly on the grounds that certain evidence used against him at the trial had been obtained in violation of the Fourth Amendment, and that the trial judge had improperly refused to disqualify himself upon the filing of an affidavit of prejudice. It is important to note that this application did not allege that the conviction resulted from the prosecution's knowing use of false testimony. The District Court issued an order to show cause, a return was made, and the petitioner then filed a traverse in the form of a "Motion to overrule Respondent's return and issue writ." This motion likewise failed to aver the knowing use of false testimony. But it did call the court's attention to "two different statements" made at the trial by the prosecution's chief witness, Fred T. Donner, and to the "methods . . . used to obtain" this change in testimony. [Footnote 3] There was no indication given as to what those "methods" were. Donner's testimony at the trial was attached as an exhibit, testimony which revealed that Donner had gone to the office of the District Attorney and talked to him and his assistant during the interval between the allegedly conflicting statements. [Footnote 4]

The District Court then appointed counsel for petitioner at his request. Several months later, when the matter came on for determination, the court entered an order denying the application for a writ of habeas corpus and dismissing the petition. No hearing was held, the order being entered solely on the basis of the pleadings. And no findings of fact or conclusions of law were made. Nor was an opinion written. Petitioner thereafter proceeded *pro se*. Among his various legal maneuvers, he moved for a rehearing. He stated, as grounds for the motion, that the court erred in refusing to allow him to appear and testify personally before entering the order and that the court-appointed attorney "blocked your petitioner from filing an amended petition to include additional points so that they could be reviewed on appeal." This motion was denied.

Petitioner prepared his own appeal to the Circuit Court of Appeals. Among the points upon which he stated he intended to rely was the claim that he had been denied "a fair and impartial trial" by Donner's change in testimony after talking with the District Attorney. But the Circuit Court of Appeals, in affirming the District Court's disposition of the habeas corpus petition, made no reference to this point; its opinion was devoted exclusively to the matters raised in the original petition.*Price v. Johnston*, 125 F.2d 806.

Included in the numerous claims in his attempt to secure a writ of certiorari in this Court was the reiteration that Donner's change in testimony deprived him of a fair and impartial trial. According to his written argument,

"if this was not perjured, it was base contradictory evidence, for, after this witness had completed all his evidence, he was then taken into the private chambers of the United States Attorney . . . and there was instructed as to what to say, for he came from said office and was recalled to the stand at this second setting, he rebutted all his prior testimony. This must be either classed as a conspiracy forcing a witness to change his testimony, either of which surely would not be giving the appellant the fair and impartial trial to which he is entitled."

The Government's memorandum in opposition dealt with this contention in a footnote. It was there said that petitioner's claim

"is refuted by the excerpt from the transcript of the proceedings at the trial introduced as part of petitioner's pleadings. . . . The witness did not rebut his prior testimony, but merely supplemented it with a few more details, and he affirmatively stated that his discussion with the prosecutor did not assist him in his subsequent testimony."

This Court denied the petition for a writ of certiorari. *Price v. Johnston*, 316 U.S. 677, *rehearing denied*, 316 U.S. 712.

2. In 1942, several months after the foregoing action by this Court, petitioner prepared and filed in the District Court a second petition for a writ of habeas corpus. In this petition, he sought release on the same grounds set forth in his first petition, as well as on two principal additional grounds. The two new claims were that petitioner's counsel had been absent from the courtroom during an important part of the trial, and that petitioner had not had counsel at the preliminary hearing before the United States Commissioner. The petition, as amended, contained no allegation that false testimony had been knowingly used at the trial, nor did

it refer in any way to Donner's allegedly inconsistent testimony. Moreover, no mention of such matters was made by petitioner in his testimony at the hearing on the writ of habeas corpus. [Footnote 5]

The District Court, at the close of the hearing, discharged the writ. Its findings of fact and conclusions of law were subsequently entered, and were silent as to any question relating to the knowing use of false testimony. The District Court's action was affirmed on appeal, the opinion of the Circuit Court of Appeals being devoted to the matters decided by the District Court. *Price v. Johnston*, 144 F.2d 260. This Court then denied a petition for certiorari, a petition which presented no issues differing from those raised in the lower courts. *Price v. Johnston*, 323 U.S. 789, *rehearing denied*, 323 U.S. 819.

3. Petitioner's third petition for a writ of habeas corpus was denied by the District Court on August 22, 1945. This denial was based on the ground that the issues raised were known to petitioner when he filed the earlier petitions, making the third petition an abusive use of the writ of habeas corpus. *Price v. Johnston*, 61 F.Supp. 995, 996. [Footnote 6] Leave to appeal was denied. It is not evident, however, what the issues were that petitioner did raise in this proceeding.

4. On January 2, 1946, petitioner filed his fourth application for a writ of habeas corpus. He alleged that he had been denied a fair and impartial trial in that, on the trial for bank robbery, the jury was confused by the presentation of evidence to show perjury before a notary public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that the fourth count did not allege an offense. After an order to show cause was issued, petitioner amended his petition to allege "That the government knowingly employed false testimony on the trial, to obtain the conviction."

The respondent warden, through the United States Attorney, thereupon filed his return to the order to show cause. This return did not deny the allegation that the Government knowingly employed false testimony at the trial. Nor did it question the sufficiency of the allegation or the absence of supporting facts. It simply incorporated by reference the entire record in the three prior habeas corpus proceedings and asked that the fourth petition be denied on the basis of the District Court's opinion denying the third application. [Footnote 7] Petitioner's traverse stated that the earlier petitions did not contain some of the points presented in the fourth petition. It repeated the allegations in the original petition, though it merely incorporated by reference the allegation of the amended petition that the prosecutor knowingly used false testimony.

The District Court denied the fourth petition without a hearing and without opinion. It is difficult to discover from such action the precise basis of the District Court's dismissal of the allegation in question. But, because of the nature of the warden's return, we suspect that the court thought that the matter was known to petitioner at the time of filing the first petition, and should have been urged at that time. There is nothing whatever to indicate that the dismissal stemmed from the court's belief that the allegation was insufficient on its face, or that it was obviously without merit.

On appeal, a panel of the Ninth Circuit Court of Appeals ordered up the original files in petitioner's three previous applications, and directed that petitioner be brought before the court for the argument of his appeal. After the argument, the submission of the cause was set aside and the case was assigned for hearing before the court en banc. Petitioner then moved the court en banc for an order directing his appearance for the reargument. This motion was denied on January 6, 1947. In its written opinion, a majority of the court held that circuit courts of appeals are without power to order the production of a prisoner for the argument of his appeal in person. One judge expressed the view that the court had such power, but concurred in the denial of the motion as a matter of discretion. Two judges dissented, stating that there was power to grant the requested relief; but they did not reach the question of the propriety of exercising that power in this case. 159 F.2d 234.

The appeal was then considered on the merits on briefs filed by petitioner and respondent [Footnote 8] and on oral argument by an Assistant United States Attorney. Petitioner was unrepresented at the oral argument. On May 5, 1947, the order of the District Court denying the fourth petition without a hearing was affirmed, two judges dissenting in separate opinions. 161 F.2d 705.

The majority opinion of the Circuit Court of Appeals pointed out that, by amending his fourth petition to allege "[t]hat the government knowingly employed false testimony on the trial, to obtain conviction," petitioner had interposed a wholly new ground for discharge. But the specific circumstances of this claim had not been developed in the District Court. The opinion accordingly treated the allegation as though it had incorporated petitioner's explanatory statement in his appellate brief that the United States Attorney, in the course of the trial,

"did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the

evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first."

So construing the allegation, the court then said:

"The records in these several proceedings disclose that throughout his trial appellant was represented by counsel of his own choosing. And since he was himself present at all times, he could hardly have been unaware of the described incident or of its implications, nor does he make any such claim. On the face of his showing, it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions."

161 F.2d at 706, 707. And it was further stated that

"Where there have been repeated petitions with an apparent husbanding of grounds, the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ."

Id., 161 F.2d at 707. Since petitioner had given no valid excuse for failing to present earlier the allegation in question, the conclusion was reached that the District Court did not abuse its discretion in denying the fourth petition without a hearing. Reference was made in this respect to *Salinger v. Loisel*, 265 U. S. 224, and *Wong Doo v. United States*, 265 U. S. 239.

We issued a writ of certiorari to review the important issues thus raised in the two opinions of the Circuit Court of Appeals. And, on petitioner's motion, we appointed a member of the bar of this Court to serve as his counsel before us.

I

We hold that power is resident in a circuit court of appeals to command that a prisoner be brought before it so that he may argue his own appeal in a case involving his life or liberty. That power, which may be exercised at the sound discretion of the court, grows out of the portion of § 262 of the Judicial Code, 28 U.S.C. § 377, which provides that

"The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

An order requiring the presence of a prisoner before a circuit court of appeals to argue his own appeal is one in the nature of a writ of habeas corpus. As such, it clearly falls within the scope of § 262. Basic to the power of a circuit court of appeals to issue a writ of habeas corpus under that section, of course, is the pendency of a proceeding of an appellate nature to which the contemplated writ is auxiliary. *Whitney v. Dick*, 202 U. S. 132. The writ cannot be issued by that court as an independent and original proceeding; it can only issue where it may be necessary to the complete exercise of an appellate jurisdiction already existing. Since the occasion for demanding the presence of a prisoner at an oral argument would arise only where there was an appeal already pending before the court, a writ compelling his presence satisfies this basic requirement of § 262.

Moreover, a writ of habeas corpus of this nature can on occasion be "necessary" for the exercise of appellate jurisdiction so as to be authorized by § 262. We have refused to interpret that section to mean that a circuit court of appeals can issue a habeas corpus writ only if "necessary" in the sense that the court could not otherwise physically discharge its appellate duties. *Adams v. United States ex rel. McCann*, 317 U. S. 269, 317 U. S. 273. Rather, § 262 has been read so that the writ may be issued where its use is calculated, in the sound judgment of the circuit court of appeals, to achieve the ends of justice entrusted to it. In other words, the writ is available in those exceptional cases

"where, because of special circumstances, its use as an aid to an appeal over which the court has jurisdiction may fairly be said to be reasonably necessary in the interest of justice."

Id. at 317 U. S. 274.

Exceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is "reasonably necessary in the interest of justice." True, an appeal can always be submitted on written briefs. But oral argument, while not indispensable, is frequently, if not usually, desired by the parties. And there are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument, either through

counsel or in person. The difficulty, of course, arises when one of the parties is a prisoner who has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues. Since ordinarily the court cannot designate counsel for the prisoner without his consent, an arrangement that is made for his presence and participation at the oral argument can be said to be "reasonably necessary in the interest of justice." Otherwise the court loses the benefits of listening to his contentions, hearing only the arguments of government counsel. Conceivably, the prisoner's case might be unduly prejudiced by such a one-sided debate. That the argument orally advanced by the prisoner may, in fact, be less than enlightening to the court does not detract from the fairness or the justness of giving him the opportunity to appear and argue. Thus, if a circuit court of appeals is satisfied in other respects that the prisoner should be produced at the argument, a writ designed to effectuate that production is plainly "necessary" within the contemplation of § 262.

It remains to be seen whether a writ of habeas corpus, for the purpose under consideration, is "agreeable to the usages and principles of law," as that phrase is used in § 262. At common law, there were several variants of the writ of habeas corpus. *See* 3 Blackstone's Commentaries 129-132; *Ex parte Bollman,* 4 Cranch 75, 8 U. S. 97-98. [Footnote 9] None of them, however, seems to have been devised for the particular purpose of producing a prisoner to argue his own appeal. Nor does it appear that the courts of England have used or developed the habeas corpus writ for this purpose. [Footnote 10]

However, we do not conceive that a circuit court of appeals, in issuing a writ of habeas corpus under § 262 of the Judicial Code, is necessarily confined to the precise forms of that writ in vogue at the common law or in the English judicial system. Section 262 says that the writ must be agreeable to the usages and principles of "law," a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the habeas corpus writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short, we do not read § 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather, it is a legislatively approved source of procedural instruments designed to achieve "the rational ends of law." *Adams v. United States ex rel. McCann*, *supra*, 317 U. S. 273.

We accordingly look to the usages and principles which have attached themselves to the writ of habeas corpus down through the years to the present time. The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause. The most important result of such usage has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty. With that usage, a writ for the purpose under consideration is entirely agreeable and consistent. To order the production of a prisoner before an appellate court to argue his own appeal in a case in which he alleges that he is illegally imprisoned is to perform an act which is intimately and necessarily related to the presentation of the merits of the prisoner's complaint, a presentation which is essential if relief from the allegedly illegal imprisonment is to be secured. Such production, as we have seen, may in some circumstances be essential to the proper disposition of the case of appeal. Where that is the case, a writ in the nature of habeas corpus to achieve that production is agreeable to the usages of law.

Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic, so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. The fluidity of the writ is especially desirable in the setting of a statute where Congress has given circuit courts of appeals the power to issue the writ in aid of their appellate jurisdiction wherever "reasonably necessary in the interest of justice." The ordinary forms and purposes of the writ may often have little relation to the necessities of the appellate jurisdiction of those courts. Justice may on occasion require the us of a variation or a modification of an established writ. It thus becomes essential not to limit appellate courts to the ordinary forms and purposes of legal process. Congress has said as much by the very breadth of its language in § 262. It follows that we should not write in limitations which Congress did not see fit to make.

Formulation of the limitations of § 262 which do exist must await the necessities of appellate jurisdiction in particular cases. It is enough for the present to note that where those necessities are such as to require the presence of a prisoner to argue his own appeal, the issuance of a writ of habeas corpus for that purpose is "agreeable to the usages and principles of law" so as to be sanctioned by § 262. Only in that way can we give substance in this case to our previous statement that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." *Adams v. United States ex rel. McCann*, *supra*,317 U. S. 274.

We therefore conclude that circuit courts of appeals do have the power under § 262 of the Judicial Code to issue an order in the nature of a writ of habeas corpus commanding that a prisoner be brought to the courtroom to argue his own appeal. That power has heretofore been assumed. *Schwab v. Berggren*, 143 U. S. 442, 143 U. S. 449; *and see Goldsmith v. Sanford*, 132 F.2d 126, 127; *Donnelly v. State*,26 N.J.L. 463, 472, *aff'd*, 26 N.J.L. 601. We now translate that assumption into an explicit holding.

In so deciding, however, we emphasize that the power of a circuit court of appeals to issue such a writ is discretionary. And this discretion is to be exercised with the best interests of both the prisoner and the government in mind. If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, [Footnote 11] that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in issuing the writ. But if any of those factors were found to be negative, the court might well decline to order the prisoner to be produced. Section 262, in other words, does not justify an indiscriminate opening of the prison gates to allow all those who so desire to argue their own appeals.

The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal, or even to be present at the proceedings in an appellate court. *Schwab v. Berggren, supra*. The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, [Footnote 12] *see Hopt v. Utah*, 110 U. S. 574, and *Snyder v. Massachusetts*, 291 U. S. 97, and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 U.S.C. § 394, to parties in all the courts of the United States to "plead and manage their own causes personally." To the extent that this section permits parties to conduct their own oral arguments before appellate courts, it must be modified in its application to prisoners. Oral argument on appeal is not an essential ingredient of due process, and it may be circumscribed as to prisoners where reasonable necessity so dictates.

A prisoner's right to participate in oral argument on appeal is accordingly to be determined by the exercise of the discretionary power of the circuit court of appeals under § 262. The court below erred in holding that no such power existed. But since the case must go back to the District Court for further proceedings, it is unnecessary here to remand the case to the Circuit Court of Appeals to exercise the discretionary power which rightfully belongs to it.

II

We hold that petitioner's fourth petition for a writ of habeas corpus, alleging the knowing use of false testimony to obtain his conviction, was improperly dismissed by the District Court.

The Government argues before us that the allegation in question, as presented to the District Court, is a mere allegation of law unsupported by reference to any specific facts. As such, the allegation is said to be fatally deficient, and to warrant summary denial. Reference is made in this respect to *Cuddy, Petitioner*, 131 U. S. 280, 131 U. S. 286; *Kohl v. Lehlback*, 160 U. S. 293, 160 U. S. 299; *United States v. Ju Toy*, 198 U. S. 253, 198 U. S. 261; *Collins v. McDonald*, 258 U. S. 416, 258 U. S. 420-421; *Hodge v. Huff*, 78 U.S.App.D.C. 329, 140 F.2d 686, 688; and *Long v. Benson*, 140 F.2d 195, 196.

But this proposition was apparently not presented to or passed upon by the District Court; nor was it determined by the Circuit Court of Appeals. The sole complaint made by the Government in the lower courts, and the main one raised before us, relates to petitioner's alleged abuse of the writ of habeas corpus. A consideration of that factor is preliminary, as well as collateral, to a decision as to the sufficiency or merits of the allegation itself. We accordingly address ourselves solely to the alleged abuse of the writ, leaving the Government free to press its objections to the adequacy of the allegation after the proceedings are renewed before the District Court.

The Circuit Court of Appeals, as we have noted, treated the bare allegation of the knowing use of false testimony as having incorporated the explanatory statement in petitioner's appellate brief. Whether such an expanded allegation states a sufficiently specific violation of due process within the meaning of *Mooney v. Holohan*, 294 U. S. 103, is a question which we need not now answer. Nor is it necessary here to decide the propriety of treating a statement in an appellate brief as an amplification of an allegation in the trial court, a practice to which the Government makes objection.

But in dealing with the alleged abuse of the writ of habeas corpus, we find it undenied that the explanatory statement illuminates the allegation made in the District Court. The statement makes clear the incident to which petitioner had reference when he alleged

the knowing use of false testimony. In other words, the essence of petitioner's charge is that the prosecution brought undue pressure to bear on the Government's chief witness, Donner, to change his testimony, and that this altered testimony was knowingly used to obtain petitioner's conviction. *Cf. Pyle v. Kansas,* 317 U. S. 213, 317 U. S. 215-216. The issue now is whether petitioner has so abused the writ of habeas corpus as to bar a consideration of this allegation, whether it be general or specific in form or whether it be supported or unsupported by factual references. From the facts which we have previously detailed, it is evident that this allegation was not properly raised prior to the amendment of the fourth petition. None of the three prior petitions had made this point. In the first proceeding, it is true, petitioner's traverse to the warden's return called the court's attention to the differing statements allegedly made by Donner and claimed that certain undefined "methods" had been used to obtain the change in testimony. Petitioner was apparently trying to raise the due process issue formulated in *Mooney v. Holohan, supra*. But his effort was without success. A mere claim that a witness gave inconsistent testimony is not enough to charge the prosecution's knowing use of false testimony; it may well be that the witness' subsequent statements were true, in which event the claim of inconsistency is not a constitutional objection. Since this due process issue was not properly raised, we cannot assume that the District Court's action in dismissing the first petition on the pleadings was a determination against petitioner on the merits of the issue.

Further elaboration of the Donner incident was made by petitioner in the course of seeking review of the District Court's action on the first petition. Both in the Circuit Court of Appeals and in this Court, he claimed that he had been denied a fair and impartial trial by Donner's alleged shift in testimony, and, in this Court, he stated that there had been a conspiracy to force Donner to change his story. It is noteworthy that the Government did not see fit to deny or controvert petitioner's claim until the case reached this Court. We need not decide whether the due process issue was properly raised in the review proceedings, inasmuch as petitioner's failure to make a proper allegation in that respect in the District Court foreclosed any determination of the matter. And, as we have noted, the second and third petitions for habeas corpus were completely silent as to this due process issue.

There has thus been no proper occasion prior to the fourth proceeding for a hearing and determination by the District Court as to the allegation that the prosecution knowingly used false testimony to obtain a conviction. That fact renders inapplicable *Salinger v. Loisel*, 265 U. S. 224, upon which reliance was placed by the Circuit Court of Appeals. It was there held that, while habeas corpus proceedings are free from the *res judicata* principle, a prior refusal to discharge the prisoner is not without bearing or weight when a later habeas corpus application raising the same issues is considered. But here, the three prior applications did not raise the issue now under consideration, and the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition. *Waley v. Johnston,* 316 U. S. 101.

Likewise irrelevant to the instant proceeding is *Wong Doo v. United States,* 265 U. S. 239. In that case, the petitioner set forth two grounds for discharge in his first petition. At the hearing, he offered no proof in support of the second ground. The petition was dismissed on the theory that the first ground was not good in law. A subsequent habeas corpus petition relied entirely on the second ground alleged in the first petition. This Court held that the petitioner had had full opportunity to offer proof as to the second point at the hearing on the first petition, proof which was accessible at all times. If he was intending to rely on that ground, good faith required that he produce his proof at the first hearing.

"To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered."

265 U.S. at 265 U. S. 241.

The *Wong Doo* case thus involved a situation where one has properly raised an issue in an earlier petition, has received a full opportunity at a hearing to present evidence on the point, and has refused to avail oneself of that opportunity. The distinguishing features in the instant case are obvious.

There is one factor in this case that might be thought to justify the dismissal of the fourth petition as an abusive use of the habeas corpus writ. That factor is that petitioner had prior knowledge of the Donner incident which forms the basis, at least in part, of the due process allegation now being made. The record in the first proceeding shows that petitioner's own lawyer elicited the information from Donner that he had talked with the prosecuting lawyers during the interlude between the allegedly conflicting statements. And petitioner made reference to that information during the course of the first habeas corpus proceeding in the manner heretofore described. Petitioner now utilizes that same information in alleging that the prosecution made a knowing use of false testimony.

In the first place, however, we cannot assume that petitioner has acquired no new or additional information since the time of the trial or the first habeas corpus proceeding that might indicate fraudulent conduct on the part of the prosecuting attorneys. As Judge Denman stated in his dissenting opinion below, 161 F.2d at 708, 709:

"The gravamen of the misconduct charged is not the fact that the witness changed his testimony, but that the prosecuting attorney knowingly caused the witness to give the false testimony. All the accused and his attorney knew at the trial was that the single prosecuting witness changed his testimony. Obviously, this in itself does not warrant a charge of fraud. That it was fraudulently done by persuasion of the prosecuting attorney could only have been learned after conviction, and after the convicted man was in the penitentiary."

Whether petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. *Cf. Kennedy v. Silas Mason Co.*, 334 U. S. 249.

In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

Moreover, we do not believe that the burden was on the petitioner of affirmatively alleging in the first instance that he had acquired new information or that he had adequate reasons for not raising sooner the issue of the knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief. Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this, where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. *Cf. Holiday v. Johnston*, 313 U. S. 342, 313 U. S. 350; *Pyle v. Kansas, supra*, 317 U. S. 216; *Tomkins v. Missouri*, 323 U. S. 485, 323 U. S. 487; *Rice v. Olson*, 324 U. S. 786, 324 U. S. 791-792.

And so, if the Government chooses not to deny the allegation or to question its sufficiency, and desires instead to claim that the prisoner has abused the writ of habeas corpus, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way, an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without an expressed reason. And the prisoner is given a fairer opportunity to meet all possible objections to the filing of his petition.

It is obvious that the procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ. The Government's response to the order to show cause was too indefinite and vague to give petitioner a fair opportunity to meet this important issue. Merely quoting the court's opinion in the third habeas corpus proceeding was not enough to require petitioner to explain his reasons for failing to present earlier his allegation as to the knowing use of false testimony. And the court either failed or was unable to delineate the issue by making specific findings and conclusions of law or by explaining its view of the matter in a written opinion.

We are not unaware of the many problems caused by the numerous and successive habeas corpus petitions filed by prisoners. [Footnote 13] But the answer is not to be found in repeated denials of petitions without leave to amend or without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions.

The very least that can and should be done is to make habeas corpus proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons.

To that end, we reverse the judgment below and remand the instant case to the District Court for further proceedings consistent with this opinion. We do not hold that the District Court, on remand, must grant the fourth habeas corpus petition if it is unsupported and unsubstantiated; nor do we hold that a hearing must now be held on the merits of the allegation in question. Rather, the case must be developed further in light of the principles discussed herein. The Government is free to amend its return to bring into focus whatever abuse of the writ of habeas corpus it thinks petitioner has committed. And the petitioner is free to answer such charge as may be made in that respect, the burden being on him to show that he is entitled at this late date to make the allegation as to the knowing use of false testimony. The District Court may then dispose of the matter on the pleadings or order that a hearing be had to develop the facts. If the court eventually determines that petitioner has not abused the writ, the allegation of the knowing use of false testimony should be decided as to its sufficiency and its merits. But, in any event, the court should make explicit its determination of the preliminary problem of the abusive use of the writ.

Reversed and remanded.

[Footnote 1]

12 U.S.C. §§ 588b and 588c. Petitioner was charged with having (1) entered a federally insured bank with intent to rob, (2) robbed the bank by putting an employee in fear, (3) jeopardized the lives of a bank employee and others by the use of a dangerous weapon, and (4) kidnapped a bank employee in the course of such offense. Petitioner was found guilty as charged.

[Footnote 2]

His petition to the Sixth Circuit Court of Appeals for a writ of mandamus to require the trial judge to enter a decision on his application for an appeal was denied because "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan." *Price v. Moinet*, 116 F.2d 500. His petition in this Court for a writ of certiorari was denied because filed out of time, 311 U.S. 703, *rehearing denied*, 311 U.S. 729. Petitioner acted as his own counsel in these unsuccessful maneuvers.

[Footnote 3]

Point V of petitioner's motion stated:

"Because the respondent shows falsely on the affidavit by Assistant United States Attorney John W. Babcock, respondent's Exhibit 'A', where he states that there was no determination of any one in said office of the United States Attorney to have him convicted falsely. Petitioner calls the attention of this Honorable Court to the testimony of transcript of record at page 35 Second part. Recross examination of the one and only witness that the government produced to testify that there had been a crime committed as charged in indictment No. 24629. Petitioner's Exhibit 'A', testimony given by Fred T. Donner, and it will show just what methods was used to obtain two different statements from this witness."

[Footnote 4]

This testimony was brought out on re-cross-examination of Donner by one of petitioner's attorneys. Part of this colloquy was as follows:

"Q. Witness, perhaps I misunderstood your testimony this morning. Did I understand you correctly to say that, last night after you left here, you went up to the department of Justice, or the District Attorney's office, and you discussed your testimony?"

"A. Yes, sir."

"Q. And whom did you discuss it with?"

"A. With the District Attorney, and the assistant."

"A. And after that discussion, you remembered some things that you have testified to this morning?"

"A. I remembered them yesterday, but I just — I was nervous and forgot them."

"Q. Well, my recollection and yours perhaps do not agree on it, but the statements that you made yesterday were all true to the best of your recollection, were they not?"

"A. Yes, sir."

"Q. And your conversations last night after you left the court didn't assist you in giving any testimony, did they?"

"A. No, it did not, only that I had an opportunity, I wanted an opportunity to bring out something that I hadn't said."

"Q. Did it refresh your recollection?"

"A. No, it just — there were just some things I didn't tell in my story, that is all."

[Footnote 5]

The lawyer who had represented petitioner in connection with the first application withdrew, and another was appointed in his place by the District Court to serve petitioner in the second proceeding. This lawyer filed an amended petition for the writ of habeas corpus. The writ issued, there was a hearing at which petitioner's counsel was present, a further amendment of the petition was allowed, and testimony was taken. Petitioner gave evidence on his own behalf at this hearing. In prosecuting his appeal from the District Court's action, petitioner once more acted *pro se.*

[Footnote 6]

The District Court's opinion, after briefly stating the background of the case, reads as follows:

"Petitioner alleges "that the questions now raised was not raised in the prior petitions No. 23268-W and 10.671-R." However, these matters were known to petitioner when he filed the petitions in 23268-W and 23721-R. If petitioner intended to rely on these matters, he should have urged them in 23268-W. "To reserve them for use in a later proceeding *was to make an abusive use of the writ of habeas corpus.'" Swihart v. Johnston, 9 Cir., 1945, 150 F.2d 721."*

"Since, upon the face of the petition, petitioner is not entitled to the writ, *Walker v. Johnston*, 312 U. S. 275, the petition for writ of habeas corpus is denied."

[Footnote 7]

The Government's memorandum of points and authorities, filed with the return, merely quoted the District Court's opinion denying the third petition for a writ of habeas corpus, *Price v. Johnston*, D.C., 61 F.Supp. 995 (*see* footnote 6 *supra*). The memorandum then concluded:

"Respondent, in reliance on the decision of Judge St. Sure and the authorities which he cites, respectfully urges that the petition for writ of habeas corpus should be denied, and the order to show cause, heretofore issued, discharged."

[Footnote 8]

The Government's brief in the Circuit Court of Appeals again was devoted solely to a quotation of the District Court's opinion denying the third petition. *See* footnote 7*supra.* It concluded with the following statement:

"Appellee is in accord with the reasoning of Judge St. Sure and the authorities cited in his memorandum and order denying appellant's third application for a writ of habeas corpus, and hereby adopts them *in toto* as his argument on this appeal to sustain the Court below in its decision denying appellant's fourth application for a writ of habeas corpus in our case at bar."

[Footnote 9]

Blackstone describes the following common law versions of the habeas corpus writ:

(1) *Habeas corpus ad respondendum.* Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."

(2) *Habeas corpus ad satisfaciendum.* Issued "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

(3) *Habeas corpus ad prosequendum, testificandum, deliberandum, etc.* Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

(4) *Habeas corpus ad faciendum et recipiendum.* This "issues out of any of the courts of Westminster hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce

the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an habeas corpus *cum causa*) to *do* and *receive* whatsoever the king's court shall consider in that behalf."

(5) *Habeas corpus ad subjiciendum.* The "great and efficacious writ," which is "directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."

Chief Justice Marshall examines the first four of these writs in their relation to the American judicial system in *Ex parte Bollman,* 4 Cranch 75, 8 U. S. 97.

[Footnote 10]

The courts of England have long considered themselves powerless to issue a habeas corpus writ to enable a prisoner to defend himself in another proceeding or to argue motions in the trial court. *Benns v. Mosley,* 2 C.B. (N.S.) 116; *Weldon v. Neal,* 15 Q.B.D. 471. *See also Attorney General v. Hunt,* 9 Price 147; *Ford v. Nassau,* 9 M. & W. 793; *Rex v. Parkyns,* 3 B. & Ald. 679; *Attorney General v. Cleave,* 2 Dowl.P.C. 668; *Ex parte Cobbett,* 3 H. & N. 155; *Clark v. Smith,* 3 C.B. 982. But the specific problem of whether a prisoner can be produced to argue in person his own appeal under circumstances like those present in the instant case does not appear to have a precise answer in English law.

[Footnote 11]

The Circuit Court of Appeals below felt that the production of prisoners to argue their own appeals might lead to

"the widespread abuse of the writ . . . , not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls."

159 F.2d at 237.

[Footnote 12]

But see Bell v. United States, 129 F.2d 290; *Barber v. United States,* 142 F.2d 805.

[Footnote 13]

See discussions in *Dorsey v. Gill,* 80 U.S.App.D.C. 9, 148 F.2d 857; Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F.R.D. 313; Note, 61 Harv.L.Rev. 657.

MR. JUSTICE FRANKFURTER, dissenting.

I agree with the views of MR. JUSTICE JACKSON that, in the light of all the long drawn-out prior proceedings, the two lower courts justifiably found the fourth petition for habeas corpus in this case without merit on its face. It is not too much to ask the petitioner to state, however informally, that his fourth petition is based on newly discovered matter, or, in any event, on a claim that he could not fairly have been asked to bring to the court's attention in his three prior petitions. Such a requirement certainly does not narrow the broad protection which the writ of habeas corpus serves. I also agree with his general attitude against a prisoner's being brought from Alcatraz — or any other federal prison — to argue his own case on appeal. My difference with him is that I would not bolt the door to such an undesirable practice as a matter of law, but merely leave it as a rigorous rule of practice. The power to depart from this rule ought not to be wholly foreclosed, even though opportunity for its exercise is left for contingencies not easily foreseeable.

The office of the writ of habeas corpus precludes definitive formulation of its limitations precisely because it is the prerogative writ available for vindicating liberties. *See Sunal v. Large,* 332 U. S. 174, 332 U. S. 184, 332 U. S. 187. Therefore, I would not preclude the use of the writ to bring a convict before a circuit court of appeals where circumstances in the interests of justice make his presence compelling. *See Adams v. United States ex rel. McCann,* 317 U. S. 269, 317 U. S. 272-275. It is a very different thing to judge the use of the writ for the purpose of having an incarcerated petitioner argue his own case on appeal by the ordinary standards of judicial discretion. To acknowledge such power in the circuit courts of appeals implies too broad an authority, in that the abuse of its exercise in granting the writ is too narrow a basis for review. A general rule should preclude the use of the writ for the purpose of taking a prisoner out of confinement merely to argue his own case on appeal from dismissal of a petition for habeas

corpus after conviction. Every legitimate right of such a prisoner can be safeguarded by means much more consonant with the fair and seemly and wise administration of justice.

THE CHIEF JUSTICE and MR. JUSTICE REED join in this dissent.

MR. JUSTICE JACKSON, dissenting.

I cannot agree that the District Court erred in dismissing this unsupported and unsubstantiated fourth habeas corpus petition, whether his action in so doing was based on its obvious lack of merit or on the prisoner's abuse of the writ. Nor can I agree that appearance of a prisoner merely to argue his case is "necessary for the exercise" of the jurisdiction of the Court of Appeals and "agreeable to the usages and principles of law" as is required by § 262 of the Judicial Code, 28 U.S.C. § 377.

This case is typical of many based on repeated habeas corpus petitions by the same prisoner. [Footnote 2/1] This petitioner is serving a long term for armed bank robbery. Confinement is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one habeas corpus application after another. If the trial court rules one set of allegations deficient, concoction of another set may bring success. Under this decision, failure to allege the most obvious grounds in earlier applications, or to support them with facts in a later petition, is not fatal. The number of times the Government must retry the case depends only on the prisoner's ingenuity, industry and imagination. This prisoner, in his fourth petition in eight years, has now gotten around to charging that, at his trial in 1938, the Government knowingly employed false testimony to obtain the conviction. This issue substantially involves a retrial of the original conviction after more than ten years have passed by, memories are blurred, evidence is lost, and parties dispersed. The petition is unaccompanied by any particulars supporting this most serious charge against the court and responsible officers of the law. The prisoner, of course, has nothing to lose in any event. Perjury has few terrors for a man already sentenced to 65 years' imprisonment for a crime of violence. Even such honor as exists among thieves is not too precious to be sacrificed for a chance at liberty. Consequently, his varying allegations can run the gamut of all those perpetuated in the pages of the United States reports.

The Court now holds that such irresponsible, general, unsupported and belated accusations must be tried out; further, the District Judge erred in that he did not request the perennial petitioner to fill in details, the absence of which, under established rules, justified his dismissal of the petition actually filed. I think that the Government should not be required to go to trial (or rather, retrial) on a case of this kind unless the petitioner, without prompting or solicitation by the Court, alleges with particularity conduct which would be sufficient, if proved, to entitle him to release. If he does not have such facts, he is doomed ultimately to fail; if he does have them, he should not be permitted to force the court and the Government into further litigation until he has disclosed them. And certainly it is not too much to require that, on a fourth petition, eight years after conviction, the petitioner must also set forth facts which will excuse his failure to raise his question in earlier petitions instead of at a period so remote from his trial.

Moreover, if any one of petitioner's applications and accompanying facts convince the trial judge that a hearing on the merits is justified, the prisoner's presence in the trial court to testify may fairly be said to be necessary. The procedure for bringing him before that court to give his evidence is of ancient origin. But it is another and quite different matter to say that a layman's presence, solely to take part in a legal argument on a settled record, is necessary for the exercise of the jurisdiction of the appellate court. The only suggested authority for so ordering a jailer to fetch a prisoner to argue his own appeal is § 262 of the Judicial Code, 28 U.S.C. § 377, which provides that "the Supreme Court, the circuit courts of appeal, and the district courts shall have power to issue all writs not specifically provided for by statute," and if the statute stopped here, the Court might have some basis for its action. But the section adds, "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Even if the Court of Appeals, or this Court, believed that the former should have the power to summon prisoners for argument of their appeals, that is not the issue. The issue is, can the requirements of the statute be met? Is the prisoner's presence merely to argue his case "necessary for the exercise" of the appellate court's jurisdiction? I think it is farfetched to so hold. [Footnote 2/2] Such courts may, and usually do, appoint counsel for a prisoner who cannot obtain one for himself. If there is more that the defendant himself wants to present, it can always be done in writing. Many cases are decided in appellate courts solely on written briefs. But the Court fears that some prisoners like this one may not only refuse counsel, but also wish not to rest on a written brief. Under the statute, however, it is not the convenience or the egotism of the prisoner that confers power to grant a writ — it is the necessity of the writ for the exercise of the Court's jurisdiction. It is difficult for me to believe that prisoners, whom the Court so often forgives for violating all rules of pleading and procedure on the ground of lay ignorance, can be a necessary source of light

and leading to an appellate court. The absence of such a necessity is, I suppose, the reason why no such writ has been known to the law until today's revelation, and why the statute does not allow it. But the Court, by this decision, makes it proper for any prisoner whose appeal from either conviction or denial of any one of his multitudinous petitions for habeas corpus is before the Court of Appeals to insist that he be transported to that court to argue the case and to demand a ruling by the court on that issue as well as on the merits. This seems to open the gate to new and fruitless litigation.

Admittedly, the statute's second requirement, *viz.*, that the writ be "agreeable to the usages and principles of law," cannot be met. It is apparent that the latter clause is a limitation on the earlier sweeping grant of power. *Ex parte Bollman and Swartwout,* 4 Cranch 75, 8 U. S. 99. The Circuit Courts of Appeal are statutory courts, and must look to a statutory basis for any jurisdiction they exercise. But, in this case, the Court is authorizing a complete overriding of the limitation Congress has seen fit to impose. The Court's opinion points out that employment of the writ of habeas corpus for this purpose has never been a usage or principle of the common law. No statutory or decisional [Footnote 2/3] basis for such a usage or principle is cited. Yet, ignoring the limitations of this very statute, the Court concludes that the writ can just be issued anyway. I cannot subscribe to this sort of statutory "construction."

This is one of a line of cases by which there is being put into the hands of the convict population of the country new and unprecedented opportunities to retry their cases, or to try the prosecuting attorney or their own counsel, and keep the Government and the courts litigating their cases until their sentences expire or one of their myriad claims strikes a responsive chord or the prisoner make the best of an increased opportunity to escape. I think this Court, by inflating the great and beneficent writ of liberty beyond a sound basis, is bringing about its eventual depreciation. [Footnote 2/4]

[Footnote 2/1]

Petitioner was convicted of armed bank robbery in April, 1938. After that date, and prior to the filing of this current habeas corpus petition, he took the following steps seeking his liberty:

1. In 1940, petitioned the Court of Appeals for mandamus to force the trial judge to act on an application for appeal; that court found no such application was then pending, and denied the petition; this Court denied certiorari, 311 U.S. 703, and a rehearing 311 U.S. 729.

2. In 1940, filed an application for habeas corpus. After argument by court-appointed counsel, the application was dismissed. The Court of Appeals affirmed, 125 F.2d 806; this Court denied certiorari 316 U.S. 677, and denied rehearing 316 U.S. 712, the latter decision being announced June 1, 1942.

3. On September 24, 1942, filed another habeas corpus petition. After hearing, participated in by court-appointed counsel, the petition was dismissed. The Court of Appeals affirmed, 144 F.2d 260; this Court denied certiorari, 323 U.S. 789, and denied rehearing, 323 U.S. 819, the latter decision being announced on January 29, 1945.

4. Prior to August 22, 1945, filed third habeas corpus petition, which was denied on that date, 61 F.Supp. 995.

The current petition was filed in January, 1946.

[Footnote 2/2]

It is a very different thing to find the presence of the prisoner "necessary" under such circumstances as in *Adams v. United States ex rel. McCann*, 317 U. S. 269, 317 U. S. 274, where this Court explained the necessity as follows:

"The circumstances that moved the court below to the exercise of its jurisdiction were the peculiar difficulties involved in preparing a bill of exceptions. The stenographic minutes had never been typed. The relator claimed that he was without funds. Since he was unable to raise the bail fixed by the trial judge, he had been in custody since sentence, and therefore had no opportunity to prepare a bill of exceptions. The court doubted"

"whether any [bill] can ever be made up on which the appeal can be heard. . . . In the particular circumstances of the case at bar, it seems to us that the writ is 'necessary to the complete exercise' of our appellate jurisdiction because . . . there is a danger that it cannot be otherwise exercised at all, and a certainty that it must, in any event, be a good deal hampered."

[Footnote 2/3]

The Court says that it "translates" the "assumption," found in one decision of this Court, one of a Court of Appeals, and one of a state court, into a specific holding that the Circuit Courts of Appeals do have this power. The dictum in *Schwab v. Berggren*, 143 U. S. 442, 143 U. S. 449, is merely this:

". . . But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the accused, especially where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence, but only that his presence is not essential to its jurisdiction to proceed with the case."

In *Goldsmith v. Sanford,* 132 F.2d 126, 127, *certiorari denied,* 318 U.S. 762, *rehearing denied,* 318 U.S. 799, the Court said:

". . . We know of no precedent for taking a prisoner from the penitentiary that he might be present to argue in person his appeal from the adverse judgment on habeas corpus. . . . If there be power to order the removal which was requested, discretion was well exercised in refusing it."

In *Donnelly v. State,* 26 N.J.L. 463, *affirmed,* 26 N.J.L. 601, which could hardly be even persuasive here, the Court held that the prisoner's presence was not necessary for jurisdiction, nor was it required as a technical necessity or a matter of right.

The "translation" of these "assumptions" into a holding involves, under this statute, a decision that these three isolated statements represent the "usages and principles of law." Those terms have been in the statute since the original Judiciary Act of 1789, and the Court admits there was no such usage or principle prior to that time. These three later cases are therefore the only shadow of a basis for holding that a writ such as the Court now directs meets the requirements of the statute. To consider such unauthoritative sources as a precedent on this point would be bad enough — but to enlarge them to a usage or principle of law is even less warranted. Reliance on these isolated pronouncements, which, either individually or collectively, are far from being authority on this point, seems close to creating precedents out of thin air.

[Footnote 2/4]

Such depreciation has already set in. *See* Goodman, "Use and Abuse of the Writ of Habeas Corpus," 7 F.R.D. 313, stating, at 315, that, from June, 1937, to June, 1947, 6 prisoners in Alcatraz filed a total of 68 petitions, while 57 others filed 183 petitions.*See also* Dorsey v. Gill, 80 U.S.App.D.C. 9, 148 F.2d 857, at 862, 863, stating that, in one five-year period, one prisoner filed 50 petitions in the District Court for the District of Columbia; four others filed 27, 24, 22, and 20, respectively; and 119 prisoners filed 597 petitions, an average of 5 each.

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CHAPTER OVERVIEW

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11.1: Batson v. Kentucky 476 US 79 (1986)

U.S. Supreme Court

Batson v. Kentucky, 476 U.S. 79 (1986)

Batson v. Kentucky

No. 84-6263

Argued December 12, 1985

Decided April 30, 1986

476 U.S. 79

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Syllabus

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted *voir dire* examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama*, 380 U. S. 202, and had held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

1. The principle announced in *Strauder v. West Virginia*, 100 U. S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 476 U. S. 84-89.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia*, 100 U. S. 303, 100 U. S. 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 476 U. S. 85-88.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise

peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 476 U. S. 88-89.

2. The portion of *Swain v. Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a *prima facie* case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard, because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions

relating to selection of the jury venire. A defendant may make a *prima facie*showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 476 U. S. 89-96.

3. A defendant may establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a *prima facie* showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 476 U. S. 96-98.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 476 U. S. 98-99.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. P.476 U. S. 100.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., *post*, p. 476 U. S. 100, and MARSHALL, J., *post*, p. 476 U. S. 102, filed concurring opinions. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 476 U. S. 108. O'CONNOR, J., filed a concurring opinion, *post*, p. 476 U. S. 111. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 476 U. S. 112. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, *post*, p. 476 U. S. 134.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain v. Alabama*, 380 U. S. 202(1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury. [Footnote 1]

I

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to

exercise peremptory challenges. [Footnote 2] The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire, and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that *Swain v. Alabama*, *supra*, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow

decisions of other States, *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross-section of the community. Petitioner also contended

that the facts showed that the prosecutor had engaged in a "pattern" of discriminatory challenges in this case and established an equal protection violation under *Swain*.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of *People v. Wheeler*, *supra*, and *Commonwealth v. Soares*, *supra*. The court observed that it recently had reaffirmed its reliance on *Swain*, and had held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire. *See Commonwealth v. McFerron*, 680 S.W.2d 924 (1984). We granted certiorari, 471 U.S. 1052 (1985), and now reverse.

II

In *Swain v. Alabama*, this Court recognized that a

"State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."

380 U.S. at 380 U. S. 203-204. This principle has been "consistently and repeatedly" reaffirmed, *id.* at 380 U. S. 204, in numerous decisions of this Court both preceding and following *Swain*. [Footnote 3] We reaffirm the principle today. [Footnote 4]

A

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Strauder v. West Virginia*, 100 U. S. 303 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. *Id.* at 100 U. S. 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.* at 100 U. S. 305. [Footnote 5] "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. *Akins v. Texas*, 325 U. S. 398, 325 U. S. 403 (1945). [Footnote 6] But the defendant does have the right to be

tried by a jury whose members are selected pursuant to nondiscriminatory criteria. *Martin v. Texas*, 200 U. S. 316, 200 U. S. 321 (1906); *Ex parte Virginia*, 100 U. S. 339, 100 U. S. 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder*, *supra*, at 100 U. S. 305, [Footnote 7] or on the false assumption that members of his race as a group are not qualified to serve as jurors, *see Norris v. Alabama*, 294 U. S. 587, 294 U. S. 599 (1935); *Neal v. Delaware*, 103 U. S. 370, 103 U. S. 397 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection, because it denies him the protection that a trial by jury is intended to secure.

"The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Strauder, *supra*, at 100 U. S. 308; *see Carter v. Jury Comm'n of Greene County*, 396 U. S. 320, 396 U. S. 330 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. *Duncan v. Louisiana*, 391 U. S. 145, 391 U. S. 156 (1968). [Footnote 8] Those on the venire

must be "indifferently chosen," [Footnote 9] to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice." *Strauder, supra,* at 100 U. S. 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. *See Thiel v. Southern Pacific Co.*, 328 U. S. 217,328 U. S. 223-224 (1946). A person's race simply "is unrelated to his fitness as a juror." *Id.* at 328 U. S. 227 (Frankfurter, J., dissenting). As long ago as *Strauder,*therefore, the Court recognized that, by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. 100 U.S. at 100 U. S. 308; *see Carter v. Jury Comm'n of Greene County, supra,* at 396 U. S. 329-330; *Neal v. Delaware, supra,* at 103 U. S. 386.

The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *See Ballard v. United States*, 329 U. S. 187, 329 U. S. 195 (1946); *McCray v. New York,* 461 U.S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). Discrimination within the

judicial system is most pernicious because it is

"a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

Strauder, 100 U.S. at 100 U. S. 308.

B

In *Strauder,* the Court invalidated a state statute that provided that only white men could serve as jurors. *Id.* at 100 U. S. 305. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications, and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination." *Norris v. Alabama, supra,* at 294 U. S. 589; *see Hernandez v. Texas*, 347 U. S. 475, 347 U. S. 478-479 (1954); *Ex parte Virginia, supra,* at 100 U. S. 346-347. Thus, the Court has found a denial of equal protection where the procedures implementing a neutral statute operated to exclude persons from the venire on racial grounds, [Footnote 10] and has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors. [Footnote 11] While decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury. Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, *Hill v. Texas*, 316 U. S. 400, 316 U. S. 406 (1942), the State may not draw up its jury lists pursuant to neutral procedures, but then resort to discrimination at "other stages in the selection process," *Avery v. Georgia*, 345 U. S. 559, 345 U. S. 562 (1953); *see McCray v. New York, supra,* at 462 U. S. 965, 968

(MARSHALL, J., dissenting from denial of certiorari); *see also Alexander v. Louisiana*,405 U. S. 625, 405 U. S. 632 (1972).

Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. [Footnote 12] Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, *United States v. Robinson*, 421 F.Supp. 467, 473 (Conn.1976), *mandamus granted sub nom. United States v. Newman*, 549 F.2d 240 (CA2 1977), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

III

The principles announced in *Strauder* never have been questioned in any subsequent decision of this Court.

Rather, the Court has been called upon repeatedly to review the application of those principles to particular facts. [Footnote 13] A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State. *Whitus v. Georgia*, 385 U. S. 545, 550 (1967); *Hernandez v. Texas*, *supra* at 347 U. S. 478-481; *Akins v. Texas*, 325 U.S. at 326 U. S. 403-404; *Martin v. Texas*, 200 U. S. 316 (1906). That question also was at the heart of the portion of *Swain v. Alabama* we reexamine today. [Footnote 14]

A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S. at 380 U. S. 209-210. The record in *Swain* showed that the prosecutor

had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. *Id.* at 380 U. S. 210. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. *Id.* at 380 U. S. 222-224.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, *id.* at 380 U. S. 214-220, and the constitutional prohibition on exclusion of persons from jury service on account of race, *id.* at 380 U. S. 222-224. While the Constitution does not confer a right to peremptory challenges, *id.* at 380 U. S. 219 (citing *Stilson v. United States*, 250 U. S. 583, 250 U. S. 586 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U.S. at 380 U. S. 219. [Footnote 15] To preserve the peremptory nature of the prosecutor's challenge, the Court in *Swain* declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. *Id.*at 380 U. S. 221-222.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial," or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 380 U. S. 224. Accordingly, a black defendant could make out a *prima facie* case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.*For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor,

"in case after case, whatever the

circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries."

Id. at 380 U. S. 223. Evidence offered by the defendant in *Swain* did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. *Id.* at 380 U. S. 224-228.

A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. [Footnote 16] Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, [Footnote 17] prosecutors' peremptory challenges are now largely immune

from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain*for assessing a *prima facie* case under the Equal Protection Clause.

B

Since the decision in *Swain*, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a

racially discriminatory purpose." *Washington v. Davis*, 426 U. S. 229, 426 U. S. 240 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." *Whitus v. Georgia*, 385 U.S. at385 U. S. 550 (citing *Tarrance v. Florida*, 188 U. S. 519 (1903)). In deciding if the defendant has carried his burden of persuasion, a court must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S. 252, 429 U. S. 266 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. *Washington v. Davis*, 426 U.S. at 426 U. S. 242. We have observed that, under some circumstances, proof of discriminatory impact

"may, for all practical purposes, demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds."

Ibid. For example, "total or seriously disproportionate exclusion of Negroes from jury venires," *ibid.*, "is itself such an *unequal application of the law . . . as to show intentional discrimination,'" id. at 426 U. S. 241 (quoting Akins v. Texas, 325 U.S. at 325 U. S. 404).*

Moreover, since *Swain*, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a *prima*

facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Washington v. Davis*, *supra*, at 426 U. S. 239-242. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana*, *supra*, at 405 U. S. 632. The State cannot meet this burden on mere general assertions that its officials did not discriminate, or that they properly performed their official duties. *See Alexander v. Louisiana*, *supra*, at 632; *Jones v. Georgia*, 389 U. S. 24, 25 (1967). Rather, the State must demonstrate that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Alexander v. Louisiana*, *supra*, at 405 U. S. 632; *see Washington v. Davis*, *supra*, at 426 U. S. 241. [Footnote 18]

The showing necessary to establish a *prima facie* case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. *E.g.*, *Castaneda v. Partida*, 430 U. S. 482, 430 U. S. 494-495 (1977); *Alexander v. Louisiana*, *supra*, at405 U. S. 631-632. The defendant initially must show that he is a member of a racial group capable of being singled out for different treatment. *Castaneda v. Partida*, *supra*, at 430 U. S. 494. In combination with that evidence, a defendant may then make a *prima facie* case by proving that, in the particular jurisdiction, members of his race have not been summoned for jury service over an extended period of time. *Id.* at 430 U. S. 494. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination, because the "result bespeaks discrimination." *Hernandez v. Texas*, 347

U.S. at 347 U. S. 482; *see Arlington Heights v. Metropolitan Housing Development Corp.*, *supra*, at 429 U. S. 266.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a *prima facie* case "in other ways than by evidence of long-continued unexplained absence" of members of his race "from many panels." *Cassell v. Texas*, 339 U. S. 282, 339 U. S. 290 (1950) (plurality opinion). In cases involving the venire, this Court has found a *prima facie*case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus v. Georgia*, *supra*, at 385 U. S. 552; *see Castaneda v. Partida*, *supra*, at 430 U. S. 494; *Washington v. Davis*, *supra*, at 426 U. S. 241; *Alexander v. Louisiana*, *supra*, at 405 U. S. 629-631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case. *Alexander v. Louisiana*, *supra*, at405 U. S. 630.

Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single

invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." 429 U.S. at 429 U. S. 266, n. 14. For evidentiary requirements

to dictate that "several must suffer discrimination" before one could object, *McCray v. New York*, 461 U.S. at 965 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all. [Footnote 19]

C

The standards for assessing a *prima facie* case in the context of discriminatory selection of the venire have been fully articulated since *Swain*. *See Castaneda v. Partida*, *supra*, at 430 U. S. 494-495; *Washington v. Davis*, 426 U.S. at 426 U. S. 241-242; *Alexander v. Louisiana*, *supra*, at 405 U. S. 629-631. These principles support our conclusion that a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, *supra*, at 430 U. S. 494, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. at 345 U. S. 562. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.

For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors.

Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. *See McCray v. Abrams*,750 F.2d at 1132; *Booker v. Jabe*, 775 F.2d 762, 773 (CA6 1985), *cert. pending*, No. 85-1028. But the prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race. *Cf. Norris v. Alabama*, 294 U.S. at 294 U. S. 598-599; *see Thompson v. United States*, 469 U. S. 1024, 1026 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, *supra*, at 476 U. S. 86, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of

such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." *Alexander v. Louisiana*, 405 U.S. at 405 U. S. 632. If these general assertions were accepted as rebutting a defendant's *prima facie* case, the Equal Protection Clause "would be but a vain and illusory requirement." *Norris v. Alabama*, *supra*, at 294 U. S. 598. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. [Footnote 20] The trial court then will have the duty to determine if the defendant has established purposeful discrimination. [Footnote 21]

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the

contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. [Footnote 22] In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, [Footnote 23] and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges. [Footnote 24]

V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, *prima facie*, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. *E.g.*, *Whitus v. Georgia*, 385 U.S. at 385 U. S. 549-550; *Hernandez v. Texas*, 347 U.S. at 347 U. S. 482; *Patton v. Mississippi*, 332 U.S. at 469. [Footnote 25]

It is so ordered.

[Footnote 1]

Following the lead of a number of state courts construing their State's Constitution, two Federal Courts of Appeals recently have accepted the view that peremptory challenges used to strike black jurors in a particular case may violate the Sixth Amendment. *Booker v. Jabe*, 775 F.2d 762 (CA6 1986), *cert. pending*, No. 85-1028; *McCray v. Abrams*, 750 F.2d 1113 (CA2 1984), *cert. pending*, No. 84-1426.*See People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978); *Riley v. State*, 496 A.2d 997, 1009-1013 (Del.1985); *State v. Neil*, 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). *See also State v. Crespin*, 94 N. M. 486, 612 P.2d 716 (App.1980). Other Courts of Appeals have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States v. Childress*, 715 F.2d 1313 (CA8 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); *United States v. Whitfield*, 715 F.2d 145, 147 (CA4 1983). *See Beed v. State*, 271 Ark. 526, 530-531, 609 S.W.2d 898, 903 (1980); *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599, 599-600 (1981); *Gilliard v. State*, 428 So.2d 576, 579 (Miss.), *cert. denied*, 464 U. S. 867 (1983); *People v. McCray*, 57 N.Y.2d 542, 546-549, 443 N.E.2d 915, 916-919 (1982), *cert. denied*, 461 U.S. 961 (1983); *State v. Lynch*, 300 N.C. 534, 546-547, 268 S.E.2d 161, 168-169 (1980). Federal Courts of Appeals also have disagreed over the circumstances under which supervisory power may be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks from the venire. *Compare United States v. Leslie*, 783 F.2d 541 (CA5 1986) (en banc), *with United States v. Jackson*, 696 F.2d 578, 592-593 (CA8 1982), *cert. denied*, 460 U.S. 1073 (1983). *See also United States v. McDaniels*, 379 F.Supp. 1243 (ED La.1974).

[Footnote 2]

The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself Ky.Rule Crim.Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.

[Footnote 3]

See, e.g., Strauder West Virginia, 100 U. S. 303 (1880); *Neal v. Delaware*, 103 U. S. 370(1881); *Norris v. Alabama*, 294 U. S. 587 (1935); *Hollins v. Oklahoma*, 295 U. S. 394(1935) (per curiam); *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Patton v. Mississippi*,332 U. S. 463 (1947); *Avery v. Georgia*, 345 U. S. 559 (1953); *Hernandez v. Texas*, 347 U. S. 475 (1954); *Whitus v. Georgia*, 385 U. S. 545 (1967); *Jones v. Georgia*, 389 U. S. 24(1967) (per curiam); *Carter v. Jury Comm'n of Greene County*, 396 U. S. 320 (1970); *Castaneda v. Partida*, 430 U. S. 482 (1977); *Rose v. Mitchell*, 443 U. S. 545 (1979); *Vasquez v. Hillery*, 474 U. S. 254 (1986).

The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." *Alexander v. Louisiana*, 405 U. S. 625, 405 U. S. 626, n. 3 (1972); *see Norris v. Alabama*, *supra*, at 294 U. S. 589. These principles are reinforced by the criminal laws of the United States. 18 U.S.C. § 243.

[Footnote 4]

In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross-section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection, and that we must reconsider *Swain* to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles, and express no view on the merits of any of petitioner's Sixth Amendment arguments.

[Footnote 5]

See Hernandez v. Texas, *supra*, at 347 U. S. 482; *Cassell v. Texas*, 339 U. S. 282, 339 U. S. 286-287 (1950) (plurality opinion); *Akins v. Texas*, 325 U. S. 398, 325 U. S. 403(1945); *Martin v. Texas*, 200 U. S. 316, 200 U. S. 321 (1906); *Neal v. Delaware*, *supra*, at103 U. S. 394.

[Footnote 6]

Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross-section of the community, *Taylor v. Louisiana*, 419 U. S. 522 (1975), we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," *id.* at 419 U. S. 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U. S. 78, 399 U. S. 102-103 (1970).

[Footnote 7]

See Hernandez v. Texas, *supra*, at 347 U. S. 482; *Cassell v. Texas*, *supra*, at 339 U. S. 287; *Akins v. Texas*, *supra*, at 325 U. S. 403; *Neal v. Delaware*, *supra*, at 103 U. S. 394.

[Footnote 8]

See Taylor v. Louisiana, *supra*, at 419 U. S. 530; *Williams v. Florida*, *supra*, at 399 U. S. 100. *See also* Powell, Jury Trial of Crimes, 23 Wash. & Lee L.Rev. 1 (1966).

In *Duncan v. Louisiana*, decided after *Swain*, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S. at 391 U. S. 147-158. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." *Id.* at 391 U. S. 155, 391 U. S. 156-157. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. *Id.* at 391 U. S. 156; *Glasser v.*

United States, 315 U. S. 60, 316 U. S. 86-88 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make

"juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities."

Akins v. Texas, *supra*, at 325 U. S. 408 (Murphy, J., dissenting).

[Footnote 9]

W. Blackstone, Commentaries 350 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*,391 U.S. at 391 U. S. 152).

[Footnote 10]

E.g., *Sims v. Georgia*, 389 U. S. 404, 389 U. S. 407 (1967) (per curiam); *Whitus v. Georgia*, 385 U.S. at 385 U. S. 548-549; *Avery v. Georgia*, 345 U.S. at 345 U. S. 561.

[Footnote 11]

See Norris v. Alabama, 294 U.S. at 294 U. S. 589; *Martin v. Texas*, 200 U.S. at 200 U. S. 319; *Neal v. Delaware*, 103 U.S. at 103 U. S. 394, 103 U. S. 397.

[Footnote 12]

We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. *See generally* J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183-189 (1977). Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, *see id.* at 116-118, counsel also may seek to learn which members of the pool served on juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice. Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.

[Footnote 13]

See, e.g. Vasquez v. Hillery, 474 U. S. 254 (1986); *Rose v. Mitchell*, 443 U. S. 545 (1979); *Castaneda v. Partida*, 430 U. S. 482 (1977); *Alexander v. Louisiana*, 405 U.S. at 405 U. S. 628-629; *Whitus v. Georgia*, *supra*, at 385 U. S. 549-550; *Swain v. Alabama*, 380 U. S. 202, 380 U. S. 205 (1965); *Coleman v. Alabama*, 377 U. S. 129 (1964); *Norris v. Alabama*, *supra*, at 294 U. S. 589; *Neal v. Delaware*, *supra*, at 103 U. S. 394.

[Footnote 14]

The decision in *Swain* has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. *E.g.*, Van Dyke, *supra* at 166-167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 268-270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 283-303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum.L.Rev. 1357 (1985); Note, Peremptory Challenge — Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157 (1967); Comment, *Swain v. Alabama:* A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966). *See also* Johnson, Black Innocence and the White Jury, 83 Mich.L.Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to *Swain. See* Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337 (1982).

[Footnote 15]

In *Swain*, the Court reviewed the "very old credentials" of the peremptory challenge system, and noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." 380 U.S. at 380 U. S. 219; *see id.* at 380 U. S. 212-1219.

[Footnote 16]

E.g., United Skates v. Jenkins, 701 F.2d 850, 859-860 (CA10 1983); *United States v. Boykin*, 679 F.2d 1240, 1245 (CA8 1982); *United States v. Pearson*, 448 F.2d 1207, 1213-1218 (CA5 1971); *Thigpen v. State*, 49 Ala. App. 233, 241, 270 So.2d 666, 673 (1972); *Jackson v. State*, 245 Ark. 331, 336, 432 S.W.2d 876, 878 (1968); *Johnson v. State*, 9 Md.App. 143, 148-150, 262 A.2d 792, 796-797 (1970); *State v. Johnson*, 125 N.J.Super. 438, 311 A.2d 389 (1973) (per curiam); *Stote v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973).

[Footnote 17]

See McCray v. Abrams, 750 F.2d at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. *United States v. Pearson*,448 F.2d 1207, 1217 (1971). The court believed this burden to be "most difficult" to meet. *Ibid.* In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable. *See People v. Wheeler*, 22 Cal.3d at 285-286, 583 P.2d at 767-768.

[Footnote 18]

Our decisions concerning "disparate treatment" under Title VII of the Civil Rights Act of 1964 have explained the operation of *prima facie* burden of proof rules. *See McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981); *United States Postal Service Board of Governors v. Aikens*, 460 U. S. 711 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion.*Texas Dept. of Community Affairs v. Burdine*, *supra*, at 252-256.

[Footnote 19]

Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a *prima facie* case by relying solely on the facts concerning the alleged discrimination against him. *See* cases in n18, *supra.*

[Footnote 20]

The Court of Appeals for the Second Circuit observed in *McCray v. Abrams*, 750 F.2d at 1132, that "[t]here are any number of bases" on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 450 U. S. 258.

[Footnote 21]

In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City*, 470 U. S. 564, 470 U. S. 573 (1986). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.* at 470 U. S. 575-576.

[Footnote 22]

While we respect the views expressed in JUSTICE MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a *prima facie* case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

[Footnote 23]

For example, in *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

[Footnote 24]

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, *see Booker v. Jabe*, 775 F.2d at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, *see United States v. Robinson*, 421 F.Supp. 467, 474 (Conn.1976), *mandamus granted sub nom. United States v. Newman*,549 F.2d 240 (CA2 1977).

[Footnote 25]

To the extent that anything in *Swain Alabama*, 380 U. S. 202 (1965), is contrary to the principles we articulate today, that decision is overruled.

JUSTICE WHITE, concurring.

The Court overturns the principal holding in *Swain v. Alabama*, 380 U. S. 202 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant, and that, in such a case, it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting,

that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that, over a period of time, the prosecution had consistently excluded blacks from petit juries. * This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires, rather than petit juries, are not without relevance in this case.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to *voir dire* the prospective jurors, will have an opportunity to give trial-related reasons for his strikes —

some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in *DeStefano v. Woods*, 392 U. S. 631 (1968), that *Duncan v. Louisiana*, 391 U. S. 145 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the *Duncan* decision. The same result was reached in *DeStefano* with respect to the retroactivity of *Bloom v. Illinois*, 391 U. S. 194 (1968), as it was in *Daniel v.*

Louisiana, 420 U. S. 31 (1976) (per curiam), with respect to the decision in *Taylor v. Louisiana*, 419 U. S. 522 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

* Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available. [Footnote 2/1] I nonetheless write separately to express my views. The decision today will not end the racial discrimination

that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. *See Swain v. Alabama*, 380 U. S. 202, 380 U. S. 231-238 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235 (1968); *see also* J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155-157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. *See United States v. Carter*, 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), *cert. denied*, 425 U.S. 961 (1976); *United States v. McDaniels*, 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker*, 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), *affirmance order*, 529 F.2d 516 (CA4 1975). [Footnote 2/2] Prosecutors

have explained to courts that they routinely strike black jurors, *see State v. Washington*, 375 So.2d 1162, 1163-1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "*any member of a minority group.'" [Footnote 2/3] In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white. [Footnote 2/4]*

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that

"'in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.'"

Neal v. Delaware, 103 U. S. 370, 103 U. S. 394 (1881), quoting *Virginia v. Rives*, 100 U. S. 313, 100 U. S. 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. *Post* at476 U. S. 138. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes — even an action that does not serve the

State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks

lack the "intelligence, experience, or moral integrity," *Neal*, *supra*, at 103 U. S. 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries on the basis of their race violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court *ante* at 476 U. S. 97-98 has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. *See Commonwealth v. Robinson*, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no *prima facie* case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau*, 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no *prima facie* case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a *prima facie* case, trial courts face the difficult burden of assessing prosecutors' motives. *See King v. County of Nassau*, 581 F.Supp. 493,

501-502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, *see People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), or seemed "uncommunicative," *King*, *supra*, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall*, *supra*, at 165, 672 P.2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King*, *supra*, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. *Post* at 476 U. S. 138; *see also*THE CHIEF JUSTICE's dissenting opinion, *post* at 476 U. S. 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels — a challenge I doubt all of them can meet. It is worth remembering that

"114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in

our society as a whole."

Rose v. Mitchell, 443 U. S. 545, 443 U. S. 558-559 (1979), quoted in *Vasquez v. Hillery*,474 U. S. 254, 474 U. S. 264 (1986).

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. *See* Van Dyke, at 167-169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that

"[w]ere it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."

380 U.S. at 380 U. S. 244. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis v. United States*, 146 U. S. 370, 146 U. S. 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U. S. 396, 151 U. S. 408 (1894). *See* Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L.Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system

"requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held."

Hayes v. Missouri, 120 U. S. 68, 120 U. S. 70 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of

peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S. at 380 U. S. 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.* at 380 U. S. 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial.*Frazier v. United States*, 335 U. S. 497, 335 U. S. 505, n. 11 (1948); *United States v. Wood*, 299 U. S. 123, 299 U. S. 145 (1936); *Stilson v. United States*, 250 U. S. 583, 250 U. S. 586 (1919); *see also Swain*, 380 U.S. at 380 U. S. 219. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

[Footnote 2/1]

Commonwealth v. Martin, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray v. New York*, 461 U.S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

[Footnote 2/2]

See also Harris v. Texas, 467 U. S. 1261 (1984) (MARSHALL, J., dissenting from denial of certiorari); *Williams v. Illinois*, 466 U. S. 981 (1984) (MARSHALL, J., dissenting from denial of certiorari).

[Footnote 2/3]

Van Dyke, at 152, quoting Texas Observer, May 11, 1973, p. 9, col. 2. An earlier jury selection treatise circulated in the same county instructed prosecutors: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated." Quoted in Dallas Morning News, Mar. 9, 1986, p. 29, col. 1.

[Footnote 2/4]

Id. at 1, col. 1; *see also* Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St.Louis U. L.J. 662 (1974).

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado v. Connelly*,474 U. S. 1050 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey v. T.L.O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting) — cases in which the Court directed the State to brief and argue questions not presented in its petition

for certiorari — and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision.*Post* at 476 U. S. 115-116, nn. 1 and 2. In this case, however — unlike *Connelly* and *T.L.O.* — the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the equal protection issue:

". . . Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether *Swain versus Alabama* should be reaffirmed. . . ."

"* * * *"

". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. *Swain* dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group."

"Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of *Swain.*"

"* * * *"

"In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced *Swain*, and we respectfully request that this Court affirm the opinion of the Kentucky court, as well as to reaffirm *Swain versus Alabama.* [Footnote 3/1]"

In addition to the party's reliance on the equal protection argument in defense of the judgment, several *amici curiae*

also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

"PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS"

"A. Under *Swain v. Alabama*, A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case [Footnote 3/2]"

Several other *amici* similarly emphasized this issue. [Footnote 3/3]

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years, [Footnote 3/4] I believe the Court acts wisely in

resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court. [Footnote 3/5]

[Footnote 3/1]

Tr. of Oral Arg. 27-28, 43.

[Footnote 3/2]

Brief for United States as *Amicus Curiae* 7.

[Footnote 3/3]

The argument section of the brief for the National District Attorneys Association, Inc., as *amicus curiae* in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v. Alabama.*"

Id. at 5.

Amici supporting petitioner also emphasized the importance of the equal protection issue. *See, e.g.*, Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as *Amici Curiae* 24-36; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 11-17; Brief for Elizabeth Holtzman as *Amicus Curiae* 13.

[Footnote 3/4]

See McCray v. New York, 461 U.S. 961 (1983) (opinion of STEVENS, J., respecting denial of certiorari); *id.* at 963 (MARSHALL, J., dissenting from denial of certiorari).

The eventual federal habeas corpus disposition of *McCray*, of course, proved to be one of the landmark cases that made the issues in this case ripe for review. *McCray v. Abrams*, 750 F.2d 1113 (CA2 1984), *cert. pending*, No. P,4-1426. *See also* Pet. for Cert. 5-7 (relying heavily on *McCray* as a reason for review). In *McCray*, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of *Swain*. 750 F.2d at 1118-1124. The pending petition for certiorari in *McCray* similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84-1426 (Question 2). Indeed, shortly after agreeing to hear *Batson*,the Court was presented with a motion to consolidate *McCray* and *Batson*, and consider the cases together. Presumably because the Court believed that *Batson*adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. *See Abrams v. McCray*,471 U.S. 1097 (1985). *Cf. ibid.* (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of motion to consolidate).

[Footnote 3/5]

Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, *see, e.g.*, *Bender v. Williamsport Area School Dist.*, 475 U. S. 534, 475 U. S. 551 (1986) (BURGER, C.J., dissenting) (addressing merits even though majority of the Court found a lack of standing); *Colorado v. Nunez*, 465 U. S. 324 (1984) (concurring opinion, joined by BURGER, C.J.) (expressing view on merits even though writ was dismissed as improvidently granted because state court judgment rested on adequate and independent state grounds); *Florida v. Casal*, 462 U. S. 637, 462 U. S. 639 (1983) (BURGER, C.J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that "the citizens of t he state must be aware that they have the power to amend state law to ensure rational law enforcement"). *See also Colorado v. Connelly*, 474 U. S. 1050 (1986) (ordering parties to address issue that neither party raised); *New Jersey v. T.L.O.*, 468 U. S. 1214 (1984) (same).

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and JUSTICE WHITE that today's decision does not apply retroactively.

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CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried

"in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross-section of the community."

Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. *See* Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84-SC-733-MR (Ky.). As petitioner explained at oral argument here:

"We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking *Swain* as such."

Tr. of Oral Arg. 6-7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improper

in this Court: "*The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . .'" Illinois v. Gates*, *459 U. S. 1028*, *1029, n. 2 (1982) (STEVENS, J., dissenting) (quoting Cardinale v. Louisiana*,*394 U. S. 437*, *394 U. S. 438 (1969)). Neither the Court nor JUSTICE STEVENS offers any justification for departing from this time-honored principle, which dates to Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and Crowell v. Randell, 10 Pet. 368 (1836).*

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's "question presented" involved only the

"constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross-section of the community."

Pet. for Cert. i. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted "the irrelevance of the *Swain* analysis to the present case," Brief for Petitioner 11; instead, petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor v. Louisiana*, 419 U. S. 522 (1975). During oral argument, counsel for petitioner was pointedly asked:

"QUESTION: Mr. Niehaus, *Swain* was an equal protection challenge, was it not?"

"MR. NIEHAUS: Yes."

"QUESTION: Your claim here is based solely on the Sixth Amendment?"

"MR. NIEHAUS: Yes."

"QUESTION: Is that correct?"

"MR. NIEHAUS: That is what we are arguing, yes. "

"QUESTION: You are not asking for a reconsideration of *Swain*, and you are making no equal protection claim here. Is that correct?"

"MR. NIEHAUS: We have not made an equal protection claim. I think that *Swain* will have to be reconsidered to a certain extent, if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general."

"* * * *"

"MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking *Swain* as such. . . ."

Tr. of Oral Arg. 5-7. A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

"QUESTION: So I come back again to my question why you didn't attack *Swain* head on, but I take it, if the Court were to overrule *Swain*, you wouldn't like that result."

"MR. NIEHAUS: Simply overrule *Swain* without adopting the remedy?"

"QUESTION: Yes."

"MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no."

"QUESTION: That is a concession."

Id. at 10. Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

"MR. NIEHAUS: . . . [T]here is no state action involved where the defendant is exercising his peremptory challenge. "

"QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike."

"MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question. . . ."

Id. at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have — as we sometimes do — directed the parties to brief the equal protection question in addition to the Sixth Amendment question. *See, e.g., Paris Adult Theatre I v. Slaton*, 408 U.S. 921 (1972); *Colorado v. Connelly*, 474 U. S. 1050 (1986). [Footnote 4/1] Even following oral argument, we could have — as we sometimes do — directed reargument on this particular question. *See, e.g., Brown v. Board of Education*, 345 U.S. 972 (1953); *Illinois v. Gates*, *supra; New Jersey v. T.L.O.*, 468 U. S. 1214 (1984). [Footnote 4/2] This step is particularly appropriate where reexamination

of a prior decision is under consideration. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984) (directing reargument and briefing on issue of whether *National League of Cities v. Usery*, 426 U. S. 833 (1976), should be reconsidered); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005 (1975) (directing reargument and briefing on issue of whether the holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by petitioner. The only explanation for this action is found in JUSTICE STEVENS' concurrence. JUSTICE STEVENS apparently believes that this issue is properly before the Court because "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance." *Ante* at 476 U. S. 109. *Cf. Illinois v. Gates*, 459 U.S. at 1029, n. 1 (STEVENS, J., dissenting) ("[T]here is no impediment to presenting a new argument as an alternative basis for *affirming* the decision below") (emphasis in original). To be sure, respondent and supporting *amici* did cite *Swain* and the Equal Protection Clause. But their arguments were largely limited to explaining

that *Swain* placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." JUSTICE STEVENS does not cite, and I am not aware of, any

case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

JUSTICE STEVENS also observes that several *amici curiae* address the equal protection argument. *Ante* at 476 U. S. 109-110, and n. 3. But I thought it well settled that, even if a "point is made in an *amicus curiae* brief," if the claim "has never been advanced by petitioners, . . . we have no reason to pass upon it."*Knetsch v. United States*, 364 U. S. 361, 364 U. S. 370 (1960).

When objections to peremptory challenges were brought to this Court three years ago, JUSTICE STEVENS agreed with JUSTICE MARSHALL that the challenge involved "a significant and recurring question of constitutional law." *McCray v. New York*, 461 U.S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari), *referred to with approval*, *id.* at 961 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, JUSTICE STEVENS wrote that the issue could be dealt with "more wisely at a later date." *Id.* at 962. The same conditions exist here today. JUSTICE STEVENS concedes that reargument of this case "might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years." *Ante* at 476 U. S. 110. Thus, at bottom, his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral

argument on this claim might convince us to do otherwise. [Footnote 4/3] I believe that "[d]ecisions made in this manner are unlikely to withstand the test of time."*United States v. Leon*, 468 U. S. 897, 468 U. S. 962 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in *Swain* should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the "*very old credentials'" of the peremptory challenge and the "`widely held belief that peremptory challenge is a necessary part of trial by jury.'" Ante at 476 U. S. 91, n. 15 (quoting Swain, 380 U.S. at380 U. S. 219). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago, it was*

recognized that "[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed.

"It was in use amongst the Romans in criminal cases, and the *Lex Servilia* (B.C. 104) enacted that the accuser and the accused should severally propose one hundred *judices*, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime."

Ibid.; see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain*, JUSTICE WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

"In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to 'infinite delayes and danger.' Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that, if 'they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain.' So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to 'stand aside' until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies."

380 U.S. at 380 U. S. 212-213 (footnotes omitted).

Peremptory challenges have a venerable tradition in this country as well:

"In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. . . ."

"The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common law right to stand aside, and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant."

Id. at 380 U. S. 214-216 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge.*Swain* observed:

"The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way, the peremptory satisfies the rule that, "to perform its high function in the best way, *justice must satisfy the appearance of justice.'*""

Id. at 380 U. S. 219 (quoting *In re Murchison*, 349 U. S. 133, 349 U. S. 136 (1955)).

Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

"The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals, and in which each is held reasonable and open to compromise. . . . [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say, but know is true more often than not."

Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan.L.Rev. 545, 553-554 (1975). For reasons such as these, this Court concluded in *Swain* that "the [peremptory] challenge is *one of the most important of the rights'" in our justice system. Swain, 380 U.S. at 380 U. S. 219 (quoting Pointer v. United States, 151 U. S. 396,151 U. S. 408 (1894)). For close to a century, then, it has been settled that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." Swain, supra, at 380 U. S. 219 (citing Lewis v. United States, 146 U. S. 370 (1892)).*

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a

violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least *Strauder West Virginia*, 100 U. S. 303 (1880). But if today's decision is nothing more than mere "application" of the "principles announced in *Strauder*," as the Court maintains, *ante* at 476 U. S. 89-90, some will consider it curious that the application went unrecognized for over a century. The Court in *Swain* had no difficulty in unanimously concluding that cases such as *Strauder* did not require inquiry into the basis for a peremptory challenge.*See post* at 476 U. S. 135-137 (REHNQUIST, J., dissenting). More recently we held that "[d]efendants are not entitled to a jury of any particular composition. . . ."*Taylor v. Louisiana*, 419 U.S. at 419 U. S. 538.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in *Strauder* and the allegations before us today:

"Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) . . . has made the general determination that those excluded are unfit to try *any* case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed *litigants* in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that *particular case*than others on the same venire."

"Thus, excluding a particular cognizable group from an venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks *a priori* across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular

isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its *inferiority*, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not."

United States v. Leslie, 783 F.2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as *Strauder*, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons

"normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."

Swain, supra, at 380 U. S. 220. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of "assumption" or "intuitive judgment." *Ante* at 476 U. S. 97. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum "rationality" in government actions has no application to "*an arbitrary and capricious right,'" Swain, supra, at 380 U. S. 219 (quoting Lewis v. United States, supra, at 146 U. S. 378); a constitutional principle that may invalidate state action on the basis of "stereotypic notions," Mississippi University for Women v. Hogan, 458 U. S. 718, 458 U. S. 725 (1982), does not explain the breadth of a procedure exercised on the "`sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" Lewis, supra, at 146 U. S. 376 (quoting 4 W. Blackstone, Commentaries *353).*

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge *on the basis of race;* the

Court's opinion clearly contains such a limitation. *See ante* at 476 U. S. 96 (to establish a *prima facie* case, "the defendant first must show that he is a member of a cognizable *racial group*") (emphasis added); *ibid.* ("[F]inally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury *on account of their race*") (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, *Craig v. Boren*, 429 U. S. 190 (1976); age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U. S. 307 (1976); religious or political affiliation, *Karcher v. Daggett*, 462 U. S. 725, 748 (1983) (STEVENS, J., concurring); mental capacity, *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); number of children, *Dandridge v. Williams*, 397 U. S. 471 (1970); living arrangements, *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973); and employment in a particular industry, *Minnesota v. Clover Leaf Creamery Co.*, 449 U. S. 456 (1981), or profession, *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955). [Footnote 4/4]

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a "classification" subject to equal protection scrutiny. *See McCray v. Abrams*, 750 F.2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), *cert. pending*, No. 84-1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under "strict scrutiny and . . . sustained only if . . . suitably tailored to serve a compelling state interest," *Cleburne*, 473

U.S. at 473 U. S. 440; others would be reviewed to determine if they were "substantially related to a sufficiently important government interest," *id.* at 473 U. S. 441; and still others would be reviewed to determine whether they were "a rational means to serve a legitimate end." *Id.* at 473 U. S. 442.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago, the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." *Lewis v. United States,* 146 U.S. at 146 U. S. 376. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further "litigation [that] will be required to spell out the contours of the Court's equal protection holding today. . . ." *Ante* at 476 U. S. 102 (WHITE, J., concurring). [Footnote 4/5]

The Court also purports to express "no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Ante* at 476 U. S. 89, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable

tool to both prosecutors and defense attorneys alike. Once the Court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not? [Footnote 4/6]

"Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.'"

Ante at 476 U. S. 107 (MARSHALL, J., concurring) (quoting *Hayes v. Missouri*, 120 U. S. 68, 120 U. S. 70 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes for the holding in *Swain* a curious hybrid. The defendant must first establish a "*prima facie* case," *ante* at 476 U. S. 93-94, of invidious discrimination, then the "burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Ante* at 476 U. S. 97. The Court explains that "the operation of *prima facie* burden of proof rules" is established in "[o]ur decisions concerning *disparate treatment'. . . ." Ante at 476 U. S. 94, n. 18. The Court then adds, borrowing again from a Title VII case, that "the prosecutor must give a `clear and reasonably specific' explanation of his `legitimate reasons' for exercising the challenges." Ante at 476 U. S. 98, n. 20 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 450 U. S. 258 (1981)). [Footnote 4/7]*

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress, [Footnote 4/8] they seem curiously out

of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not.

"It is called a peremptory challenge because the prisoner may challenge peremptorily, on his own dislike, *without showing of any cause.*"

H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: a challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force "the peremptory challenge [to] collapse into the challenge for cause." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in *Swain* that, if scrutiny were permitted,

"[t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards."

Swain, 380 U.S. at 380 U. S. 222.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a *prima facie* case, the Court requires a "neutral explanation" for the challenge, but is at pains to "emphasize" that the "explanation need not rise to the level

justifying exercise of a challenge for cause." *Ante* at 476 U. S. 97. I am at a loss to discern the governing principles here. A "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything

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short of a challenge for cause may well be seen as an "arbitrary and capricious" challenge, to use Blackstone's characterization of the peremptory. *See* 4 W. Blackstone, Commentaries *353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary — but not too much. While our trial judges are "experienced in supervising *voir dire*, " *ante* at476 U. S. 97, they have no experience in administering rules like this.

An example will quickly demonstrate how today's holding, while purporting to "further the ends of justice," *ante* at 476 U. S. 99, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. *See Turner v. Murray*, *ante* at 476 U. S. 36-37. The basis for such a question is to flush out any "juror who believes that [Asians] are violence-prone or morally inferior. . . ." *Ante* at 476 U. S. 35. [Footnote 4/9] Assume further that all white jurors deny harboring racial prejudice, but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an "assumption," or "intuitive judgment," *ante* at 476 U. S. 97, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in *Lewis v. United States:*

"[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom

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he has conceived a prejudice even without being able to assign a reason for such his dislike."

146 U.S. at 146 U. S. 376. The effect of the Court's decision, however, will be to force the defendant to come forward and "articulate a neutral explanation," *ante* at476 U. S. 98, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial. This will surely do more than "disconcert" litigants; it will diminish confidence in the jury system.

A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a "melting pot." In *Avery v. Georgia*, 345 U. S. 559 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that

"opportunity for working of a discriminatory system exists whenever the mechanism for jury selection *has a component part*, such as the slips here, *that differentiates between white and colored. . . .*"

Id. at 345 U. S. 564 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that "such questions may be offensive to some jurors, and thus are not ordinarily asked on *voir dire*." *People v. Motton*, 39 Cal.3d 596, 604, 704 P.2d

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176, 180, *modified*, 40 Cal.3d 4b (1985) (advance sheet). [Footnote 4/10] This process is sure to tax even the most capable counsel and judges, since determining whether a *prima facie* case has been established will "require a continued monitoring and recording of the *group' composition of the panel present and prospective. . . .*" *People v. Wheeler, 22 Cal.3d 258, 294, 583 P.2d 748, 773 (1978) (Richardson, J., dissenting).*

Even after a "record" on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. *See People v. Motton, supra.*However,

after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error, and that she was black. 71 A.B.A.J. 22 (Nov.1985). The California court nonetheless denied a rehearing petition. [Footnote 4/11]

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: "[W]e make no attempt to instruct [trial] courts how best to implement

our holding today." *Ante* at 476 U. S. 99-100, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right." I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

"from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions."

Holley v. J & S Sweeping Co., 143 Cal.App.3d 588, 595-596, 192 Cal.Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted). The Court's effort to "furthe[r] the ends of justice," *ante* at 476 U. S. 99, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil "sporting contest" theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. *See* Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds.1979). Pound warned then that "too much of the current dissatisfaction has a just origin in our judicial organization and procedure." *Id.* at 352. I am afraid that today's newly created constitutional right will justly give rise to similar disapproval.

III

I also add my assent to JUSTICE WHITE's conclusion that today's decision does not apply retroactively. *Ante* at 476 U. S. 102 (concurring); *see also ante* at 476 U. S. 111(O'CONNOR, J., concurring). We held in *Solem v. Stumes*, 465 U. S. 638, 465 U. S. 643(1984), that

"'[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' *Stovall v. Denno*, 388 U. S. 293, 388 U. S. 297 (1967)."

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only "cuts this Court loose from the force of precedent," *Mackey v. United States*, 401 U. S. 667, 401 U. S. 680 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert "the clear danger of convicting the innocent." *Tehan v. United States ex rel. Shott*, 382 U. S. 406, 382 U. S. 416 (1966). Second, it is readily apparent that "law enforcement authorities and state courts have justifiably relied on a prior rule of law. . . ." *Solem*,465 U.S. at 465 U. S. 645-646. Today's holding clearly "overrule[s] [a] prior decision" and drastically "transform[s] standard practice." *Id.* at 465 U. S. 647. This fact alone "virtually compel[s]" the conclusion of nonretroactivity. *United States v. Johnson*, 457 U. S. 537, 457 U. S. 549-550 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a "*prima facie* showing" of invidious intent, *ante* at476 U. S. 97, and, if so, whether the state has a sufficient "neutral explanation" for its actions, *ibid.*, essentially requires reconstructing

the entire *voir dire*, something that will be extremely difficult even if undertaken soon after the close of the trial. [Footnote 4/12] In most cases, therefore, retroactive application of today's decision will be "a virtual impossibility." *State v. Neil*, 457 So.2d 481, 488

(Fla.1984).

In sum, under our prior holdings, it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. *See People v. Wheeler,* 22 Cal.3d at 283, n. 31, 583 P.2d at 766, n. 31; *State v. Neil*, *supra*, at 488; *Commonwealth v. Soares*, 377 Mass. 461, 493, n. 38, 387 N.E.2d 499, 518, n. 38, *cert. denied*, 444 U.S. 881 (1979). [Footnote 4/13] I therefore am persuaded by JUSTICE WHITE's position, *ante* at 476 U. S. 102(concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

"The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that"

"it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes

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of society. . . ."

Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980). At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

[Footnote 4/1]

In *Colorado v. Connelly,* JUSTICE BRENNAN, joined by JUSTICE STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that

"it is hardly for this Court to 'second chair' the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.' Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not 'fairly included' in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim."

474 U.S. at 1052. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was "cause for concern," I would think *a fortiori* that the far more expansive action the Court takes today would warrant similar concern.

[Footnote 4/2]

JUSTICE STEVENS, joined by JUSTICE BRENNAN and JUSTICE MARSHALL, dissented from the order directing reargument in *New Jersey v. T.L.O.* They explained:

"The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here. . . . Volunteering unwanted advice is rarely a wise course of action."

"* * * *"

"I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review."

468 U.S. at 1215-1216.

JUSTICE STEVENS' proffered explanation notwithstanding, *see ante* at 476 U. S. 109(concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

[Footnote 4/3]

This fact alone distinguishes the cases cited by JUSTICE STEVENS as support for today's unprecedented action. *See ante* at 476 U. S. 111, n. 5. In *Bender v. Williamsport Area School Dist.*, 475 U. S. 534, 475 U. S. 551 (1986) (BURGER, C.J., dissenting), *Colorado v. Nunez*, 465 U. S. 324 (1984) (WHITE, J., concurring), and *Florida v. Casal*, 462 U. S. 637, 462 U. S. 639 (1983) (BURGER, C.J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[un]necessary to the disposition of the case or petition." *Ante* at 476 U. S. 111, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in *Colorado v. Connelly*, 474 U. S. 1050 (1986), and *New Jersey v. T.L.O.*,468 U. S. 1214 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

[Footnote 4/4]

While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. *See Alexander v. Louisiana*, 405 U. S. 625, 405 U. S. 633 (1972).

[Footnote 4/5]

The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," *ante* at 476 U. S. 97, but on sociological studies or other similar foundations. *See* Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, . . . then counsel has exercised the challenge as it was intended — to remove the most partial jurors." *Id.*at 365.

[Footnote 4/6]

"[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited."

United States v. Leslie, 783 F.2d 541, 565 (CA5 1986) (en banc).

[Footnote 4/7]

One court has warned that overturning *Swain* has "[t]he potential for stretching out criminal trials that are already too long, by making the *voir dire* a Title VII proceeding in miniature." *United States v. Clark*, 737 F.2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

[Footnote 4/8]

It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discerns today. As the Solicitor General explains in urging a rejection of the Sixth Amendment issue presented by this petition and an affirmance of the decision below,

"[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment, it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* . . . [T]he House Report makes clear that . . ."

"the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons."

Brief for United States as *Amicus Curiae* 20, n. 11 (quoting H.R.Rep. No. 1076, 90th Cong., 2d Sess., 5-6 (1968)).

[Footnote 4/9]

This question, required by *Turner* in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury *voir dire* seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

[Footnote 4/10]

The California Supreme Court has attempted to finesse this problem by asserting that

"discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a *prima facie* case"

of racial discrimination. *People v. Motton*, 39 Cal.3d at 604, 704 P.2d at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record" of such impressions is to be made.

[Footnote 4/11]

Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." *Ante* at 476 U. S. 83. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that, "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does *not* hold that petitioner has established a "*prima facie* case" entitling him to any form of relief. *Ante* at 476 U. S. 100.

[Footnote 4/12]

Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

[Footnote 4/13]

Although Delaware has suggested that it might follow a rule like that adopted by the Court today, *see Riley v. State*, 496 A.2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain v. Alabama*, 380 U. S. 202 (1965), concerning

"the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."

Ante at 476 U. S. 82 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks

"for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population,"

380 U.S. at 380 U. S. 224, might violate the guarantees of equal protection. *See id.*at 380 U. S. 222-228. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the

exclusion of blacks "in case after case, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be.*" *Id.* at 380 U. S. 223(emphasis added). Nevertheless, the Court ultimately held that

"the record in this case is not sufficient to demonstrate that th[is] rule has been violated. . . . Petitioner has the burden of proof, and he has failed to carry it."

Id. at 380 U. S. 224, 380 U. S. 226. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. *See id.* at 380 U. S. 228-247 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

Significantly, the *Swain* Court reached a very different conclusion with respect to the second kind of peremptory challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. *Id.* at 380 U. S. 209-222. JUSTICE WHITE, writing for the Court, explained:

"While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a *real or imagined* partiality that is less easily designated or demonstrable. *Hayes v. Missouri*, 120 U. S. 68, 120 U. S. 70 [1887]. It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' *Lewis \[v. United States*,146 U. S. 370,] 146 U. S. 376 [1892], upon a juror's 'habits and associations,' *Hayes v. Missouri, supra,* at 120 U. S. 70, or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' *Lewis, supra,* at 146 U. S. 376. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people

summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather, they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory. . . ."

Id. at 380 U. S. 220-222 (emphasis added; footnotes omitted). At the beginning of Part III of the opinion, the *Swain* Court reiterated:

"We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, *the particular defendant involved*, and the particular crime charged."

Id. at 380 U. S. 223 (emphasis added).

Even the *Swain* dissenters did not take issue with the majority's position that the Equal Protection Clause does not prohibit the State from using its peremptory challenges to exclude blacks based on the assumption or belief that they would be partial to a black defendant. The dissenters emphasized that their view concerning the evidentiary burden facing a defendant who alleges an equal protection claim based on the State's use of peremptory challenges

"would

[not] mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury *in a particular case*."

Id. at 380 U. S. 245 (Goldberg, J., dissenting) (emphasis added).

The Court today asserts, however, that

"the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely . . . on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

Ante at 476 U. S. 89. Later, in discussing the State's need to establish a nondiscriminatory basis for striking blacks from the jury, the Court states that

"the prosecutor may not rebut the defendant's *prima facie* case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race."

Ante at 476 U. S. 97. Neither of these statements has anything to do with the "evidentiary burden" necessary to establish an equal protection claim in this context, and both statements are directly contrary to the view of the Equal Protection Clause shared by the majority and the dissenters in *Swain*. Yet the Court in the instant case offers absolutely no analysis in support of its decision to overrule *Swain* in this regard, and in fact does not discuss Part II of the *Swain*opinion at all.

I cannot subscribe to the Court's unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge, which has been described as "a necessary part of trial by jury." *Swain*, 380 U.S. at 380 U. S. 219. In my view, there is simply nothing "unequal" about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so

on. This case-specific use of peremptory challenges by the State does not single out blacks, or members of any other race for that matter, for discriminatory treatment. [Footnote 5/1] Such use of peremptories is, at best, based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see — and the Court most certainly has not explained — how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment.*See ante* at 476 U. S. 84-85, n. 4. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving nonblack defendants, it harms neither the excluded jurors nor the remainder of the community. *See ante* at 476 U. S. 87-88.

The use of group affiliations, such as age, race, or occupation, as a "proxy" for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges. *See Swain, supra; United States v. Leslie*, 783 F.2d 541 (CA5 1986) (en banc); *United States v. Carter*, 528 F.2d 844 (CA8 1975), *cert. denied*, 425 U.S. 961 (1976). Indeed, given the need for reasonable

limitations on the time devoted to *voir dire*, the use of such "proxies" by both the State and the defendant [Footnote 5/2] may be extremely useful in eliminating from the jury persons who might be biased in one way or another. The Court today holds that the State may not use its peremptory challenges to strike black prospective jurors on this basis without violating the Constitution. But I do not believe there is anything in the Equal Protection Clause, or any other constitutional provision, that justifies such a departure from the substantive holding contained in Part II of *Swain.* Petitioner in the instant case failed to make a sufficient showing to overcome the presumption announced in *Swain* that the State's use of peremptory challenges was related to the context of the case. I would therefore affirm the judgment of the court below.

[Footnote 5/1]

I note that the Court does not rely on the argument that, because there are fewer "minorities" in a given population than there are "majorities," the equal use of peremptory challenges against members of "majority" and "minority" racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in *United States v. Leslie*,783 F.2d 541, 558-561 (1986).

[Footnote 5/2]

See, e.g., Commonwealth v. DiMatteo, 12 Mass.App. 547, 427 N.E.2d 754 (1981) (under State Constitution, trial judge properly rejected white defendant's attempted peremptory challenge of black prospective juror).

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11.2: Griffin v. California 380 US 609(1965)

U.S. Supreme Court

Griffin v. California, 380 U.S. 609 (1965)

Griffin v. California

No. 202

Argued March 9, 1965

Decided April 28, 1965

380 U.S. 609

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify as to the matters which he can reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant's silence under those circumstances evidences guilt violates the Self-Incrimination Clause of the Fifth Amendment of the Federal Constitution, as made applicable to the States by the Fourteenth, *Malloy v. Hogan*, 378 U. S. 1. 380 U. S. 610-615.

60 Cal.2d 182, 383 P.2d 432, reversed.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree after a jury trial in a California court. He did not testify at the trial on the issue of guilt, though he did testify at the separate trial [Footnote 1] on the issue of penalty. The trial court instructed the jury on the issue of guilt, stating

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that a defendant has a constitutional right not to testify. But it told the jury: [Footnote 2]

"As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

It added, however, that no such inference could be drawn as to evidence respecting which he had no knowledge. It stated that failure of a defendant to deny or explain the evidence of which he had knowledge does not create a presumption of guilt, nor, by itself, warrant an inference of guilt nor relieve the prosecution of any of its burden of proof.

Petitioner had been seen with the deceased the evening of her death, the evidence placing him with her in the alley where her body was found. The prosecutor made much of the failure of petitioner to testify:

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her."

"What kind of a man is it that would want to have sex with a woman that beat up is she was beat up at the time he left? "

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"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor, because he was conscious of his own guilt and wanted to get away from that damaged or injured woman."

"These things he has not seen fit to take the stand and deny or explain."

"And, in the whole world, if anybody would know, this defendant would know."

"Essie Mae is dead; she can't tell you her side of the story. The defendant won't."

The death penalty was imposed, and the California Supreme Court affirmed. 60 Cal.2d 182, 32 Cal.Rptr. 24, 383 P.2d 432. The case is here on a writ of certiorari which we granted, 377 U.S. 989, to consider whether comment on the failure to testify violated the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth in *Malloy v. Hogan*, 378 U. S. 1, decided after the Supreme Court of California had affirmed the present conviction. [Footnote 3]

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If this were a federal trial, reversible error would have been committed. *Wilson v. United States*, 149 U. S. 60, so holds. It is said, however, that the *Wilson* decision rested not on the Fifth Amendment, but on an Act of Congress, now 18 U.S.C. § 3481. [Footnote 4] That indeed is the fact, as the opinion of the Court in the *Wilson*case states. *And see Adamson v. California*, 332 U. S. 46, 332 U. S. 50, n. 6;

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Bruno v. United States, 308 U. S. 287, 308 U. S. 294. But that is the beginning, not the end, of our inquiry. The question remains whether, statute or not, the comment rule, approved by California, violates the Fifth Amendment.

We think it does. It is, in substance, a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made, as in other situations, but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance. The Court in the *Wilson* case stated:

". . . the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him will often confuse and embarrass him to such a degree as to increase, rather than remove, prejudices against him. It is not everyone, however, honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him."

149 U.S. p. 149 U. S. 66.

If the words "fifth Amendment" are substituted for "act" and, for "statute," the spirit of the Self-Incrimination

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Clause is reflected. For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy v. Waterfront Comm.*, 378 U. S. 52,378 U. S. 55, which the Fifth Amendment outlaws. [Footnote 5] It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is, in any event, natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People v. Modesto*, 62 Cal.2d 436, 452-453, 42 Cal.Rptr. 417, 426-427, 398 P.2d 753, 762-763. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. That the inference

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of guilt is not always so natural or irresistible is brought out in the *Modesto* opinion itself:

"Defendant contends that the reason a defendant refuses to testify is that his prior convictions will be introduced in evidence to impeach him (Code Civ.Proc. § 2051), and not that he is unable to deny the accusations. It is true that the defendant might fear that his prior convictions will prejudice the jury, and therefore another possible inference can be drawn from his refusal to take the stand."

Id. p. 453, 42 Cal.Rptr., p. 427, 398 P.2d, p. 763.

We said in *Malloy v. Hogan*, *supra*, p. 378 U. S. 11, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." We take that in its literal sense, and hold that the Fifth Amendment, in its direct

application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. [Footnote 6]

Reversed.

THE CHIEF JUSTICE took no part in the decision of this case.

[Footnote 1]

See Penal Code § 190.1, providing for separate trials on the two issues.

[Footnote 2]

Article I, § 13, of the California Constitution provides in part:

". . . in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

[Footnote 3]

The California Supreme Court later held, in *People v. Modesto*, 62 Cal.2d 436, 42 Cal.Rptr. 417, 398 P.2d 753, that its "comment" rule squared with *Malloy v. Hogan*,378 U. S. 1. The overwhelming consensus of the States, however, is opposed to allowing comment on the defendant's failure to testify. The legislatures or courts of 44 States have recognized that such comment is, in light of the privilege against self-incrimination, "an unwarrantable line of argument." *State v. Howard*, 35 S.C. 197, 203, 14 S.E. 481, 483. *See* 8 Wigmore, Evidence § 2272, n. 2 (McNaughton rev. ed. 1961 and 1964 Supp.). Of the six States which permit comment, two, California and Ohio, give this permission by means of an explicit constitutional qualification of the privilege against self-incrimination. Cal.Const. Art. I, § 13; Ohio Const. Art. I, § 10. New Jersey permits comment, *State v. Corby*, 28 N.J. 106, 145 A.2d 289; *cf. State v. Garvin*, 44 N.J. 268, 208 A.2d 402; but its constitution contains no provision embodying the privilege against self-incrimination (*see Laba v. Newark Bd. of Educ.*,23 N.J. 364, 389, 129 A.2d 273, 287; *State v. White*, 27 N.J. 158, 168-169, 142 A.2d 65, 70). The absence of an express constitutional privilege against self-incrimination also puts Iowa among the six. *See State v. Ferguson*, 226 Iowa 361, 372-373, 283 N.W. 917, 923. Connecticut permits comment by the judge, but not by the prosecutor. *State v. Heno*, 119 Conn. 29, 174 A. 181. New Mexico permits comment by the prosecutor, but holds that the accused is then entitled to an instruction that "the jury shall indulge no presumption against the accused because of his failure to testify." N.M.Stat.Ann. § 41-12-19; *State v. Sandoval*, 59 N.M. 85, 279 P.2d 850.

[Footnote 4]

Section 3481 reads as follows:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

June 25, 1948, c. 645, 62 Stat. 833.

The legislative history shows that 18 U.S.C. § 3481 was designed, *inter alia*, to bar counsel for the prosecution from commenting on the defendant's refusal to testify. Mr. Frye of Maine, spokesman for the bill, said, "That is the law of Massachusetts, and we proposed to adopt it as a law of the United States." 7 Cong.Rec. 385. The reference was to Mass.Stat. 1866, c. 260, now Mass.Gen.Laws Ann., c. 233, § 20, cl. Third (1959), which is almost identical with 18 U.S.C. § 3481. *See also Commonwealth v. Harlow*, 110 Mass. 411; *Commonwealth v. Scott*, 123 Mass. 239; *Opinion of the Justices*, 300 Mass. 620, 15 N.E.2d 662.

[Footnote 5]

Our decision today that the Fifth Amendment prohibits comment on the defendant's silence is no innovation, for, on a previous occasion, a majority of this Court indicated their acceptance of this proposition. In *Adamson v. California*, 332 U. S. 46, the question was, as here, whether the Fifth Amendment proscribed California's comment practice. The four dissenters (BLACK, DOUGLAS, Murphy and Rutledge, JJ.) would have answered this question in the affirmative. A fifth member of the Court, Justice Frankfurter, stated in a separate opinion:

"For historical reasons, a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in

federal prosecutions."

Id. p. 332 U. S. 61. But, though he agreed with the dissenters on this point, he also agreed with Justices Vinson, Reed, Jackson, and Burton that the Fourteenth Amendment did not make the Self-Incrimination Clause of the Fifth Amendment applicable to the States; thus, he joined the opinion of the Court which so held (the Court's opinion assumed that the Fifth Amendment barred comment, but it expressly disclaimed any intention to decide the point. *Id.* p. 332 U. S. 50).

[Footnote 6]

We reserve decision on whether an accused can require, as in *Bruno v. United States*, 308 U. S. 287, that the jury be instructed that his silence must be disregarded.

MR. JUSTICE HARLAN, concurring.

I agree with the Court that, within the federal judicial system, the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial, a right accorded him by that amendment. And given last Term's decision in *Malloy v. Hogan*, 378 U. S. 1, that the Fifth Amendment applies

to the States in all its refinements, I see no legitimate escape from today's decision and therefore concur in it. I do so, however, with great reluctance, since, for me, the decision exemplifies the creeping paralysis with which this Court's recent adoption of the "incorporation" doctrine is infecting the operation of the federal system. *See* my opinion concurring in the result in *Pointer v. Texas*, 380 U. S. 400, at380 U. S. 408.

While I would agree that the accusatorial, rather than inquisitorial, process is a fundamental part of the "liberty" guaranteed by the Fourteenth Amendment, my Brother STEWART, in dissent, post, p. 380 U. S. 617, fully demonstrates that the no-comment rule "might be lost, and justice still be done," *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325. As a "non-fundamental" part of the Fifth Amendment (*cf.* my opinion concurring in the result in *Pointer*, 380 U.S. at 380 U. S. 409), I would not, but for *Malloy*, apply the no-comment rule to the States.

Malloy put forward a single argument for applying the Fifth Amendment, as such, to the States:

"It would be *incongruous* to have different standards determine the validity of a claim of privilege . . ., depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."

Malloy v. Hogan, *supra*, at 378 U. S. 11. (Emphasis added.)

My answer then (378 U.S. at 378 U. S. 27) and now is that "incongruity," within the limits of fundamental fairness, is at the heart of our federal system. The powers and responsibilities of the State and Federal Governments are not congruent, and, under the Constitution, they are not intended to be.

It has also recently been suggested that measuring state procedures against standards of fundamental fairness as reflected in such landmark decision as *Twining v. New*

Jersey, 211 U. S. 78, and *Palko v. Connecticut*, *supra*, "would require this Court to intervene in the state judicial process with considerable lack of predictability and with a consequent likelihood of considerable friction," *Pointer v. Texas*, *supra*, at 380 U. S. 413-414 (concurring opinion of GOLDBERG, J.). This approach to the requirements of federalism, not unlike that evinced by the Court in *Henry v. Mississippi*, 379 U. S. 443, apparently leads, in cases like this, to the conclusion that the way to eliminate friction with state judicial systems is not to attempt a working harmony, but to override them altogether.

Although compelled to concur in this decision, I am free to express the hope that the Court will eventually return to constitutional paths which, until recently, it has followed throughout its history.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, dissenting.

The petitioner chose not to take the witness stand at his trial upon a charge of first-degree murder in a California court. Article I, § 13, of the California Constitution establishes a defendant's privilege against self-incrimination, and further provides:

"[I]n any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court any by counsel, and may be considered by the court or the jury."

In conformity with this provision, the prosecutor, in his argument to the jury, emphasized that a person accused of crime in a public forum would ordinarily deny or explain the evidence against him if he truthfully could do so. [Footnote 2/1] Also in conformity with this California constitutional

provision, the judge instructed the jury in the following terms:

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that, among the inferences that may be reasonably drawn therefrom, those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that, if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

The jury found the petitioner guilty as charged, and his conviction was affirmed by the Supreme Court of California. [Footnote 2/2]

No claim is made that the prosecutor's argument or the trial judge's instructions to the jury in this case deprived the petitioner of due process of law as such. This Court long ago decided that the Due Process Clause of the Fourteenth Amendment does not, of its own force, forbid this kind of comment on a defendant's failure to testify. *Twining v. New Jersey*, 211 U. S. 78; *Adamson v. California*, 332 U. S. 46. The Court holds, however, that the California constitutional provision violates the Fifth Amendment's injunction that no person"shall be compelled in any criminal case to be a witness against himself," an injunction which the Court less than a year ago for the first time found was applicable to trials in the courts of the several States.

With both candor and accuracy, the Court concedes that the question before us is one of first impression here. [Footnote 2/3] It is a question which has not arisen before, because, until last year, the self-incrimination provision of the Fifth Amendment had been held to apply only to federal proceedings, and, in the federal judicial system, the matter has been

covered by a specific Act of Congress which has been in effect ever since defendants have been permitted to testify at all in federal criminal trials. [Footnote 2/4] *See Bruno v. United States*, 308 U. S. 287; *Wilson v. United States*, 149 U. S. 60; *Adamson v. California*, *supra.*

We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced. [Footnote 2/5]

Those were the lurid realities which behind enactment of the Fifth Amendment, a far cry from the subject matter of the case before us. I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds, and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel. In support of its conclusion that the California procedure does compel the accused to testify, the Court has only this to say: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Exactly what the penalty

imposed consists of is not clear. It is not, as I understand the problem, that the jury becomes aware that the defendant has chosen not to testify in his own defense, for the jury will, of course, realize this quite evidence fact, even though the choice goes unmentioned. Since comment by counsel and the court does not compel testimony by creating such an awareness, the Court must be saying that the California constitutional provision places some other compulsion upon the defendant to incriminate himself, some compulsion which the Court does not describe and which I cannot readily perceive.

It is not at all apparent to me, on any realistic view of the trial process, that a defendant will be at more of a disadvantage under the California practice than he would be in a court which permitted no comment at all on his failure to take the witness stand. How can it be said that the inferences drawn by a jury will be more detrimental to a defendant under the limiting and carefully controlling language of the instruction here involved than would result if the jury were left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt? The instructions in this case expressly cautioned the jury that the defendant's failure to testify "does not create a presumption of guilt or by itself warrant an inference of guilt"; it was further admonished that such failure does not "relieve the prosecution of its burden of providing every essential element of the crime," and, finally, the trial judge warned that the prosecution's burden remained that of proof "beyond a reasonable doubt." Whether the same limitations would be observed by a jury without the benefit of protective instructions shielding the defendant is certainly open to real doubt.

Moreover, no one can say where the balance of advantage might lie as a result of the attorneys' discussion of the matter. No doubt the prosecution's argument will seek to encourage the drawing of inferences unfavorable to the

defendant. However, the defendant's counsel equally has an opportunity to explain the various other reasons why a defendant may not wish to take the stand, and thus rebut the natural if uneducated assumption that it is because the defendant cannot truthfully deny the accusations made.

I think the California comment rule is not a coercive device which impairs the right against self-incrimination, but rather a means of articulating and bringing into the light of rational discussion a fact inescapably impressed on the jury's consciousness. The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts. Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence and to shape a legal process designed to ascertain the truth.

The California rule allowing comment by counsel and instruction by the judge on the defendant's failure to take the stand is hardly an idiosyncratic aberration. The Model Code of Evidence, and the Uniform Rules of Evidence both sanction the use of such procedures. [Footnote 2/6] The practice has been endorsed by resolution of the American Bar Association and the American Law Institute, [Footnote 2/7] and has the support of the weight of scholarly opinion. [Footnote 2/8]

The formulation of procedural rules to govern the administration of criminal justice in the various States is properly a matter of local concern. We are charged with no general supervisory power over such matters; our only legitimate function is to prevent violations of the Constitution's commands. California has honored the constitutional command that no person shall "be compelled in any criminal case to be a witness against himself." The petitioner was not compelled to testify, and he did not do so. But whenever, in a jury trial, a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind. Without limiting instructions, the danger exists that the inferences drawn by the jury may be unfairly broad. Some States have permitted this danger to go unchecked by forbidding any comment at all upon the defendant's failure to take the witness stand. [Footnote 2/9] Other States have dealt with this danger in a variety of ways, as the Court's opinion indicates. *Ante*, <l=|380 u.s.="" 609fn2="" 3|="">note 3, at pp. 380 U. S. 611-612. Some might differ, as a matter of policy, with the way California has chosen to deal with the problem, or even disapprove of the judge's specific instructions in this case. [Footnote 2/10] But, so long as the constitutional command is obeyed, such matters of state policy are not for this Court to decide.</l=|380>

I would affirm the judgment.

[Footnote 2/1]

See the excerpt from the prosecutor's argument quoted in the Court's opinion, *ante*, pp. 380 U. S. 609-610.

[Footnote 2/2]

60 Cal.2d 182, 32 Cal.Rptr. 24, 383 P.2d 432. As this case was decided before *Malloy v. Hogan*, 378 U. S. 1, the California Supreme Court did not give plenary consideration to the question now before us; however, that court has since upheld the federal constitutionality of the California comment rule in a thoroughly reasoned opinion by Chief Justice Traynor. *People v. Modesto*, 62 Cal.2d 436, 42 Cal.Rptr. 417, 398 P.2d 753.

[Footnote 2/3]

In the *Adamson* case, the present question was not reached, because the majority ruled that the Fifth Amendment is not applicable to the States. Mr. Justice Reed's opinion made clear that the California rule was only assumed to contravene the Fifth Amendment, "without any intention . . .of ruling upon the issue." The dissenting opinion of MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS read the majority opinion as "strongly [implying] that the Fifth Amendment does not, of itself, bar comment upon failure to testify," but they considered the case on the majority's assumption, thereby giving no approval to that assumption, even in dictum. That no such approval was given by this dissenting opinion is further made evident by the fact that Mr. Justice Murphy and Mr. Justice Rutledge, also in dissent, felt it necessary to make what they characterized as an "addition," an expression of their view that the guarantee against self-incrimination had been violated in the case. Mr. Justice Frankfurter, in concurring, also indicated that he was prepared to agree that the Fifth Amendment barred comment, thus bringing to three the members of the Court who, in dicta, took the view embraced by the Court today.

[Footnote 2/4]

20 Stat. 30, as amended, now 18 U.S.C. § 3481.

[Footnote 2/5]

See generally 8 Wigmore, Evidence § 2250 (McNaughton rev. ed. 1961).

[Footnote 2/6]

Model Code of Evidence, Rule 201 (1942); Uniform Rules of Evidence, Rule 23(4) (1953).

[Footnote 2/7]

56 A.B.A.Rep. 137-159 (1931); 59 A.B.A.Rep. 130-141 (1934); 9 Proceedings A.L.I. 202, 203 (1931).

[Footnote 2/8]

See Bruce, The Right to Comment on the Failure of the Defendant to Testify, 31 Mich.L.Rev. 226; Dunmore, Comment on Failure of Accused to Testify, 26 Yale L.J. 464; Hadley, Criminal Justice in America, 11 A.B.A.J. 674, 677; Hiscock, Criminal Law and Procedure in New York, 26 Col.L.Rev. 253, 258-262; Note, Comment on Defendant's Failure to Take the Stand, 57 Yale L.J. 145.

[Footnote 2/9]

See, e.g., State v. Pearce, 56 Minn., 226, 57 N.W. 652, 1065; *Tines v. Commonwealth*,77 S.W. 363, 25 Ky.L.Rep. 1233; *Hanks v. Commonwealth*, 248 Ky. 203, 58 S.W.2d 394.

[Footnote 2/10]

It should be noted that the defendant's counsel did not request any additions to the instructions which would have brought but other possible reasons which might have influenced the defendant's decision not to become a witness. The California Constitution does not, in terms, prescribe what form of instruction should be given, and the petitioner has not argued that another form would have been denied.

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11.3: In re Gault 387 U.S. 1 (1967

U.S. Supreme Court

In re Gault, 387 U.S. 1 (1967)

In re Gault

No. 116

Argued December 6, 1966

Decided May 15, 1967

387 U.S. 1

APPEAL FROM THE SUPREME COURT OF ARIZONA

Syllabus

Appellants' 15-year-old son, Gerald Gault, was taken into custody as the result of a complaint that he had made lewd telephone calls. After hearings before a juvenile court judge, Gerald was ordered committed to the State Industrial School as a juvenile delinquent until he should reach majority. Appellants brought a habeas corpus action in the state courts to challenge the constitutionality of the Arizona Juvenile Code and the procedure actually used in Gerald's case, on the ground of denial of various procedural due process rights. The State Supreme Court affirmed dismissal of the writ. Agreeing that the constitutional guarantee of due process applies to proceedings in which juveniles are charged as delinquents, the court held that the Arizona Juvenile Code impliedly includes the requirements of due process in delinquency proceedings, and that such due process requirements were not offended by the procedure leading to Gerald's commitment.

Held:

1. *Kent v. United States*, 383 U. S. 541, 383 U. S. 562 (1966), held "that the [waiver] hearing must measure up to the essentials of due process and fair treatment." This view is reiterated, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution. The holding in this case relates only to the adjudicatory stage of the juvenile process, where commitment to a state institution may follow. When proceedings may result in incarceration in an institution of

confinement, "it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase *due process.*'" *Pp.387 U. S. 12-31.*

2. Due process requires, in such proceedings, that adequate written notice be afforded the child and his parents or guardian. Such notice must inform them "of the specific issues that they must meet," and must be given "at the earliest practicable time, and, in any event, sufficiently in advance of the hearing to permit preparation." Notice here was neither timely nor adequately specific, nor was there waiver of the right to constitutionally adequate notice. Pp. 387 U. S. 31-34.

3. In such proceedings, the child and his parents must be advised of their right to be represented by counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child. Mrs. Gault's statement at the habeas corpus hearing that she had known she could employ counsel, is not "an *intentional relinquishment or abandonment' of a fully known right." Pp. 387 U. S. 34-42.*

4. The constitutional privilege against self-incrimination is applicable in such proceedings:

"an admission by the juvenile may [not] be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak, and would not be penalized for remaining silent."

"[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. . . . [J]uvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination."

Furthermore, experience has shown that "admissions and confessions by juveniles require special caution" as to their reliability and voluntariness, and "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children."

"[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children, and . . . there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary. . . ."

Gerald's admissions did not

measure up to these standards, and could not properly be used as a basis for the judgment against him. Pp. 387 U. S. 44-56.

5. Absent a valid confession, a juvenile in such proceedings must be afforded the rights of confrontation and sworn testimony of witnesses available for cross-examination. Pp. 387 U. S. 56-57.

6. Other questions raised by appellants, including the absence of provision for appellate review of a delinquency adjudication, and a transcript of the proceedings, are not ruled upon. Pp. 387 U. S. 57-58.

99 Ariz. 181, 407 P.2d 760, reversed and remanded.

MR. JUSTICE FORTAS delivered the opinion of the Court.

This is an appeal under 28 U.S.C. § 1257(2) from a judgment of the Supreme Court of Arizona affirming the

dismissal of a petition for a writ of habeas corpus. 99 Ariz. 181, 407 P.2d 760 (1965). The petition sought the release of Gerald Francis Gault, appellants' 15-year-old son, who had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona. The Supreme Court of Arizona affirmed dismissal of the writ against various arguments which included an attack upon the constitutionality of the Arizona Juvenile Code because of its alleged denial of procedural due process rights to juveniles charged with being "delinquents." The court agreed that the constitutional guarantee of due process of law is applicable in such proceedings. It held that Arizona's Juvenile Code is to be read as "impliedly" implementing the "due process concept." It then proceeded to identify and describe "the particular elements which constitute due process in a juvenile hearing." It concluded that the proceedings ending in commitment of Gerald Gault did not offend those requirements. We do not agree, and we reverse. We begin with a statement of the facts.

I

On Monday, June 8, 1964, at about 10 a.m., Gerald Francis Gault and a friend, Ronald Lewis, were taken into custody by the Sheriff of Gila County. Gerald was then still subject to a six months' probation order which had been entered on February 25, 1964, as a result of his having been in the company of another boy who had stolen a wallet from a lady's purse. The police action on June 8 was taken as the result of a verbal complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd or indecent remarks. It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.

At the time Gerald was picked up, his mother and father were both at work. No notice that Gerald was being taken into custody was left at the home. No other steps were taken to advise them that their son had, in effect, been arrested. Gerald was taken to the Children's Detention Home. When his mother arrived home at about 6 o'clock, Gerald was not there. Gerald's older brother was sent to look for him at the trailer home of the Lewis family. He apparently learned then that Gerald was in custody. He so informed his mother. The two of them went to the Detention Home. The deputy probation officer, Flagg, who was also superintendent of the Detention Home, told Mrs. Gault "why Jerry was there," and said that a hearing would be held in Juvenile Court at 3 o'clock the following day, June 9.

Officer Flagg filed a petition with the court on the hearing day, June 9, 1964. It was not served on the Gaults. Indeed, none of them saw this petition until the habeas corpus hearing on August 17, 1964. The petition was entirely formal. It made no reference to any

factual basis for the judicial action which it initiated. It recited only that

"said minor is under the age of eighteen years, and is in need of the protection of this Honorable Court; [and that] said minor is a delinquent minor."

It prayed for a hearing and an order regarding "the care and custody of said minor." Officer Flagg executed a formal affidavit in support of the petition.

On June 9, Gerald, his mother, his older brother, and Probation Officers Flagg and Henderson appeared before the Juvenile Judge in chambers. Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. No memorandum or record of the substance of the proceedings was prepared. Our information about the proceedings

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and the subsequent hearing on June 15, derives entirely from the testimony of the Juvenile Court Judge, [Footnote 1] Mr. and Mrs. Gault and Officer Flagg at the habeas corpus proceeding conducted two months later. From this, it appears that, at the June 9 hearing, Gerald was questioned by the judge about the telephone call. There was conflict as to what he said. His mother recalled that Gerald said he only dialed Mrs. Cook's number and handed the telephone to his friend, Ronald. Officer Flagg recalled that Gerald had admitted making the lewd remarks. Judge McGhee testified that Gerald "admitted making one of these [lewd] statements." At the conclusion of the hearing, the judge said he would "think about it." Gerald was taken back to the Detention Home. He was not sent to his own home with his parents. On June 11 or 12, after having been detained since June 8, Gerald was released and driven home. [Footnote 2] There is no explanation in the record as to why he was kept in the Detention Home or why he was released. At 5 p.m. on the day of Gerald's release, Mrs. Gault received a note signed by Officer Flagg. It was on plain paper, not letterhead. Its entire text was as follows:

"Mrs. Gault: "

"Judge McGHEE has set Monday June 15, 1964 at 11:00 A.M. as the date and time for further Hearings on Gerald's delinquency"

/s/Flagg

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At the appointed time on Monday, June 15, Gerald, his father and mother, Ronald Lewis and his father, and Officers Flagg and Henderson were present before Judge McGhee. Witnesses at the habeas corpus proceeding differed in their recollections of Gerald's testimony at the June 15 hearing. Mr. and Mrs. Gault recalled that Gerald again testified that he had only dialed the number, and that the other boy had made the remarks. Officer Flagg agreed that, at this hearing Gerald did not admit making the lewd remarks. [Footnote 3] But Judge McGhee recalled that "there was some admission again of some of the lewd statements. He he didn't admit any of the more serious lewd statements." [Footnote 4] Again, the complainant, Mrs. Cook, was not present. Mrs. Gault asked that Mrs. Cook be present "so she could see which boy that done the talking, the dirty talking over the phone." The Juvenile Judge said "she didn't have to be present at that hearing." The judge did not speak to Mrs. Cook or communicate with her at any time. Probation Officer Flagg had talked to her once — over the telephone on June 9.

At this June 15 hearing a "referral report" made by the probation officers was filed with the court, although not disclosed to Gerald or his parents. This listed the charge as "Lewd Phone Calls." At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School "for the period of his minority [that is, until 21], unless sooner discharged

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by due process of law." An order to that effect was entered. It recites that "after a full hearing and due deliberation the Court finds that said minor is a delinquent child, and that said minor is of the age of 15 years."

No appeal is permitted by Arizona law in juvenile cases. On August 3, 1964, a petition for a writ of habeas corpus was filed with the Supreme Court of Arizona and referred by it to the Superior Court for hearing.

At the habeas corpus hearing on August 17, Judge McGhee was vigorously cross-examined as to the basis for his actions. He testified that he had taken into account the fact that Gerald was on probation. He was asked "under what section of . . . the code you found the boy delinquent?"

His answer is set forth in the margin. [Footnote 5] In substance, he concluded that Gerald came within ARS § 201-6(a), which specifies that a "delinquent child" includes one "who has violated a law of the state or an ordinance or regulation of a political subdivision thereof." The law which Gerald was found to have violated is ARS § 13-377. This section of the Arizona Criminal Code provides that a person who "in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language, is guilty of a misdemeanor. . . ." The penalty specified in the Criminal Code, which would

apply to an adult, is $5 to $50, or imprisonment for not more than two months. The judge also testified that he acted under ARS § 8-201-6(d), which includes in the definition of a "delinquent child" one who, as the judge phrased it, is "habitually involved in immoral matters." [Footnote 6]

Asked about the basis for his conclusion that Gerald was "habitually involved in immoral matters," the judge testified, somewhat vaguely, that two years earlier, on July 2, 1962, a "referral" was made concerning Gerald, "where the boy had stolen a baseball glove from another boy and lied to the Police Department about it." The judge said there was "no hearing," and "no accusation" relating to this incident, "because of lack of material foundation." But it seems to have remained in his mind as a relevant factor. The judge also testified that Gerald had admitted making other nuisance phone calls in the past, which, as the judge recalled the boy's testimony, were "silly calls, or funny calls, or something like that."

The Superior Court dismissed the writ, and appellants sought review in the Arizona Supreme Court. That court stated that it considered appellants' assignments of error as urging (1) that the Juvenile Code, ARS § 8-201 to § 8-23, is unconstitutional because it does not require that parents and children be apprised of the specific charges, does not require proper notice of a hearing, and does not provide for an appeal, and (2) that the proceedings

and order relating to Gerald constituted a denial of due process of law because of the absence of adequate notice of the charge and the hearing; failure to notify appellants of certain constitutional rights including the rights to counsel and to confrontation, and the privilege against self-incrimination; the use of unsworn hearsay testimony, and the failure to make a record of the proceedings. Appellants further asserted that it was error for the Juvenile Court to remove Gerald from the custody of his parents without a showing and finding of their unsuitability, and alleged a miscellany of other errors under state law.

The Supreme Court handed down an elaborate and wide-ranging opinion affirming dismissal of the writ and stating the court's conclusions as to the issues raised by appellants and other aspects of the juvenile process. In their jurisdictional statement and brief in this Court, appellants do not urge upon us all of the points passed upon by the Supreme Court of Arizona. They urge that we hold the Juvenile Code of Arizona invalid on its face or as applied in this case because, contrary to the Due Process Clause of the Fourteenth Amendment, the juvenile is taken from the custody of his parents and committed to a state institution pursuant to proceedings in which the Juvenile Court has virtually unlimited discretion, and in which the following basic rights are denied:

1. Notice of the charges;

2. Right to counsel;

3. Right to confrontation and cross-examination;

4. Privilege against self-incrimination;

5. Right to a transcript of the proceedings; and

6. Right to appellate review.

We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize

that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution. [Footnote 7]

II

The Supreme Court of Arizona held that due process of law is requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved, with the consequence that he is committed to an institution in which his freedom is curtailed. This conclusion is in accord with the decisions of a number of courts under both federal and state constitutions. [Footnote 8]

This Court has not heretofore decided the precise question. In *Kent v. United States*,383 U. S. 541 (1966), we considered the requirements for a valid waiver of the "exclusive" jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court of the District. Although our decision turned upon the language of the statute, we emphasized the necessity that "the basic requirements of due process and fairness" be satisfied in such proceedings. [Footnote 9] *Haley v. Ohio*, 332 U. S. 596 (1948), involved the admissibility, in a state criminal court of general jurisdiction, of a confession by a 15-year-old boy. The Court held that the Fourteenth Amendment applied to

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prohibit the use of the coerced confession. MR. JUSTICE DOUGLAS said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." [Footnote 10] To the same effect is *Gallegos v. Colorado*, 370 U. S. 49 (1962). Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

We do not in this opinion consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. *See* note 48 *infra*. We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. [Footnote 11] The problem is to ascertain

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the precise impact of the due process requirement upon such proceedings.

From the inception of the juvenile court system, wide differences have been tolerated — indeed insisted upon — between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. [Footnote 12] It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles. [Footnote 13]

The history and theory underlying this development are well known, but a recapitulation is necessary for purposes of this opinion. The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico. [Footnote 14] The constitutionality

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of Juvenile Court laws has been sustained in over 40 jurisdictions against a variety of attacks. [Footnote 15]

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." [Footnote 16] The child — essentially good, as they saw it — was to be made "to feel that he is the object of [the state's] care and solicitude," [Footnote 17] not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both

substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was

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to be "treated" and "rehabilitated," and the procedures, from apprehension through institutionalization, were to be "clinical", rather than punitive.

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae.* [Footnote 18] The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky, and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. [Footnote 19] But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. [Footnote 20] In these old days,

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the state was not deemed to have authority to accord them fewer procedural rights than adults.

The right of the state, as *parens patriae,* to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty, but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions — that is, if the child is "delinquent" — the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. [Footnote 21] On this basis, proceedings involving juveniles were described as "civil," not "criminal," and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. [Footnote 22]

Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is — to say the least — debatable. And in practice, as we remarked in the *Kent* case, *supra,* the results have

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not been entirely satisfactory. [Footnote 23] Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts. . . ." [Footnote 24] The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently

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resulted not in enlightened procedure, but in arbitrariness. The Chairman of the Pennsylvania Council of Juvenile Court Judges has recently observed:

"Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process. [Footnote 25]"

Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate

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or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. [Footnote 26] As Mr. Justice

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Frankfurter has said: “The history of American freedom is, in no small measure, the history of procedure.” [Footnote 27] But, in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. “Procedure is to law what *scientific method' is to science.” [Footnote 28]*

It is claimed that juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process. As we shall discuss, the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process. [Footnote 29] But it is important, we think, that the claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes, for example, to such startling findings

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as that reported in an exceptionally reliable study of repeaters or recidivism conducted by the Stanford Research Institute for the President’s Commission on Crime in the District of Columbia. This Commission’s Report states:

“In fiscal 1966, approximately 66 percent of the 16- and 17-year-old juveniles referred to the court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once, and that 42 percent had been referred at least twice before.”

Id. at 773.

Certainly these figures and the high crime rates among juveniles to which we have referred (*supra*, n 26), could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done, is effective to reduce crime or rehabilitate offenders. We do not mean by this to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable. But the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion. [Footnote 30] Further, we are

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told that one of the important benefits of the special juvenile court procedures is that they avoid classifying the juvenile as a “criminal.” The juvenile offender is now classed as a “delinquent.” There is, of course, no reason why this should not continue. It is disconcerting,

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however, that this term has come to involve only slightly less stigma than the term “criminal” applied to adults. [Footnote 31] It is also emphasized that, in practically all jurisdictions, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him for civil service appointment. [Footnote 32] There is no reason why the application of due process requirements should interfere with such provisions.

Beyond this, it is frequently said that juveniles are protected by the process from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law’s policy “to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.” This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those, the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. [Footnote 33] Of more importance are police records. In most States, the police keep a complete file of juvenile “police contacts” and have complete discretion as to disclosure of

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juvenile records. Police departments receive requests for information from the FBI and other law enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. [Footnote 34] Private employers word their application

forms to produce information concerning juvenile arrests and court proceedings, and, in some jurisdictions, information concerning juvenile police contacts is furnished private employers as well as government agencies. [Footnote 35]

In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles. It is interesting to note, however, that the Arizona Supreme Court used the confidentiality argument as a justification for the type of notice which is here attacked as inadequate for due process purposes. The parents were given merely general notice that their child was charged with "delinquency." No facts were specified. The Arizona court held, however, as we shall discuss, that, in addition to this general "notice," the child and his parents must be advised "of the facts involved in the case" no later than the initial hearing by the judge. Obviously, this does not "bury" the word about the child's transgressions. It merely defers the time of disclosure to a point when it is of limited use to the child or his parents in preparing his defense or explanation.

Further, it is urged that the juvenile benefits from informal proceedings in the court. The early conception

of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career." [Footnote 36] Then, as now, goodwill and compassion were admirably prevalent. But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned. For example, in a recent study, the sociologists Wheeler and Cottrell observe that, when the procedural laxness of the "*parens patriae*" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. They conclude as follows:

"Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated, and may therefore resist the rehabilitative efforts of court personnel. [Footnote 37]"

Of course it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they

are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.

Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." [Footnote 38] Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness [Footnote 39] to rape and homicide.

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and

the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it — was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? [Footnote 40] Under traditional notions, one would

assume that, in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. [Footnote 41] Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and his "wanting to go to . . . Grand Canyon with his father," the points to which the judge directed his attention were little different from those that would be involved

in determining any charge of violation of a penal statute. [Footnote 42] The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18.

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. [Footnote 43] For the particular offense immediately involved, the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18 and had committed an offense to which such a sentence might apply, he would have been entitled to substantial rights under the Constitution of the United States as well as under Arizona's laws and constitution. The United States Constitution would guarantee him rights and protections with respect to arrest, search and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere

verbiage, and reasons more persuasive than cliche can provide. As Wheeler and Cottrell have put it,

"The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines. [Footnote 44]"

In *Kent v. United States*, *supra*, we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that "the admonition to function in a *parental' relationship is not an invitation to procedural arbitrariness." [Footnote 45] With respect to the waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth, we said that*

"there is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a statement of reasons. [Footnote 46]"

We announced with respect to such waiver proceedings that, while

"We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. [Footnote 47]"

We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement

which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution. [Footnote 48]

We now turn to the specific issues which are presented to us in the present case.

III

NOTICE OF CHARGES.

Appellants allege that the Arizona Juvenile Code is unconstitutional, or, alternatively, that the proceedings before the Juvenile Court were constitutionally defective because of failure to provide adequate notice of the hearings. No notice was given to Gerald's parents when he was taken into custody on Monday, June 8. On that night, when Mrs. Gault went to the Detention Home, she was

orally informed that there would be a hearing the next afternoon and was told the reason why Gerald was in custody. The only written notice Gerald's parents received at any time was a note on plain paper from Officer Flagg delivered on Thursday or Friday, June 11 or 12, to the effect that the judge had set Monday, June 15, "for further Hearings on Gerald's delinquency."

A "petition" was filed with the court on June 9 by Officer Flagg, reciting only that he was informed and believed that "said minor is a delinquent minor and that it is necessary that some order be made by the Honorable Court for said minor's welfare." The applicable Arizona

statute provides for a petition to be filed in Juvenile Court, alleging in general terms that the child is "neglected, dependent or delinquent." The statute explicitly states that such a general allegation is sufficient, "without alleging the facts." [Footnote 49] There is no requirement that the petition be served, and it was not served upon, given to, or shown to Gerald or his parents. [Footnote 50]

The Supreme Court of Arizona rejected appellants' claim that due process was denied because of inadequate notice. It stated that "Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home." The court also pointed out that the Gaults appeared at the two hearings "without objection." The court held that, because "the policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past," advance notice of the specific charges or basis for taking the juvenile into custody and for the hearing is not necessary. It held that the appropriate rule is that

"the infant and his parent or guardian will receive a petition only reciting a conclusion of delinquency. [Footnote 51] But, no later than the initial hearing by the judge, they must be advised of the facts involved in the

case. If the charges are denied, they must be given a reasonable period of time to prepare."

We cannot agree with the court's conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged misconduct with particularity." [Footnote 52] It is obvious, as we have discussed above, that no purpose of shielding the child from the public stigma of knowledge of his having been taken into custody and scheduled for hearing is served by the procedure approved by the court below. The "initial hearing" in the present case was a hearing on the merits. Notice at that time is not timely, and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and, in any event, sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described — that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. [Footnote 53] It does

not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet. Nor, in the circumstances of this case, can it reasonably be said that the requirement of notice was waived. [Footnote 54]

IV

RIGHT TO COUNSEL

Appellants charge that the Juvenile Court proceedings were fatally defective because the court did not advise Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency, and the order of commitment in the absence of counsel for the child and his parents or an express waiver of the right thereto. The Supreme Court of Arizona pointed out that "[t]here is disagreement [among the various jurisdictions] as to whether the court must advise the infant

that he has a right to counsel." [Footnote 55] It noted its own decision in *Arizona State Dept. of Public Welfare v. Barlow*, 80 Ariz. 249, 296 P.2d 28 (1956), to the effect "that *the parents* of an infant in a juvenile proceeding cannot be denied representation by counsel of their choosing." (Emphasis added.) It referred to a provision of the Juvenile Code which it characterized as requiring "that the probation officer shall look after the interests of neglected, delinquent and dependent children," including representing their interests in court. [Footnote 56] The court argued that "The parent and the probation officer may be relied upon to protect the infant's interests." Accordingly, it rejected the proposition that "due process requires that an infant have a right to counsel." It said that juvenile courts have the discretion, but not the duty, to allow such representation; it referred specifically to the situation in which the Juvenile Court discerns conflict between the child and his parents as an instance in which this discretion might be exercised. We do not agree. Probation

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officers, in the Arizona scheme, are also arresting officers. They initiate proceedings and file petitions which they verify, as here, alleging the delinquency of the child, and they testify, as here, against the child. And here the probation officer was also superintendent of the Detention Home. The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing, by statute and, in fact, is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. [Footnote 57] A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, [Footnote 58] to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him." [Footnote 59] Just as in *Kent v. United States*, *supra*, at 383 U. S. 561-562, we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration

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in a state institution until the juvenile reaches the age of 21. [Footnote 60]

During the last decade, court decisions, [Footnote 61] experts, [Footnote 62] and legislatures [Footnote 63] have demonstrated increasing recognition of this view. In at least one-third of the States, statutes

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now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions. [Footnote 64]

The President's Crime Commission has recently recommended that, in order to assure "procedural justice for the child," it is necessary that "Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent." [Footnote 65] As stated by the authoritative "Standards

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for Juvenile and Family Courts," published by the Children's Bureau of the United States Department of Health, Education, and Welfare:

"As a component part of a fair hearing required by due process guaranteed under the 14th amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel."

Standards, p. 57.

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This statement was "reviewed" by the National Council of Juvenile Court Judges at its 1965 Convention and they "found no fault" with it. [Footnote 66] The New York Family Court Act contains the following statement:

"This act declares that minors have a right to the assistance of counsel of their own choosing or of law guardians [Footnote 67] in neglect proceedings under article three and in proceedings to determine juvenile delinquency and whether a person is in need of

supervision under article seven. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. [Footnote 68]"

The Act provides that "At the commencement of any hearing" under the delinquency article of the statute, the juvenile and his parent shall be advised of the juvenile's

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"right to be represented by counsel chosen by him or his parent . . . or by a law guardian assigned by the court. . . ." [Footnote 69] The California Act (1961) also requires appointment of counsel. [Footnote 70]

We conclude that the Due Process Clause of the Fourteenth Amendment requires that, in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or, if they are unable to afford counsel, that counsel will be appointed to represent the child.

At the habeas corpus proceeding, Mrs. Gault testified that she knew that she could have appeared with counsel

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at the juvenile hearing. This knowledge is not a waiver of the right to counsel which she and her juvenile son had, as we have defined it. They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled, in view of the seriousness of the charge and the potential commitment, to appointed counsel unless they chose waiver. Mrs. Gault's knowledge that she could employ counsel was not an "intentional relinquishment or abandonment" of a fully known right. [Footnote 71]

V

CONFRONTATION, SELF-INCRIMINATION, CROSS-EXAMINATION

Appellants urge that the writ of habeas corpus should have been granted because of the denial of the rights of confrontation and cross-examination in the Juvenile Court hearings, and because the privilege against self-incrimination was not observed. The Juvenile Court Judge testified at the habeas corpus hearing that he had proceeded on the basis of Gerald's admissions at the two hearings. Appellants attack this on the ground that the admissions were obtained in disregard of the privilege against self-incrimination. [Footnote 72] If the confession is disregarded, appellants argue that the delinquency conclusion, since it was fundamentally based on a finding that Gerald had made lewd remarks during the phone call to Mrs. Cook, is fatally defective for failure to accord the rights of confrontation and cross-examination which the Due Process Clause of the Fourteenth Amendment of the

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Federal Constitution guarantees in state proceedings generally. [Footnote 73]

Our first question, then, is whether Gerald's admission was improperly obtained and relied on as the basis of decision, in conflict with the Federal Constitution. For this purpose, it is necessary briefly to recall the relevant facts.

Mrs. Cook, the complainant, and the recipient of the alleged telephone call, was not called as a witness. Gerald's mother asked the Juvenile Court Judge why Mrs. Cook was not present, and the judge replied that "she didn't have to be present." So far as appears, Mrs. Cook was spoken to only once, by Officer Flagg, and this was by telephone. The judge did not speak with her on any occasion. Gerald had been questioned by the probation officer after having been taken into custody. The exact circumstances of this questioning do not appear, but any admissions Gerald may have made at this time do not appear in the record. [Footnote 74] Gerald was also questioned by the Juvenile Court Judge at each of the two hearings. The judge testified in the habeas corpus proceeding that Gerald admitted making "some of the lewd statements. . . , [but not] any of the more serious lewd statements." There was conflict and uncertainty among the witnesses at the habeas corpus proceeding — the Juvenile Court Judge, Mr. and Mrs. Gault, and the probation officer — as to what Gerald did or did not admit.

We shall assume that Gerald made admissions of the sort described by the Juvenile Court Judge, as quoted above. Neither Gerald nor his parents were advised that

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he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a "delinquent."

The Arizona Supreme Court rejected appellants' contention that Gerald had a right to be advised that he need not incriminate himself. It said:

"We think the necessary flexibility for individualized treatment will be enhanced by a rule which does not require the judge to advise the infant of a privilege against self-incrimination."

In reviewing this conclusion of Arizona's Supreme Court, we emphasize again that we are here concerned only with a proceeding to determine whether a minor is a "delinquent" and which may result in commitment to a state institution. Specifically, the question is whether, in such a proceeding, an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent. In light of *Miranda v. Arizona*, 384 U. S. 436 (1966), we must also consider whether, if the privilege against self-incrimination is available, it can effectively be waived unless counsel is present or the right to counsel has been waived.

It has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny. Dean Wigmore states:

"The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, judicial experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported . . . , but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that, under certain stresses, a person, especially one of defective mentality or peculiar

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temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is, at the time, the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt in preference to some worse alternative associated with silence."

"* * * *"

"The principle, then, upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*. . . . [T]he essential feature is that the principle of exclusion is a testimonial one, analogous to the other principles which exclude narrations as untrustworthy. . . . [Footnote 75]"

This Court has emphasized that admissions and confessions of juveniles require special caution. In *Haley v. Ohio*, 332 U. S. 596, where this Court reversed the conviction of a 15-year-old boy for murder, MR. JUSTICE DOUGLAS said:

"What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight

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to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. [Footnote 76]"

In *Haley*, as we have discussed, the boy was convicted in an adult court, and not a juvenile court. In notable decisions, the New York Court of Appeals and the Supreme Court of New Jersey have recently considered decisions of Juvenile Courts in which boys have been adjudged "delinquent" on the basis of confessions obtained in circumstances comparable to those in *Haley*. In both instances, the State contended before its highest tribunal that constitutional requirements governing inculpatory statements applicable in adult courts do not apply to juvenile proceedings. In each case, the State's contention was rejected, and the juvenile court's determination of delinquency was set aside on the grounds of inadmissibility of the confession. *In the Matters of Gregory W. and Gerald S.*, 19 N.Y.2d 55, 224 N.E.2d 102 (1966) (opinion by Keating, J.), and *In the Interests of Carlo and Stasilowicz*, 48 N.J. 224, 225 A.2d 110 (1966) (opinion by Proctor, J.).

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The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle, because the privilege reflects the limits of the individual's attornment to the state and — in a philosophical sense — insists upon the equality of the individual and the state. [Footnote 77] In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction. [Footnote 78]

It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. As MR. JUSTICE WHITE, concurring, stated in *Murphy v. Waterfront Commission*, 378 U. S. 52, 378 U. S. 94 (1964):

"The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosures*

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which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.* [Footnote 79]"

(Emphasis added.)

With respect to juveniles, both common observation and expert opinion emphasize that the "distrust of confessions made in certain situations" to which Dean Wigmore referred in the passage quoted *supra*, at 387 U. S. 44-45, is imperative in the case of children from an early age through adolescence. In New York, for example, the recently enacted Family Court Act provides that the juvenile and his parents must be advised at the start of the hearing of his right to remain silent. [Footnote 80] The New York statute also provides that the police must attempt to communicate with the juvenile's parents before questioning him, [Footnote 81] and that, absent "special circumstances," a confession may not be obtained from a child prior to notifying his parents or relatives and releasing the child either to them or to the Family Court. [Footnote 82] In *In the Matters of Gregory W. and Gerald S.*, referred to above, the New York Court of Appeals held that the privilege against self-incrimination applies in juvenile delinquency cases and requires the exclusion of involuntary confessions, and that *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353

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(1932), holding the contrary, had been specifically overruled by statute.

The authoritative "Standards for Juvenile and Family Courts" concludes that,

"Whether or not transfer to the criminal court is a possibility, certain procedures should always be followed. Before being interviewed [by the police], the child and his parents should be informed of his right to have legal counsel present and to refuse to answer questions or be fingerprinted [Footnote 83] if he should so decide. [Footnote 84]"

Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil," and not "criminal," and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to

the States by reason of the Fourteenth Amendment, is that no person "shall be compelled in any criminal case to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory. [Footnote 85]

It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold

otherwise would be to disregard substance because of the feeble enticement of the "civil" "label of convenience" which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States, juveniles may be placed in or transferred to adult penal institutions [Footnote 86] after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty — a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom. [Footnote 87]

In addition, apart from the equivalence for this purpose of exposure to commitment as a juvenile delinquent and exposure to imprisonment as an adult offender, the fact of the matter is that there is little or no assurance in Arizona, as in most if not all of the States, that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish

or waive jurisdiction to the ordinary criminal courts. [Footnote 88] In the present case, when Gerald Gault was interrogated concerning violation of a section of the Arizona Criminal Code, it could not be certain that the Juvenile Court Judge would decide to "suspend" criminal prosecution in court for adults by proceeding to an adjudication in Juvenile Court. [Footnote 89]

It is also urged, as the Supreme Court of Arizona here asserted, that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders.

In fact, evidence is accumulating that confessions by juveniles do not aid in "individualized treatment," as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. In light of the observations of Wheeler and Cottrell, [Footnote 90] and others, it seems probable that, where children are induced to confess by "paternal" urgings on the part of officials and the confession is then followed

by disciplinary action, the child's reaction is likely to be hostile and adverse — the child may well feel that he has been led or tricked into confession and that, despite his confession, he is being punished. [Footnote 91]

Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of "confessions" by children. This Court's observations in *Haley v. Ohio* are set forth above. The recent decision of the New York Court of Appeals referred to above, *In the Matters of Gregory W. and Gerald S.*, deals with a dramatic and, it is to be hoped, extreme example. Two 12-year-old Negro boys were taken into custody for the brutal assault and rape of two aged domestics, one of whom died as the result of the attack. One of the boys was schizophrenic, and had been locked in the security ward of a mental institution at the time of the attacks. By a process that may best be described as bizarre, his confession was obtained by the police. A psychiatrist testified that the boy would admit "whatever he thought was expected so that he could get out of the immediate situation." The other 12-year-old also "confessed." Both confessions were in specific detail, albeit they contained various inconsistencies. The Court of Appeals, in an opinion by Keating, J., concluded that the confessions were products of the will of the police, instead of the boys. The confessions

were therefore held involuntary, and the order of the Appellate Division affirming the order of the Family Court adjudging the defendants to be juvenile delinquents was reversed.

A similar and equally instructive case has recently been decided by the Supreme Court of New Jersey. *In the Interests of Carlo and Stasilowicz, supra.* The body of a 10-year-old girl was found. She had been strangled. Neighborhood boys who knew the girl were questioned.

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The two appellants, aged 13 and 15, confessed to the police, with vivid detail and some inconsistencies. At the Juvenile Court hearing, both denied any complicity in the killing. They testified that their confessions were the product of fear and fatigue due to extensive police grilling. The Juvenile Court Judge found that the confessions were voluntary and admissible. On appeal, in an extensive opinion by Proctor, J., the Supreme Court of New Jersey reversed. It rejected the State's argument that the constitutional safeguard of voluntariness governing the use of confessions does not apply in proceedings before the Juvenile Court. It pointed out that, under New Jersey court rules, juveniles under the age of 16 accused of committing a homicide are tried in a proceeding which "has all of the appurtenances of a criminal trial," including participation by the county prosecutor, and requirements that the juvenile be provided with counsel, that a stenographic record be made, etc. It also pointed out that, under New Jersey law, the confinement of the boys after reaching age 21 could be extended until they had served the maximum sentence which could have been imposed on an adult for such a homicide, here found to be second-degree murder carrying up to 30 years' imprisonment. [Footnote 92] The court concluded that the confessions were involuntary, stressing that the boys, contrary to statute, were placed in the police station and there interrogated; [Footnote 93] that the parents of both boys were not allowed to see them while they

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were being interrogated; [Footnote 94] that inconsistencies appeared among the various statements of the boys and with the objective evidence of the crime, and that there were protracted periods of questioning. The court noted the State's contention that both boys were advised of their constitutional rights before they made their statements, but it held that this should not be given "significant weight in our determination of voluntariness." [Footnote 95] Accordingly, the judgment of the Juvenile Court was reversed.

In a recent case before the Juvenile Court of the District of Columbia, Judge Ketcham rejected the proffer of evidence as to oral statements made at police headquarters by four juveniles who had been taken into custody for alleged involvement in an assault and attempted robbery. *In the Matter of Four Youths*, Nos. 28-776-J, 28-778-J, 28-783-J, 28-859-J, Juvenile Court of the District of Columbia, April 7, 1961. The court explicitly stated that it did not rest its decision on a showing that

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the statements were involuntary, but because they were untrustworthy. Judge Ketcham said:

"Simply stated, the Court's decision in this case rests upon the considered opinion — after nearly four busy years on the Juvenile Court bench during which the testimony of thousands of such juveniles has been heard — that the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy, and often distort the truth."

We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. [Footnote 96]

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The "confession" of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears. The judgment of the Juvenile Court was stated by the judge to be based on Gerald's admissions in court. Neither "admission" was reduced to writing, and, to say the least, the process by which the "admissions" were obtained and received must be characterized as lacking the certainty and order which are required of

proceedings of such formidable consequences. [Footnote 97] Apart from the "admissions," there was nothing upon which a judgment or finding might be based. There was no sworn testimony. Mrs. Cook, the complainant, was not present. The Arizona Supreme Court held that

"sworn testimony must be required of all witnesses including police officers, probation officers and others who are part of or officially related to the juvenile court structure."

We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of "delinquency" and an order committing Gerald to a state institution for a maximum of six years.

The recommendations in the Children's Bureau's "Standards for Juvenile and Family Courts" are in general accord with our conclusions. They state that testimony should be under oath and that only competent, material and relevant evidence under rules applicable

to civil cases should be admitted in evidence. [Footnote 98] The New York Family Court Act contains a similar provision. [Footnote 99]

As we said in *Kent v. United States*, 383 U. S. 541, 383 U. S. 554 (1966), with respect to waiver proceedings, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony. . . ." We now hold that, absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.

VI

APPELLATE REVIEW AND TRANSCRIPT OF PROCEEDINGS

Appellants urge that the Arizona statute is unconstitutional under the Due Process Clause because, as construed by its Supreme Court, "there is no right of appeal

from a juvenile court order. . . ." The court held that there is no right to a transcript because there is no right to appeal and because the proceedings are confidential, and any record must be destroyed after a prescribed period of time. [Footnote 100] Whether a transcript or other recording is made, it held, is a matter for the discretion of the juvenile court.

This Court has not held that a State is required by the Federal Constitution "to provide appellate courts or a right to appellate review at all." [Footnote 101] In view of the fact that we must reverse the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus for other reasons, we need not rule on this question in the present case or upon the failure to provide a transcript or recording of the hearings — or, indeed, the failure of the Juvenile Judge to state the grounds for his conclusion. *Cf. Kent v. United States, supra*, at 383 U. S. 561, where we said, in the context of a decision of the juvenile court waiving jurisdiction to the adult court, which by local law, was permissible: ". . . it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor." As the present case illustrates, the consequences of failure to provide an appeal, to record the proceedings, or to make findings or state the grounds for the juvenile court's conclusion may be to throw a burden upon the machinery for habeas corpus, to saddle the reviewing process with the burden of attempting to reconstruct a record, and to impose upon the Juvenile Judge the unseemly duty of testifying under cross-examination as to the events that transpired in the hearings before him. [Footnote 102]

For the reasons stated, the judgment of the Supreme Court of Arizona is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[Footnote 1]

Under Arizona law, juvenile hearings are conducted by a judge of the Superior Court, designated by his colleagues on the Superior Court to serve as Juvenile Court Judge. Arizona Const., Art. 6, § 15; Arizona Revised Statutes (hereinafter ARS) §§ 8-201, 8-202.

[Footnote 2]

There is a conflict between the recollection of Mrs. Gault and that of Officer Flagg. Mrs. Gault testified that Gerald was released on Friday, June 12, Officer Flagg that it had been on Thursday, June 11. This was from memory; he had no record, and the note hereafter referred to was undated.

[Footnote 3]

Officer Flagg also testified that Gerald had not, when questioned at the Detention Home, admitted having made any of the lewd statements, but that each boy had sought to put the blame on the other. There was conflicting testimony as to whether Ronald had accused Gerald of making the lewd statements during the June 15 hearing.

[Footnote 4]

Judge McGhee also testified that Gerald had not denied "certain statements" made to him at the hearing by Officer Henderson.

[Footnote 5]

"Q. All right. Now, Judge, would you tell me under what section of the law or tell me under what section of — of the code you found the boy delinquent?"

"A. Well, there is a — I think it amounts to disturbing the peace. I can't give you the section, but I can tell you the law, that, when one person uses lewd language in the presence of another person, that it can amount to — and I consider that, when a person makes it over the phone, that it is considered in the presence, I might be wrong, that is one section. The other section upon which I consider the boy delinquent is Section 201, Subsection (d), habitually involved in immoral matters."

[Footnote 6]

ARS § 8-201-6, the section of the Arizona Juvenile Code which defines a delinquent child, reads:

"'Delinquent child' includes: "

"(a) A child who has violated a law of the state or an ordinance or regulation of a political subdivision thereof."

"(b) A child who, by reason of being incorrigible, wayward or habitually disobedient, is uncontrolled by his parent, guardian or custodian."

"(c) A child who is habitually truant from school or home."

"(d) A child who habitually so deports himself as to injure or endanger the morals or health of himself or others."

[Footnote 7]

For example, the laws of Arizona allow arrest for a misdemeanor only if a warrant is obtained or if it is committed in the presence of the officer. ARS § 13-1403. The Supreme Court of Arizona held that this is inapplicable in the case of juveniles. *See*ARS § 8-221, which relates specifically to juveniles. *But compare Two Brothers and a Case of Liquor,* Juv.Ct.D.C. Nos. 66-2652-J, 66-2653-J, December 28, 1966 (opinion of Judge Ketcham); Standards for Juvenile and Family Courts, Children's Bureau Pub. No. 437-1966, p. 47 (hereinafter cited as Standards); New York Family Court Act § 721 (1963) (hereinafter cited as N.Y.Family Court Act).

The court also held that the judge may consider hearsay if it is "of a kind on which reasonable men are accustomed to rely in serious affairs." *But compare* Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv.L.Rev. 775, 794-795 (1966) (hereinafter cited as Harvard Law Review Note):

"The informality of juvenile court hearings frequently leads to the admission of hearsay and unsworn testimony. It is said that 'close adherence to the strict rules of evidence might prevent the court from obtaining important facts as to the child's character and condition which could only be to the child's detriment.' The assumption is that the judge will give normally inadmissible evidence only its proper weight. It is also declared in support of these evidentiary practices that the juvenile court is not a criminal court, that the importance of the hearsay rule has been overestimated, and that allowing an attorney to make 'technical objections' would disrupt the desired informality of the proceedings. But to the extent that the rules of evidence are not merely technical or historical, but, like the hearsay rule, have a sound basis in human experience, they should not be rejected in any judicial inquiry. Juvenile

court judges in Los Angeles, Tucson, and Wisconsin Rapids, Wisconsin report that they are satisfied with the operation of their courts despite application of unrelaxed rules of evidence."

(Footnotes omitted.)

It ruled that the correct burden of proof is that "the juvenile judge must be persuaded by clear and convincing evidence that the infant has committed the alleged delinquent act." *Compare* the "preponderance of the evidence" test, N.Y.Family Court Act § 744 (where maximum commitment is three years, §§ 753, 758). *Cf.* Harvard Law Review Note, p. 795.

[Footnote 8]

See, e.g., In the Matters of Gregory W. and Gerald S., 19 N.Y.2d 55, 224 N.E.2d 102 (1966); *In the Interests of Carlo and Stasilowicz*, 48 N.J. 224, 225 A.2d 110 (1966); *People v. Dotson*, 46 Cal.2d 891, 299 P.2d 875 (1956); *Pee v. United States*, 107 U.S.App.D.C. 47, 274 F.2d 556 (1959); *Wissenburg v. Bradley*, 209 Iowa 813, 229 N.W. 205 (1930); *Bryant v. Brown*, 151 Miss. 398, 118 So. 184 (1928); *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944); *Application of Johnson*, 178 F.Supp. 155 (D.C.N.J.1957).

[Footnote 9]

383 U.S. at 383 U. S. 553.

[Footnote 10]

332 U.S. at 332 U. S. 601 (opinion for four Justices).

[Footnote 11]

See Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" (1967) (hereinafter cited as Nat'l Crime Comm'n Report), pp. 81, 85-86; Standards, p. 71; Gardner, The *Kent*Case and the Juvenile Court: A Challenge to Lawyers, 52 A.B.A.J. 923 (1966); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547 (1957); Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw.U.L.Rev. 585 (1965); Allen, The Borderland of Criminal Justice (1964), pp. 19-23; Harvard Law Review Note, p. 791; Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281 (1967); Comment, Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal, 114 U.Pa.L.Rev. 1171 (1966).

[Footnote 12]

See Kent v. United States, 383 U. S. 541, 383 U. S. 555 and n. 22 (1966).

[Footnote 13]

See n 7, *supra.*

[Footnote 14]

See National Council of Juvenile Court Judges, Directory and Manual (1964), p. 1. The number of Juvenile Judges as of 1964 is listed as 2,987, of whom 213 are full-time Juvenile Court Judges. *Id.* at 305. The Nat'l Crime Comm'n Report indicates that half of these judges have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-quarter of their time to juvenile matters. *See also* McCune, Profile of the Nation's Juvenile Court Judges (monograph, George Washington University, Center for the Behavioral Sciences, 1965), which is a detailed statistical study of Juvenile Court Judges, and indicates additionally that about a quarter of these judges have no law school training at all. About one-third of all judges have no probation and social work staff available to them; between eighty and ninety percent have no available psychologist or psychiatrist. *Ibid.* It has been observed that, while

"good will, compassion, and similar virtues are . . . admirably prevalent throughout the system . . . expertise, the keystone of the whole venture, is lacking."

Harvard Law Review Note, p. 809. In 1965, over 697,000 delinquency cases (excluding traffic) were disposed of in these courts, involving some 601,000 children, or 2% of all children between 10 and 17. Juvenile Court Statistics — 1965, Children's Bureau Statistical Series No. 85 (1966), p. 2.

[Footnote 15]

See Paulsen, *Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Sup.Ct. Review 167, 174.

[Footnote 16]

Julian Mack, The Juvenile Court, 23 Harv.L.Rev. 104, 119-120 (1909).

[Footnote 17]

Id. at 120.

[Footnote 18]

Id. at 109; Paulsen, *op. cit. supra,* n 15, at 173-174. There seems to have been little early constitutional objection to the special procedures of juvenile courts. *But see*Waite, How Far Can Court Procedure Be Socialized Without Impairing Individual Rights, 12 J.Crim.L. & Criminology 339, 340 (1922):

"The court which must direct its procedure even apparently to do something to a child because of what he has done, is parted from the court which is avowedly concerned only with doing something for a child because of what he is and needs, by a gulf too wide to be bridged by any humanity which the judge may introduce into his hearings, or by the habitual use of corrective, rather than punitive, methods after conviction."

[Footnote 19]

Paulsen, *op. cit. supra,* n 15, at 173; Hurley, Origin of the Illinois Juvenile Court Law, in The Child, The Clinic, and the Court (1925), pp. 320, 328.

[Footnote 20]

Julian Mack, The Chancery Procedure in the Juvenile Court, in The Child, The Clinic, and the Court (19'25), p. 310.

[Footnote 21]

See, e.g., Shears, Legal Problems Peculiar to Children's Courts, 48 A.B.A.J. 719, 720 (1962) ("The basic right of a juvenile is not to liberty, but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so."); *Ex parte Crouse,* 4 Whart. 9, 11 (Sup.Ct.Pa. 1839); *Petition of Ferrier,* 103 Ill. 367, 371-373 (1882).

[Footnote 22]

The Appendix to the opinion of Judge Prettyman in *Pee v. United States,* 107 U.S.App.D.C. 47, 274 F.2d 556 (1959), lists authority in 51 jurisdictions to this effect. Even rules required by due process in civil proceedings, however, have not generally been deemed compulsory as to proceedings affecting juveniles. For example, constitutional requirements as to notice of issues, which would commonly apply in civil cases, are commonly disregarded in juvenile proceedings, as this case illustrates.

[Footnote 23]

"There is evidence . . . that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."

383 U.S. at 383 U. S. 556, citing Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7; Harvard Law Review Note, and various congressional materials set forth in 383 U.S. at 383 U. S. 546, n. 5.

On the other hand, while this opinion and much recent writing concentrate upon the failures of the Juvenile Court system to live up to the expectations of its founders, the observation of the Nat'l Crime Comm'n Report should be kept in mind:

"Although its shortcomings are many and its results too often disappointing, the juvenile justice system in many cities is operated by people who are better educated and more highly skilled, can call on more and better facilities and services, and has more ancillary agencies to which to refer its clientele than its adult counterpart."

Id. at 78.

[Footnote 24]

Foreword to Young, Social Treatment in Probation and Delinquency (1937), p. xxvii. The 1965 Report of the United States Commission on Civil Rights, "Law Enforcement — A Report on Equal Protection in the South," pp. 80-83, documents numerous instances in which "local authorities used the broad discretion afforded them by the absence of safeguards [in the juvenile process]" to punish, intimidate, and obstruct youthful participants in civil rights demonstrations. *See also* Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif.L.Rev. 694, 707-709 (1966).

[Footnote 25]

Lehman, A Juvenile's Right to Counsel in a Delinquency Hearing, 17 Juvenile Court Judges Journal 53, 54 (1966).

Compare the observation of the late Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, in a foreword to Virtue, Basic Structure for Children's Services in Michigan (1953), p. x:

"In their zeal to care for children, neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties, and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel."

We are warned that the system must not "degenerate into a star chamber proceeding with the judge imposing his own particular brand of culture and morals on indigent people. . . ." Judge Marion G. Woodward, letter reproduced in 18 Social Service Review 366, 368 (1944). Doctor Bovet, the Swiss psychiatrist, in his monograph for the World Health Organization, Psychiatric Aspects of Juvenile Delinquency (1951), p. 79, stated that:

"One of the most definite conclusions of this investigation is that few fields exist in which more serious coercive measures are applied, on such flimsy objective evidence, than in that of juvenile delinquency."

We are told that

"The judge as amateur psychologist, experimenting upon the unfortunate children who must appear before him, is neither an attractive nor a convincing figure."

Harvard Law Review Note, at 808.

[Footnote 26]

The impact of denying fundamental procedural due process to juveniles involved in "delinquency" charges is dramatized by the following considerations: (1) In 1965, persons under 18 accounted for about one-fifth of all arrests for serious crimes (Nat'l Crime Comm'n Report, p. 55) and over half of all arrests for serious property offenses (*id.* at 56), and, in the same year, some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts (Juvenile Court Statistics — 1965, Children's Bureau Statistical Series No. 85 (1966) p. 2). About one out of nine youths will be referred to juvenile court in connection with a delinquent act (excluding traffic offenses) before he is 18 (Nat'l Crime Comm'n Report, p. 55).*Cf. also* Wheeler & Cottrell, Juvenile Delinquency — Its Prevention and Control (Russell Sage Foundation, 1965), p. 2; Report of the President's Commission on Crime in the District of Columbia (1966) (hereinafter cited as D.C. Crime Comm'n Report), p. 773. Furthermore, most juvenile crime apparently goes undetected or not formally punished. Wheeler & Cottrell, *supra*, observe that "[A]lmost all youngsters have committed at least one of the petty forms of theft and vandalism in the course of their adolescence." *Id.* at 28-29. *See also* Nat'l Crime Comm'n Report, p. 55, where it is stated that "self-report studies reveal that perhaps 90 percent of all young people have committed at least one act for which they could have been brought to juvenile court." It seems that the rate of juvenile delinquency is also steadily rising. *See* Nat'l Crime Comm'n Report, p. 56; Juvenile Court Statistics, *supra*, pp. 2-3. (2) In New York, where most juveniles are represented by counsel (*see* n 69, *infra*) and substantial procedural rights are afforded (*see, e.g.*, nn.80 81 99 *infra*), out of a fiscal year 1965-1966 total of 10,755 juvenile proceedings involving boys, 2,242 were dismissed for failure of proof at the factfinding hearing; for girls, the figures were 306 out of a total of 1,051. New York Judicial Conference, Twelfth Annual Report, pp. 314, 316 (1967). (3) In about one-half of the States, a juvenile may be transferred to an adult penal institution after a juvenile court has found him "delinquent" (Delinquent Children in Penal Institutions, Children's Bureau Pub. No. 4151964, p. 1). (4) In some jurisdictions, a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile court commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a

federal district court judge, in a habeas corpus action. *Sawyer v. Hauck*, 245 F.Supp. 55 (D.C.W.D.Tex.1965). (5) In most of the States, the juvenile may end in criminal court through waiver (Harvard Law Review Note, p. 793).

[Footnote 27]

Malinski v. New York, 324 U. S. 401, 324 U. S. 414 (1945) (separate opinion).

[Footnote 28]

Foster, Social Work, the Law, and Social Action, in Social Casework, July 1964, pp. 383, 386.

[Footnote 29]

See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321, and *passim* (1967).

[Footnote 30]

Here again, however, there is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, coincide. *See generally infra.*

While we are concerned only with procedure before the juvenile court in this case, it should be noted that, to the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo.* As to the problem and importance of special care at the adjudicatory stage, *cf.* nn. 14 and <l=|387 u<="" a="">| </l=|387>14 and <l=|387 u<="" a="">S. 1fn26|>26, *supra.* As to treatment, *see* Nat'l Crime Comm'n Report, pp. 80, 87; D.C. Crime Comm'n Report, pp. 665-676, 686-687 (at p. 687, the Report refers to the District's "bankruptcy of dispositional resources"), 692-695, 700-718 (at p. 701, the Report observes that "The Department of Public Welfare currently lacks even the rudiments of essential diagnostic and clinical services"); Wheeler & Cottrell, Juvenile Delinquency — Its Prevention and Control (Russell Sage Foundation, 1965), pp. 3235; Harvard Law Review Note, p. 809; Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Calif.L.Rev. 694, 709-712 (1966); Polier, A View From the Bench (1964). *Cf. also* In the Matter of the Youth House, Inc., Report of the July, 1966, "A" Term of the Bronx County Grand Jury, Supreme Court of New York, County of Bronx, Trial Term, Part XII, March 21, 1967 (*cf.* New York Times, March 23, 1967, p. 1, col. 8). The high rate of juvenile recidivism casts some doubt upon the adequacy of treatment afforded juveniles.*See* D.C. Crime Comm'n Report, p. 773; Nat'l Crime Comm'n Report, pp. 55, 78.</l=|387>

[1]

In fact, some courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not, in fact, receiving any special treatment. *See Creek v. Stone*, ___ U.S.App.D.C. ___, 379 F.2d 106 (1967); *Kautter v. Reid*, 183 F.Supp. 352 (D.C.D.C.1960); *White v. Reid*, 125 F.Supp. 647 (D.C.D.C.1954).*See also Elmore v. Stone*, 122 U.S.App.D.C. 416, 355 F.2d 841 (1966) (separate statement of Bazelon, C.J.); *Clayton v. Stone*, 123 U.S.App.D.C. 181, 358 F.2d 548 (1966) (separate statement of Bazelon, C.J.). *Cf.* Wheeler & Cottrell, *supra*, pp. 32, 35; *In re Rich*, 125 Vt. 373, 216 A.2d 266 (1966). *Cf. also Rouse v. Cameron*, 125 U.S.App.D.C. 366, 373 F.2d 451 (1966); *Millard v. Cameron*, 125 U.S.App.D.C. 383, 373 F.2d 468 (1966).

[2]

[Footnote 31]

"[T]he word 'delinquent' has today developed such invidious connotations that the terminology is in the process of being altered; the new descriptive phrase is 'persons in need of supervision,' usually shortened to 'pins.'"

Harvard Law Review Note, p 799, n. 140. The N.Y.Family Court Act § 712 distinguishes between "delinquents" and "persons in need of supervision."

[Footnote 32]

See, e.g., the Arizona provision, ARS § 8-228.

[Footnote 33]

Harvard Law Review Note, pp. 784-785, 800. *Cf.* Nat'l Crime Comm'n Report, pp. 87-88; Ketcham, The Unfulfilled Promise of the Juvenile Court, 7 Crime & Delin. 97, 102-103 (1961).

[Footnote 34]

Harvard Law Review Note, pp. 785-787.

[Footnote 35]

Id. at 785, 800. *See also*, with respect to the problem of confidentiality of records, Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 286-289 (1967). Even the privacy of the juvenile hearing itself is not always adequately protected. *Id.* at 285-286.

[Footnote 36]

Mack, The Juvenile Court, 23 Harv.L.Rev. 104, 120 (1909).

[Footnote 37]

Juvenile Delinquency — Its Prevention and Control (Russell Sage Foundation, 1966), p. 33. The conclusion of the Nat'l Crime Comm'n Report is similar:

"[T]here is increasing evidence that the informal procedures, contrary to the original expectation, may themselves constitute a further obstacle to effective treatment of the delinquent to the extent that they engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers."

Id. at 85. *See also* Allen, The Borderland of Criminal Justice (1964), p. 19.

[Footnote 38]

Holmes' Appeal, 379 Pa. 599, 616, 109 A.2d 523, 530 (1954) (Musmanno, J., dissenting). *See also The State (Sheerin) v. Governor*, [1966] I.R. 379 (Supreme Court of Ireland); *Trimble v. Stone*, 187 F.Supp. 483, 485-486 (D.C.D.C.1960); Allen, The Borderland of Criminal Justice (1964), pp. 18, 52-56.

[Footnote 39]

Cf. the Juvenile Code of Arizona, ARS § 8-201-6.

[Footnote 40]

Cf., however, the conclusions of the D.C. Crime Comm'n Report, pp. 692-693, concerning the inadequacy of the "social study records" upon which the Juvenile Court Judge must make this determination and decide on appropriate treatment.

[Footnote 41]

The Juvenile Judge's testimony at the habeas corpus proceeding is devoid of any meaningful discussion of this. He appears to have centered his attention upon whether Gerald made the phone call and used lewd words. He was impressed by the fact that Gerald was on six months' probation because he was with another boy who allegedly stole a purse — a different sort of offense, sharing the feature that Gerald was "along." And he even referred to a report which he said was not investigated because "there was no accusation" "because of lack of material foundation."

With respect to the possible duty of a trial court to explore alternatives to involuntary commitment in a civil proceeding, *cf. Lake v. Cameron*, 124 U.S.App.D.C. 264, 364 F.2d 657 (1966), which arose under statutes relating to treatment of the mentally ill.

[Footnote 42]

While appellee's brief suggests that the probation officer made some investigation of Gerald's home life, etc., there is not even a claim that the judge went beyond the point stated in the text.

[Footnote 43]

ARS §§ 201, 202.

[Footnote 44]

Juvenile Delinquency — Its Prevention and Control (Russell Sage Foundation, 1966), p. 35. The gap between rhetoric and reality is also emphasized in the Nat'l Crime Comm'n Report, pp. 80-81.

[Footnote 45]

383 U.S. at 383 U. S. 555.

[Footnote 46]

383 U.S. at 383 U. S. 554. THE CHIEF JUSTICE stated in a recent speech to a conference of the National Council of Juvenile Court Judges, that a juvenile court "must function within the framework of law and . . . in the attainment of its objectives it cannot act with unbridled caprice." Equal Justice for Juveniles, 15 Juvenile Court Judges Journal, No. 3, pp. 14, 15 (1964).

[Footnote 47]

383 U.S. at 383 U. S. 562.

[Footnote 48]

The Nat'l Crime Comm'n Report recommends that "Juvenile courts should make fullest feasible use of preliminary conferences to dispose of cases short of adjudication." *Id.* at 84. *See also* D.C. Crime Comm'n Report, pp. 662-665. Since this "consent decree" procedure would involve neither adjudication of delinquency nor institutionalization, nothing we say in this opinion should be construed as expressing any views with respect to such procedure. The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process.

[Footnote 49]

ARS § 8-222(b).

[Footnote 50]

Arizona's Juvenile Code does not provide for notice of any sort to be given at the commencement of the proceedings to the child or his parents. Its only notice provision is to the effect that, if a person other than the parent or guardian is cited to appear, the parent or guardian shall be notified "by personal service" of the time and place of hearing. ARS § 8-224. The procedure for initiating a proceeding, as specified by the statute, seems to require that, after a preliminary inquiry by the court, a determination may be made "that formal jurisdiction should be acquired." Thereupon, the court may authorize a petition to be filed. ARS § 8-222. It does not appear that this procedure was followed in the present case.

[Footnote 51]

No such petition was served or supplied in the present case.

[Footnote 52]

Nat'l Crime Comm'n Report, p. 87. The Commission observed that "The unfairness of too much informality is . . . reflected in the inadequacy of notice to parents and juveniles about charges and hearings." *Ibid.*

[Footnote 53]

For application of the due process requirement of adequate notice in a criminal context, *see, e.g., Cole v. Arkansas*, 333 U. S. 196 (1948); *In re Oliver*, 333 U. S. 257,333 U. S. 273-278 (1948). For application in a civil context, *see, e.g., Armstrong v. Manzo*, 380 U. S. 545 (1965); *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306 (1950).*Cf. also Chaloner v. Sherman*, 242 U. S. 455 (1917). The Court's discussion in these cases of the right to timely and adequate notice forecloses any contention that the notice approved by the Arizona Supreme Court, or the notice actually given the Gaults, was constitutionally adequate. *See also* Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 395 (1961); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 557 (1957). *Cf.* Standards, pp. 63-65; Procedures and evidence in the Juvenile Court, A Guidebook for Judges, prepared by the Advisory Council of Judges of the National Council on Crime and Delinquency (1962), pp.9-23 (*and see* cases discussed therein).

[Footnote 54]

Mrs. Gault's "knowledge" of the charge against Gerald, and/or the asserted failure to object, does not excuse the lack of adequate notice. Indeed, one of the purposes of notice is to clarify the issues to be considered, and, as our discussion of the facts, *supra*, shows, even the Juvenile Court Judge was uncertain as to the precise issues determined at the two "hearings." Since the Gaults had no counsel and were not told of their right to counsel, we cannot consider their failure to object to the lack of constitutionally

adequate notice as a waiver of their rights. Because of our conclusion that notice given only at the first hearing is inadequate, we need not reach the question whether the Gaults ever received adequately specific notice even at the June 9 hearing, in light of the fact they were never apprised of the charge of being habitually involved in immoral matters.

[Footnote 55]

For recent cases in the District of Columbia holding that there must be advice of the right to counsel, and to have counsel appointed if necessary, *see, e.g., Shioutakon v. District of Columbia*, 98 U.S.App.D.C. 371, 236 F.2d 666 (1956); *Black v. United States*, 122 U.S.App.D.C. 393, 355 F.2d 104 (1965); *In re Poff*, 135 F.Supp. 224 (D.C.D.C.1955). *Cf. also In re Long*, 184 So.2d 861, 862 (1966); *People v. Dotson*, 46 Cal.2d 891, 299 P.2d 875 (1956).

[Footnote 56]

The section cited by the court, ARS § 8-204-C, reads as follows:

"The probation officer shall have the authority of a peace officer. He shall: "

"1. Look after the interests of neglected, delinquent and dependent children of the county."

"2. Make investigations and file petitions."

"3. Be present in court when cases are heard concerning children and represent their interests."

"4. Furnish the court information and assistance as it may require."

"5. Assist in the collection of sums ordered paid for the support of children."

"6. Perform other acts ordered by the court."

[Footnote 57]

Powell v. Alabama, 287 U. S. 45, 287 U. S. 61 (1932); *Gideon v. Wainwright*, 372 U. S. 335 (1963).

[Footnote 58]

In the present proceeding, for example, although the Juvenile Judge believed that Gerald's telephone conversation was within the condemnation of ARS § 13-377, he suggested some uncertainty because the statute prohibits the use of vulgar language "in the presence or hearing of" a woman or child.

[Footnote 59]

Powell v. Alabama, 287 U. S. 45, 287 U. S. 69 (1932).

[Footnote 60]

This means that the commitment, in virtually all cases, is for a minimum of three years since jurisdiction of juvenile courts is usually limited to age 18 and under.

[Footnote 61]

See cases cited in n 55, *supra.*

[Footnote 62]

See, e.g., Schinitasky, 17 The Record 10 (N.Y.City Bar Assn.1962); Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 568-573 (1957); Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L.Q. 387, 404-407 (1961); Paulsen, *Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 187-189; Ketcham, The Legal Renaissance in the Juvenile Court, 60 Nw.U.L.Rev. 585 (1965); Elson, Juvenile Courts & Due Process, in Justice for the Child (Rosenheim ed.) 95, 103-105 (1962); Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321-327 (1967). *See also* Nat'l Probation and Parole Assn., Standard Family Court Act (1959) § 19, and Standard Juvenile Court Act (1959) § 19, in 5 NPPA Journal 99, 137, 323, 367 (1959) (hereinafter cited as Standard Family Court Act and Standard Juvenile Court Act, respectively).

[Footnote 63]

Only a few state statutes require advice of the right to counsel and to have counsel appointed. *See* N.Y.Family Court Act §§ 241, 49, 728, 741; Calif.Welf. & Inst'ns Code §§ 633, 634, 659, 700 (1966) (appointment is mandatory only if conduct would be a

felony in the case of an adult); Minn.Stat.Ann. § 260.155(2) (1966 Supp.) (*see*Comment of Legislative Commission accompanying this section); District of Columbia Legal Aid Act, D.C.Code Ann. § 2-2202 (1961) (Legal Aid Agency "shall make attorneys available to represent indigents . . . in proceedings before the juvenile court. . . ." *See Black v. United States*, 122 U.S.App.D.C. 393, 395-396, 355 F.2d 104, 106-107 (1965), construing this Act as providing a right to appointed counsel and to be informed of that right). Other state statutes allow appointment on request, or in some classes of cases, or in the discretion of the court, etc. The state statutes are collected and classified in Riederer, The Role of Counsel in the Juvenile Court, 2 J.Fam.Law 16, 19-20 (1962), which, however, does not treat the statutes cited above. *See also* Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 321-322 (1967).

[Footnote 64]

Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J. Fam.Law 77, 95-96 (1964); Riederer, The Role of Counsel in the Juvenile Court, 2 J. Fam.Law 16 (1962).

Recognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation. *See* Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 324-327 (1967).

[Footnote 65]

Nat'l Crime Comm'n Report, pp. 86-87. The Commission's statement of its position is very forceful:

"The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability."

"Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. They deal with many cases involving conduct that can lead to incarceration or close supervision for long periods, and therefore juveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger inheres that the court's coercive power will be applied without adequate knowledge of the circumstances."

"Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court. But informality has no necessary connection with therapy; it is a device that has been used to approach therapy, and it is not the only possible device. It is quite possible that, in many instances lawyers, for all their commitment to formality, could do more to further therapy for their clients than can the small, overworked social staffs of the courts. . . ."

"The Commission believes it is essential that counsel be appointed by the juvenile court for those who are unable to provide their own. Experience under the prevailing systems in which children are free to seek counsel of their choice reveals how empty of meaning the right is for those typically the subjects of juvenile court proceedings. Moreover, providing counsel only when the child is sophisticated enough to be aware of his need and to ask for one or when he fails to waive his announced right [is] not enough, as experience in numerous jurisdictions reveals."

"*The Commission recommends: "*

"COUNSEL SHOULD BE APPOINTED AS A MATTER OF COURSE WHEREVER COERCIVE ACTION IS A POSSIBILITY, WITHOUT REQUIRING ANY AFFIRMATIVE CHOICE BY CHILD OR PARENT."

[Footnote 66]

Lehman, A Juvenile's Right to Counsel in A Delinquency Hearing, 17 Juvenile Court Judge's Journal 53 (1966). In an interesting review of the 1966 edition of the Children's Bureau's "Standards," Rosenheim, Standards for Juvenile and Family Courts: Old Wine in a New Bottle, 1 Fam.L.Q. 25, 29 (1967), the author observes that

"The 'standards' of 1966, just like the 'standards' of 1954, are valuable precisely because they represent a diligent and thoughtful search for an accommodation between the aspirations of the founders of the juvenile court and the grim realities of life against which, in part, the due process of criminal and civil law offers us protection."

[Footnote 67]

These are lawyers designated, as provided by the statute, to represent minors. N.Y.Family Court Act § 242.

[Footnote 68]

N.Y.Family Court Act § 241.

[Footnote 69]

N.Y.Family Court Act § 741. For accounts of New York practice under the new procedures, *see* Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court, 12 Buffalo L.Rev. 501 (1963); Dembitz, Ferment and Experiment in New York: Juvenile Cases in the New Family Court, 48 Cornell L.Q. 499, 508-512 (1963). Since introduction of the law guardian system in September of 1962, it is stated that attorneys are present in the great majority of cases. Harvard Law Review Note, p. 796. *See* New York Judicial Conference, Twelfth Annual Report, pp. 288-291 (1967), for detailed statistics on representation of juveniles in New York. For the situation before 1962, *see* Schinitasky, The Role of the Lawyer in Children's Court, 17 The Record 10 (N.Y.City Bar Assn.1962). In the District of Columbia, where statute and court decisions require that a lawyer be appointed if the family is unable to retain counsel, *see* n 63, *supra*, and where the juvenile and his parents are so informed at the initial hearing, about 85% to 90% do not choose to be represented, and sign a written waiver form. D.C.Crime Comm'n Report, p. 646. The Commission recommends adoption in the District of Columbia of a "law guardian" system similar to that of New York, with more effective notification of the right to appointed counsel, in order to eliminate the problems of procedural fairness, accuracy of factfinding, and appropriateness of disposition which the absence of counsel in so many juvenile court proceedings involves. *Id.* at 681-685.

[Footnote 70]

See n 63, *supra.*

[Footnote 71]

Johnson v. Zerbst, 304 U. S. 458, 304 U. S. 464 (1938); *Carnley v. Cochran*, 369 U. S. 506 (1962); *United States ex rel. Brown v. Fay*, 242 F.Supp. 273 (D.C.S.D.N.Y.1965).

[Footnote 72]

The privilege is applicable to state proceedings. *Malloy v. Hogan*, 378 U. S. 1 (1964).

[Footnote 73]

Pointer v. Texas, 380 U. S. 400 (1965); *Douglas v. Alabama*, 380 U. S. 415 (1965).

[Footnote 74]

For this reason, we cannot consider the status of Gerald's alleged admissions to the probation officers. *Cf.*, however, Comment, *Miranda* Guarantees in the California Juvenile Court, 7 Santa Clara Lawyer 114 (1966).

[Footnote 75]

3 Wigmore, Evidence § 822 (3d ed.1940).

[Footnote 76]

332 U.S. at 332 U. S. 599-600 (opinion of MR. JUSTICE DOUGLAS, joined by JUSTICES BLACK, Murphy and Rutledge; Justice Frankfurter concurred in a separate opinion).

[Footnote 77]

See Fortas, The Fifth Amendment, 25 Cleveland Bar Assn. Journal 91 (1954).

[Footnote 78]

See Rogers v. Richmond, 365 U. S. 534 (1961); *Culombe v. Connecticut*, 367 U. S. 568(1961) (opinion of Mr. Justice Frankfurter, joined by MR. JUSTICE STEWART); *Miranda v. Arizona*, 384 U. S. 436 (1966).

[Footnote 79]

See also Malloy v. Hogan, 378 U. S. 1 (1964); *McCarthy v. Arndstein*, 266 U. S. 34, 266 U. S. 40 (1924).

[Footnote 80]

N.Y.Family Court Act § 741.

[Footnote 81]

N.Y.Family Court Act § 724(a). In *In the Matter of Williams*, 49 Misc.2d 154, 267 N.Y.S.2d 91 (1966), the New York Family Court held that

"The failure of the police to notify this child's parents that he had been taken into custody, if not alone sufficient to render his confession inadmissible, is germane on the issue of its voluntary character. . . ."

Id. at 165, 267 N.Y.S.2d at 106. The confession was held involuntary, and therefore inadmissible.

[Footnote 82]

N.Y.Family Court Act § 724 (as amended 1963, *see* Supp. 1966). *See In the Matter of Addison*, 20 App.Div.2d 90, 245 N.Y.S.2d 243 (1963).

[Footnote 83]

The issues relating to fingerprinting of juveniles are not presented here, and we express no opinion concerning them.

[Footnote 84]

Standards, p. 49.

[Footnote 85]

See n 79, *supra*, and accompanying text.

[Footnote 86]

Delinquent Children in Penal Institutions, Children's Bureau Pub. No. 415 — 1964, p. 1.

[Footnote 87]

See, e.g., Miranda v. Arizona, 384 U. S. 436 (1966), *Garrity v. New Jersey*, 385 U. S. 493(1967); *Spevack v. Klein*, 385 U. S. 511 (1967); *Haynes v. Washington*, 373 U. S. 503(1963); *Culombe v. Connecticut*, 367 U. S. 568 (1961); *Rogers v. Richmond*, 365 U. S. 534 (1961); *Malloy v. Hogan*, 378 U. S. 1 (1964); *Griffin v. California*, 380 U. S. 609(1965).

[Footnote 88]

Arizona Constitution, Art. 6, § 15 (as amended 1960); ARS §§ 223, 8-228(A); Harvard Law Review Note, p. 793. Because of this possibility that criminal jurisdiction may attach, it is urged that ". . . all of the procedural safeguards in the criminal law should be followed." Standards, p. 49. *Cf. Harlin v. United States*, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961).

[Footnote 89]

ARS § 8-228(A).

[Footnote 90]

Juvenile Delinquency — Its Prevention and Control (Russell Sage Foundation, 1966).

[Footnote 91]

Id. at 33. *See also* the other materials cited in n 37, *supra*.

[Footnote 92]

92 N.J.Rev.Stat. § 2A:4-37(b)(2) (Supp. 1966); N.J.Rev.Stat. § 2A:113-4.

[Footnote 93]

N.J.Rev.Stat. § 2A:4-32-33. The court emphasized that the "frightening atmosphere" of a police station is likely to have "harmful effects on the mind and will of the boy," citing *In the Matter of Rutane*, 37 Misc.2d 234, 234 N.Y.S.2d 777 (Fam.Ct. Kings County, 1962).

[Footnote 94]

The court held that this alone might be enough to show that the confessions were involuntary "even though, as the police testified, the boys did not wish to see their parents" (citing *Gallegos v. Colorado*, 370 U. S. 49 (1962)).

[Footnote 95]

The court quoted the following passage from *Haley v. Ohio*, *supra*, at 332 U. S. 601:

"But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice, and that, on the facts of this record, he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain."

[Footnote 96]

The N.Y.Family Court Act § 744(b) provides that "an uncorroborated confession made out of court by a respondent is not sufficient" to constitute the required "preponderance of the evidence."

See United States v. Morales, 233 F.Supp. 160 (D.C. Mont.1964), holding a confession inadmissible in proceedings under the Federal Juvenile Delinquency Act (18 U.S.C. § 5031 *et seq.*) because, in the circumstances in which it was made, the District Court could not conclude that it

"was freely made while Morales was afforded all of the requisites of due process required in the case of a sixteen year old boy of his experience."

Id. at 170.

[Footnote 97]

Cf. Jackson v. Denno, 378 U. S. 368 (1964); *Miranda v. Arizona*, 384 U. S. 436 (1966).

[Footnote 98]

Standards, pp. 72-73. The Nat'l Crime Comm'n Report concludes that

"the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumor, and other unreliable types of information. To minimize the danger that adjudication will be affected by inappropriate considerations, social investigation reports should not be made known to the judge in advance of adjudication."

Id. at 87 (bold face eliminated). *See also* Note, Rights and Rehabilitation in the Juvenile Courts, 67 Col.L.Rev. 281, 336 (1967):

"At the adjudication stage, the use of clearly incompetent evidence in order to prove the youth's involvement in the alleged misconduct . . . is not justifiable. Particularly in delinquency cases, where the issue of fact is the commission of a crime, the introduction of hearsay — such as the report of a policeman who did not witness the events — contravenes the purposes underlying the sixth amendment right of confrontation."

(Footnote omitted.)

[Footnote 99]

N.Y.Family Court Act § 744(a). *See also* Harvard Law Review Note, p. 795. *Cf. Willner v. Committee on Character*, 373 U. S. 96 (1963).

[Footnote 100]

ARS § 238.

[Footnote 101]

Griffin v. Illinois, 351 U. S. 12, 351 U. S. 18 (1956).

[Footnote 102]

"Standards for Juvenile and Family Courts' recommends 'written findings of fact, some form of record of the hearing' 'and the right to appeal.' Standards, p. 8. It recommends verbatim recording of the hearing by stenotypist or mechanical recording (p. 76) and urges that the judge make clear to the child and family their right to appeal (p. 78). *See also* Standard Family Court Act §§ 19, 24, 28; Standard Juvenile Court Act §§ 19, 24, 28. The Harvard Law Review Note, p. 799, states that 'The result [of the infrequency of appeals due to absence of record, indigency, etc.] is that juvenile court proceedings are largely unsupervised.' The Nat'l Crime Comm'n Report observes, p. 86, that 'records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability."

MR. JUSTICE BLACK, concurring.

The juvenile court laws of Arizona and other States, as the Court points out, are the result of plans promoted by humane and forward-looking people to provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults. For this reason, such state laws generally provide less formal and less public methods for the trial of children. In line with this policy, both courts and legislators have shrunk back from labeling these laws as "criminal" and have preferred to call them "civil." This, in part, was to prevent the full application to juvenile court cases of the Bill of Rights safeguards, including notice as provided in the Sixth Amendment, [Footnote 2/1] the right to counsel guaranteed by the Sixth, [Footnote 2/2] the right against self-incrimination

guaranteed by the Fifth, [Footnote 2/3] and the right to confrontation guaranteed by the Sixth. [Footnote 2/4] The Court here holds, however, that these four Bill of Rights safeguards apply to protect a juvenile accused in a juvenile court on a charge under which he can be imprisoned for a term of years. This holding strikes a well nigh fatal blow to much that is unique about the juvenile courts in the Nation. For this reason, there is much to be said for the position of my Brother STEWART that we should not pass on all these issues until they are more squarely presented. But since the majority of the Court chooses to decide all of these questions, I must either do the same or leave my views unexpressed on the important issues determined. In these circumstances, I feel impelled to express my views.

The juvenile court planners envisaged a system that would practically immunize juveniles from "punishment" for "crimes" in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that this exalted ideal has failed of achievement since the beginning of the system. Indeed, the state laws from the first one on contained provisions, written in emphatic terms, for arresting and charging juveniles with violations of state criminal laws, as well as for taking juveniles by force of law away from their parents and turning them over to different individuals or groups or for confinement within some state school or institution for a number of years. The latter occurred in this case. Young Gault was arrested and detained on a charge of violating an Arizona penal law by using vile and offensive language to a lady on the telephone. If an adult, he

could only have been fined or imprisoned for two months for his conduct. As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or, more realistically, "sentenced," to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punishment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail.

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees

of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws — an invidious discrimination — to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards. I consequently agree with the Court that the Arizona law as applied here denied to the parents and their son the right of notice, right to counsel, right against self-incrimination, and right to confront the witnesses against young Gault. Appellants are entitled to these rights, not because "fairness, impartiality and orderliness — in short, the essentials of due process" — require them and not because they are "the procedural rules which have been fashioned from the generality of due process," but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

A few words should be added because of the opinion of my Brother HARLAN who rests his concurrence and

dissent on the Due Process Clause alone. He reads that clause alone as allowing this Court "to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings" "in a fashion consistent with the *traditions and conscience of our people.'" Cf. Rochin v. California,342 U. S. 165. He believes that the Due Process Clause gives this Court the power, upon weighing a "compelling public interest," to impose on the States only those specific constitutional rights which the Court deems "imperative" and "necessary" to comport with the Court's notions of "fundamental fairness."*

I cannot subscribe to any such interpretation of the Due Process Clause. Nothing in its words or its history permits it, and "fair distillations of relevant judicial history" are no substitute for the words and history of the clause itself. The phrase "due process of law" has through the years evolved as the successor in purpose and meaning to the words "law of the land" in Magna Charta which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense had been committed. That provision in Magna Charta was designed to prevent defendants from being tried according to criminal laws or proclamations specifically promulgated to fit particular cases or to attach new consequences to old conduct. Nothing done since Magna Charta can be pointed to as intimating that the Due Process Clause gives courts power to fashion laws in order to meet new conditions, to fit the "decencies" of changed conditions, or to keep their consciences from being shocked by legislation, state or federal.

And, of course, the existence of such awesome judicial power cannot be buttressed or created by relying on the word "procedural." Whether labeled as "procedural" or "substantive," the Bill of Rights safeguards, far from

being mere "tools with which" other unspecified "rights could be fully vindicated," are the very vitals of a sound constitutional legal system designed to protect and safeguard the most cherished liberties of a free people. These safeguards were written into our Constitution not by judges, but by Constitution makers. Freedom in this Nation will be far less secure the very moment that it is decided that judges can determine which of these safeguards "should" or "should not be imposed" according to their notions of what constitutional provisions are consistent with the "traditions and conscience of our people." Judges with such power, even though they profess to "proceed with restraint," will be above the Constitution, with power to write it, not merely to interpret it, which I believe to be the only power constitutionally committed to judges.

There is one ominous sentence, if not more, in my Brother HARLAN's opinion which bodes ill, in my judgment, both for legislative programs and constitutional commands. Speaking of procedural safeguards in the Bill of Rights, he says:

"These factors in combination suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs. . . . [T]he court should necessarily proceed with restraint."

It is to be noted here that this case concerns Bill of Rights Amendments; that the "procedure" power my Brother HARLAN claims for the Court here relates solely to Bill of Rights safeguards, and that he is here claiming for the Court a supreme power to fashion new Bill of Rights safeguards according to the Court's notions of

what fits tradition and conscience. I do not believe that the Constitution vests any such power in judges, either in the Due Process Clause or anywhere else. Consequently, I do not vote to invalidate this Arizona law on the ground that it is "unfair," but solely on the ground that it violates the Fifth and Sixth Amendments made obligatory on the States by the Fourteenth Amendment. *Cf. Pointer v. Texas*,380 U. S. 400, 380 U. S. 412 (Goldberg, J., concurring). It is enough for me that the Arizona law as here applied collides head-on with the Fifth and Sixth Amendments in the four respects mentioned. The only relevance to me of the Due Process Clause is that it would, of course, violate due process or the "law of the land" to enforce a law that collides with the Bill of Rights.

[Footnote 2/1]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .' Also requiring notice is the Fifth Amendment's provision that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

[Footnote 2/2]

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel in his defence."

[Footnote 2/3]

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[Footnote 2/4]

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

MR. JUSTICE WHITE, concurring.

I join the Court's opinion except for 387 U. S. I also agree that the privilege against compelled self-incrimination applies at the adjudicatory stage of juvenile court proceedings. I do not, however, find an adequate basis in the record for determining whether that privilege was violated in this case. The Fifth Amendment protects a person from being "compelled" in any criminal proceeding to be a witness against himself. Compulsion is essential to a violation. It may be that, when a judge, armed with the authority he has or which people think he has, asks questions of a party or a witness in an adjudicatory hearing, that person, especially if a minor, would feel compelled to answer, absent a warning to the contrary or similar information from some other source. The difficulty is that the record made at the habeas corpus hearing, which is the only information we have concerning the proceedings in the juvenile court, does not directly inform us whether Gerald Gault or his parents were told of Gerald's right to remain silent; nor does it reveal whether the parties

were aware of the privilege from some other source, just as they were already aware that they had the right to have the help of counsel and to have witnesses on their behalf. The petition for habeas corpus did not raise the Fifth Amendment issue, nor did any of the witnesses focus on it.

I have previously recorded my views with respect to what I have deemed unsound applications of the Fifth Amendment. *See, for example, Miranda v. Arizona*, 384 U. S. 436, 384 U. S. 526, and *Malloy v. Hogan*, 378 U. S. 1, 378 U. S. 33, dissenting opinions. These views, of course, have not prevailed. But I do hope that the Court will proceed with some care in extending the privilege, with all its vigor, to proceedings in juvenile court, particularly the nonadjudicatory stages of those proceedings.

In any event, I would not reach the Fifth Amendment issue here. I think the Court is clearly ill-advised to review this case on the basis of *Miranda v. Arizona*, since the adjudication of delinquency took place in 1964, long before the *Miranda* decision.*See Johnson v. New Jersey*, 384 U. S. 719. Under these circumstances, this case is a poor vehicle for resolving a difficult problem. Moreover, no prejudice to appellants is at stake in this regard. The judgment below must be reversed on other grounds, and, in the event further proceedings are to be had, Gerald Gault will have counsel available to advise him.

For somewhat similar reasons, I would not reach the questions of confrontation and cross-examination, which are also dealt with in Part V of the opinion.

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

Each of the 50 States has created a system of juvenile or family courts, in which distinctive rules are employed and special consequences imposed. The jurisdiction of

these courts commonly extends both to cases which the States have withdrawn from the ordinary processes of criminal justice and to cases which involve acts that, if performed by an adult, would not be penalized as criminal. Such courts are denominated civil, not criminal, and are characteristically said not to administer criminal penalties. One consequence of these systems, at least as Arizona construes its own, is that certain of the rights guaranteed to criminal defendants by the Constitution are withheld from juveniles. This case brings before this Court for the first time the question of what limitations the Constitution places upon the operation of such tribunals. [Footnote 3/1] For reasons which follow, I have concluded that the Court has gone too far in some respects, and fallen short in others, in assessing the procedural requirements demanded by the Fourteenth Amendment.

I

I must first acknowledge that I am unable to determine with any certainty by what standards the Court decides that Arizona's juvenile courts do not satisfy the obligations of due process. The Court's premise, itself the product of reasoning which is not described, is that the "constitutional and theoretical basis" of state systems of juvenile and family courts is "debatable"; it buttresses these doubts by marshaling a body of opinion which suggests that the accomplishments of these courts have often fallen short of expectations. [Footnote 3/2] The Court does not

indicate at what points or for what purposes such views, held either by it or by other observers, might be pertinent to the present issues. Its failure to provide any discernible standard for the measurement of due process in relation to juvenile proceedings unfortunately might be understood to mean that the Court is concerned principally with the wisdom of having such courts at all.

If this is the source of the Court's dissatisfaction, I cannot share it. I should have supposed that the constitutionality of juvenile courts was beyond proper question under the standards now employed to assess the substantive validity of state legislation under the Due Process Clause of the Fourteenth Amendment. It can scarcely be doubted that it is within the State's competence to adopt measures reasonably calculated to meet more effectively the persistent problems of juvenile delinquency; as the opinion for the Court makes abundantly plain, these are among the most vexing and ominous of the concerns which now face communities throughout the country.

The proper issue here is, however, not whether the State may constitutionally treat juvenile offenders through a system of specialized courts, but whether the proceedings in Arizona's juvenile courts include procedural guarantees which satisfy the requirements of the Fourteenth Amendment. Among the first premises of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the "traditions and conscience of our people." *Snyder v. Massachusetts*, 291 U. S. 97,291 U. S. 105. The importance of these procedural guarantees is doubly intensified here. First, many of the problems with which Arizona is concerned

are among those traditionally confined to the processes of criminal justice; their disposition necessarily affects in the most direct and substantial manner the liberty of individual citizens. Quite obviously, systems of specialized penal justice might permit erosion, or even evasion, of the limitations placed by the Constitution upon state criminal proceedings. Second, we must recognize that the character and consequences of many juvenile court proceedings have, in fact, closely resembled those of ordinary criminal trials. Nothing before us suggests that juvenile courts were intended as a device to escape constitutional constraints, but I entirely agree with the Court that we are nonetheless obliged to examine with circumspection the procedural guarantees the State has provided.

The central issue here, and the principal one upon which I am divided from the Court, is the method by which the procedural requirements of due process should be measured. It must at the outset be emphasized that the protections necessary here cannot be determined by resort to any classification of juvenile proceedings either as criminal or as civil, whether made by the State or by this Court. Both formulae are simply too imprecise to permit reasoned analysis of these difficult constitutional issues. The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 59 U. S. 277; second, the "fundamental principles of liberty and justice which lie at the base of all our civil and political

institutions," *Hebert v. Louisiana*, 272 U. S. 312, 272 U. S. 316, and third, the character and requirements of the circumstances presented in each situation. *FCC v. WJR*, 337 U. S. 265, 337 U. S. 277; *Yakus v.*

United States, 321 U. S. 414. *See*, further, my dissenting opinion in *Poe v. Ullman*, 367 U. S. 497, 367 U. S. 522, and compare my opinion concurring in the result in *Pointer v. Texas*, 380 U. S. 400, 380 U. S. 408. Each of these factors is relevant to the issues here, but it is the last which demands particular examination.

The Court has repeatedly emphasized that determination of the constitutionally required procedural safeguards in any situation requires recognition both of the "interests affected" and of the "circumstances involved." *FCC v. WJR*, *supra*, at 337 U. S. 277. In particular, a "compelling public interest" must, under our cases, be taken fully into account in assessing the validity under the due process clauses of state or federal legislation and its application. *See, e.g., Yakus v. United States*, *supra*, at321 U. S. 442; *Bowles v. Willingham*, 321 U. S. 503, 321 U. S. 520; *Miller v. Schoene*,276 U. S. 272, 276 U. S. 279. Such interests would never warrant arbitrariness or the diminution of any specifically assured constitutional right, *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 290 U. S. 426, but they are an essential element of the context through which the legislation and proceedings under it must be read and evaluated.

No more evidence of the importance of the public interests at stake here is required than that furnished by the opinion of the Court; it indicates that "some 601,000 children under 18, or 2% of all children between 10 and 17, came before juvenile courts" in 1965, and that "about one-fifth of all arrests for serious crimes" in 1965 were of juveniles. The Court adds that the rate of juvenile crime is steadily rising. All this, as the Court suggests, indicates the importance of these due process issues, but it mirrors no less vividly that state authorities are confronted by formidable and immediate problems involving the most fundamental social values. The state legislatures have determined that the most hopeful solution for

these problems is to be found in specialized courts, organized under their own rules and imposing distinctive consequences. The terms and limitations of these systems are not identical, nor are the procedural arrangements which they include, but the States are uniform in their insistence that the ordinary processes of criminal justice are inappropriate, and that relatively informal proceedings, dedicated to premises and purposes only imperfectly reflected in the criminal law, are instead necessary.

It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the "main guardian" of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as "well nigh" conclusive.*Berman v. Parker*, 348 U. S. 26, 348 U. S. 32. This principle does not, however, reach all the questions essential to the resolution of this case. The legislative judgments at issue here embrace assessments of the necessity and wisdom of procedural guarantees; these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence. The fundamental issue here is, therefore, in what measure and fashion the Court must defer to legislative determinations which encompass constitutional issues of procedural protection.

It suffices for present purposes to summarize the factors which I believe to be pertinent. It must first be emphasized that the deference given to legislators upon substantive issues must realistically extend in part to ancillary procedural questions. Procedure at once reflects and creates substantive rights, and every effort of courts since the beginnings of the common law to separate the two has proved essentially futile. The distinction between them is particularly inadequate here, where the

legislature's substantive preferences directly and unavoidably require judgments about procedural issues. The procedural framework is here a principal element of the substantive legislative system; meaningful deference to the latter must include a portion of deference to the former. The substantive-procedural dichotomy is, nonetheless, an indispensable tool of analysis, for it stems from fundamental limitations upon judicial authority under the Constitution. Its premise is ultimately that courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected. *See, e.g., McLean v. Arkansas*, 211 U. S. 539, 211 U. S. 547; *Olsen v. Nebraska*, 313 U. S. 236, 313 U. S. 246-247. The Constitution has in this manner created for courts and legislators areas of primary responsibility which are essentially congruent to their areas of special competence. Courts are thus

obliged both by constitutional command and by their distinctive functions to bear particular responsibility for the measurement of procedural due process. These factors, in combination, suggest that legislatures may properly expect only a cautious deference for their procedural judgments, but that, conversely, courts must exercise their special responsibility for procedural guarantees with care to permit ample scope for achieving the purposes of legislative programs. Plainly, courts can exercise such care only if they have in each case first studied thoroughly the objectives and implementation of the program at stake; if, upon completion of those studies, the effect of extensive procedural restrictions upon valid legislative purposes cannot be assessed with reasonable certainty, the court should necessarily proceed with restraint.

The foregoing considerations, which I believe to be fair distillations of relevant judicial history, suggest

three criteria by which the procedural requirements of due process should be measured here: first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose, and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime.

II

Measured by these criteria, only three procedural requirements should, in my opinion, now be deemed required of state juvenile courts by the Due Process Clause of the Fourteenth Amendment: first, timely notice must be provided to parents and children of the nature and terms of any juvenile court proceeding in which a determination affecting their rights or interests may be made; second, unequivocal and timely notice must be given that counsel may appear in any such proceeding in behalf of the child and its parents, and that, in cases in which the child may be confined in an institution, counsel may, in circumstances of indigency, be appointed for them, and third, the court must maintain a written record, or its equivalent, adequate to permit effective review on appeal or in collateral proceedings. These requirements would guarantee to juveniles the tools with which their rights could be fully vindicated, and yet permit the States to pursue without unnecessary hindrance the purposes which they believe imperative in this field. Further, their imposition now would later

permit more intelligent assessment of the necessity under the Fourteenth Amendment of additional requirements, by creating suitable records from which the character and deficiencies of juvenile proceedings could be accurately judged. I turn to consider each of these three requirements.

The Court has consistently made plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the proceeding. *See, e.g., Roller v. Holly*, 176 U. S. 398, 176 U. S. 409.; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 237 U. S. 424. Notice is ordinarily the prerequisite to effective assertion of any constitutional or other rights; without it, vindication of those rights must be essentially fortuitous. So fundamental a protection can neither be spared here nor left to the "favor or grace" of state authorities. *Central of Georgia Ry. v. Wright*, 207 U. S. 127, 207 U. S. 138; *Coe v. Armour Fertilizer Works*, *supra*, at 237 U. S. 425.

Provision of counsel and of a record, like adequate notice, would permit the juvenile to assert very much more effectively his rights and defenses, both in the juvenile proceedings and upon direct or collateral review. The Court has frequently emphasized their importance in proceedings in which an individual may be deprived of his liberty, *see Gideon v. Wainwright*, 372 U. S. 335, and *Griffin v. Illinois*,351 U. S. 12; this reasoning must include with special force those who are commonly inexperienced and immature. *See Powell v. Alabama*, 287 U. S. 45. The facts of this case illustrate poignantly the difficulties of review without either an adequate record or the participation of counsel in the proceeding's initial stages. At the same time, these requirements should not cause any substantial modification in the character of juvenile court proceedings: counsel, although now present in only a small percentage of juvenile cases, have apparently already appeared without

incident in virtually all juvenile courts; [Footnote 3/3] and the maintenance of a record should not appreciably alter the conduct of these proceedings.

The question remains whether certain additional requirements, among them the privilege against self-incrimination, confrontation, and cross-examination, must now, as the Court holds, also be imposed. I share in part the views expressed in my Brother WHITE's concurring opinion, but believe that there are other, and more deep-seated, reasons to defer, at least for the present, the imposition of such requirements.

Initially, I must vouchsafe that I cannot determine with certainty the reasoning by which the Court concludes that these further requirements are now imperative. The Court begins from the premise, to which it gives force at several points, that juvenile courts need not satisfy "all of the requirements of a criminal trial." It therefore scarcely suffices to explain the selection of these particular procedural requirements for the Court to declare that juvenile court proceedings are essentially criminal, and thereupon to recall that these are requisites for a criminal trial. Nor does the Court's voucher of "authoritative opinion," which consists of four extraordinary juvenile cases, contribute materially to the solution of these issues. The Court has, even under its own premises, asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.

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In my view, the Court should approach this question in terms of the criteria, described above, which emerge from the history of due process adjudication. Measured by them, there are compelling reasons at least to defer imposition of these additional requirements. First, quite unlike notice, counsel, and a record, these requirements might radically alter the character of juvenile court proceedings. The evidence from which the Court reasons that they would not is inconclusive, [Footnote 3/4] and other available evidence suggests that they very likely would. [Footnote 3/5] At the least, it is plain that these additional requirements would contribute materially to the creation in these proceedings of the atmosphere of an ordinary criminal trial, and would, even if they do no more, thereby largely frustrate a central purpose of these specialized courts. Further, these are restrictions intended to conform to the demands of an intensely adversary system of criminal justice; the broad purposes which they represent might be served in juvenile courts with equal effectiveness by procedural devices more consistent with the premises of proceedings

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in those courts. As the Court apparently acknowledges, the hazards of self-accusation, for example, might be avoided in juvenile proceedings without the imposition of all the requirements and limitations which surround the privilege against self-incrimination. The guarantee of adequate notice, counsel, and a record would create conditions in which suitable alternative procedures could be devised; but, unfortunately, the Court's haste to impose restrictions taken intact from criminal procedure may well seriously hamper the development of such alternatives. Surely this illustrates that prudence and the principles of the Fourteenth Amendment alike require that the Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness, and that the States should instead be permitted additional opportunities to develop without unnecessary hindrance their systems of juvenile courts.

I find confirmation for these views in two ancillary considerations. First, it is clear that an uncertain, but very substantial, number of the cases brought to juvenile courts involve children who are not in any sense guilty of criminal misconduct. Many of these children have simply the misfortune to be in some manner distressed; others have engaged in conduct, such as truancy, which is plainly not criminal. [Footnote 3/6] Efforts are now being made to develop effective, and entirely noncriminal, methods of treatment for these children. [Footnote 3/7] In such cases, the state authorities

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are in the most literal sense acting *in loco parentis;* they are, by any standard, concerned with the child's protection, and not with his punishment. I do not question that the methods employed in such cases must be consistent with the constitutional obligation to act in accordance with due process, but certainly the Fourteenth Amendment does not demand that they be constricted by the procedural guarantees devised for ordinary criminal prosecutions. *Cf. Minnesota ex rel. Pearson v. Probate Court,* 309 U. S. 270. It must be remembered that the various classifications of juvenile court proceedings are, as the vagaries of the available statistics illustrate, often arbitrary or ambiguous; it would therefore be imprudent, at the least, to build upon these classifications rigid systems of procedural requirements which would be applicable, or not, in accordance with the descriptive label given to the particular proceeding. It is better, it seems to me, to begin by now requiring the essential elements of fundamental fairness in juvenile courts, whatever the label given by the State to the proceeding; in this way, the Court could avoid imposing unnecessarily

rigid restrictions, and yet escape dependence upon classifications which may often prove to be illusory. Further, the provision of notice, counsel, and a record would permit orderly efforts to determine later whether more satisfactory classifications can be devised, and, if they can, whether additional procedural requirements are necessary for them under the Fourteenth Amendment.

Second, it should not be forgotten that juvenile crime and juvenile courts are both now under earnest study throughout the country. I very much fear that this Court, by imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the systems of juvenile courts. It is

appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies "every quality of the law but its age." *Hurtado v. California*, 110 U. S. 516, 110 U. S. 529.

III

Finally, I turn to assess the validity of this juvenile court proceeding under the criteria discussed in this opinion. Measured by them, the judgment below must, in my opinion, fall. Gerald Gault and his parents were not provided adequate notice of the terms and purposes of the proceedings in which he was adjudged delinquent; they were not advised of their rights to be represented by counsel, and no record in any form was maintained of the proceedings. It follows, for the reasons given in this opinion, that Gerald Gault was deprived of his liberty without due process of law, and I therefore concur in the judgment of the Court.

[Footnote 3/1]

Kent v. United States, 383 U. S. 541, decided at the 1965 Term, did not purport to rest on constitutional grounds.

[Footnote 3/2]

It is appropriate to observe that, whatever the relevance the Court may suppose that this criticism has to present issues, many of the critics have asserted that the deficiencies of juvenile courts have stemmed chiefly from the inadequacy of the personnel and resources available to those courts. *See, e.g.*, Paulsen, *Kent v. United States:* The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 191-192; Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7, 46.

[Footnote 3/3]

The statistical evidence here is incomplete, *but see generally* Skoler & Tenney, Attorney Representation in Juvenile Court, 4 J.Fam.Law 77. They indicate that some 91% of the juvenile court judges whom they polled favored representation by counsel in their courts. *Id.* at 88.

[Footnote 3/4]

Indeed, my Brother BLACK candidly recognizes that such is apt to be the effect of today's decision, *ante*, p. 387 U. S. 60. The Court itself is content merely to rely upon inapposite language from the recommendations of the Children's Bureau, plus the terms of a single statute.

[Footnote 3/5]

The most cogent evidence, of course, consists of the steady rejection of these requirements by state legislatures and courts. The wide disagreement and uncertainty upon this question are also reflected in Paulsen, *Kent v. United States:*The Constitutional Context of Juvenile Cases, 1966 Sup.Ct.Rev. 167, 186, 191. *See also* Paulsen, Fairness to the Juvenile Offender, 41 Minn.L.Rev. 547, 561-562; McLean, An Answer to the Challenge of *Kent*, 53 A.B.A.J. 456, 457; Alexander, Constitutional Rights in Juvenile Court, 46 A.B.A.J. 1206; Shears, Legal Problems Peculiar to Children's Courts, 48 A.B.A.J. 719; Siler, The Need for Defense Counsel in the Juvenile Court, 11 Crime & Delin. 45, 57-58. *Compare* Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7, 32.

[Footnote 3/6]

Estimates of the number of children in this situation brought before juvenile courts range from 26% to some 48%; variation seems chiefly a product both of the inadequacy of records and of the difficulty of categorizing precisely the conduct with which juveniles

are charged. *See generally* Sheridan, Juveniles Who Commit Noncriminal Acts: Why Treat in a Correctional System? 31 Fed. Probation 26, 27. By any standard, the number of juveniles involved is "considerable." *Ibid.*

[Footnote 3/7]

Id. at 28-30.

MR. JUSTICE STEWART, dissenting.

The Court today uses an obscure Arizona case as a vehicle to impose upon thousands of juvenile courts throughout the Nation restrictions that the Constitution made applicable to adversary criminal trials. [Footnote 4/1] I believe the Court's decision is wholly unsound as a matter of constitutional law, and sadly unwise as a matter of judicial policy.

Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected

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child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

In the last 70, years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of juvenile and family courts in each of the 50 States. There can be no denying that, in many areas the performance of these agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons, the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of public juvenile and family agencies — in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.

I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the Court's opinion in this case, which serves to convert a juvenile proceeding into a criminal prosecution.

The inflexible restrictions that the Constitution so wisely made applicable to adversary criminal trials have no inevitable place in the proceedings of those public social agencies known as juvenile or family courts. And to impose the Court's long catalog of requirements upon juvenile proceedings in every area of the country is to invite a long step backwards into the nineteenth century. In that era, there were no juvenile proceedings, and a

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child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death by hanging. The sentence was executed. It was all very constitutional. [Footnote 4/2]

A State in all its dealings must, of course, accord every person due process of law. And due process may require that some of the same restrictions which the Constitution has placed upon criminal trials must be imposed upon juvenile proceedings. For example, I suppose that all would agree that a brutally coerced confession could not constitutionally be considered in a juvenile court hearing. But it surely does not follow that the testimonial privilege against self-incrimination is applicable in all juvenile proceedings. [Footnote 4/3] Similarly, due process clearly

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requires timely notice of the purpose and scope of any proceedings affecting the relationship of parent and child. *Armstrong v. Manzo*, 380 U. S. 545. But it certainly does not follow that notice of a juvenile hearing must be framed with all the technical niceties of a criminal indictment. *See Russell v. United States*, 369 U. S. 749.

In any event, there is no reason to deal with issues such as these in the present case. The Supreme Court of Arizona found that the parents of Gerald Gault

"knew of their right to counsel, to subpoena and cross-examine witnesses, of the right to confront the witnesses against Gerald, and the possible consequences of a finding of delinquency."

99 Ariz. 181, 185, 407 P.2d 760, 763. It further found that "Mrs. Gault knew the exact nature of the charge against Gerald from the day he was taken to the detention home." 99 Ariz. at 193, 407 P.2d at 768. And, as MR. JUSTICE WHITE correctly points out, pp. 387 U. S. 64-65, *ante*, no issue of compulsory self-incrimination is presented by this case.

I would dismiss the appeal.

[Footnote 4/1]

I find it strange that a Court so intent upon fastening an absolute right to counsel upon nonadversary juvenile proceeding has not been willing even to consider whether the Constitution requires a lawyer's help in a criminal prosecution upon a misdemeanor charge. *See Winters v. Beck*, 385 U. S. 907; *DeJoseph v. Connecticut*, 385 U. S. 982.

[Footnote 4/2]

State v. Guild, 5 Halst. 163, 18 Am. Dec. 404 (N.J.Sup.Ct.).

"Thus, also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion, and as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment."

4 Blackstone, Commentaries 23 (Wendell ed. 1847).

[Footnote 4/3]

Until June 13, 1966, it was clear that the Fourteenth Amendment's ban upon the use of a coerced confession is constitutionally quite a different thing from the Fifth Amendment's testimonial privilege against self-incrimination. *See, for example*, the Court's unanimous opinion in *Brown v. Mississippi*, 297 U. S. 278, at 297 U. S. 285-286, written by Chief Justice Hughes and joined by such distinguished members of this Court as Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo. *See also Tehan v. Shott*, 382 U. S. 406, decided January 19, 1966, where the Court emphasized the "contrast" between "the wrongful use of a coerced confession" and "the Fifth Amendment's privilege against self-incrimination." 382 U.S. at 382 U. S. 416. The complete confusion of these separate constitutional doctrines in Part V of the Court's opinion today stems, no doubt, from *Miranda v. Arizona*, 384 U. S. 436, a decision which I continue to believe was constitutionally erroneous.

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11.4: Crawford v. Washington 541 US 36 (2004)

OCTOBER TERM, 2003
CRAWFORD V. WASHINGTON SUPREME COURT OF THE UNITED STATES

CRAWFORD *v.* WASHINGTON

certiorari to the supreme court of washington

No. 02–9410. Argued November 10, 2003—Decided March 8, 2004

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio* v. *Roberts*, 448 U. S. 56, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,' " a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*, at 66. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.*, interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Pp. 5–33.

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right … to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States*, 156 U. S. 237, 243. Pp. 5–21.

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning. See, *e.g.*, *Mattox*, *supra*. Pp. 21–23.

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts*, *supra*, at 66. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding. Pp. 24–25.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Pp. 25–27.

(e) *Roberts'* framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp. 27–30.

(f) The instant case is a self-contained demonstration of *Roberts'* unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising. Pp. 30–32.

147 Wash. 2d 424, 54 P. 3d 656, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed an opinion concurring in the judgment, in which O'Connor, J., joined.

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11.5: Maryland v. Craig 497 US 836 (1990)

U.S. Supreme Court

Maryland v. Craig, 497 U.S. 836 (1990)

Maryland v. Craig

No. 89-478

Argued April 18, 1990

Decided June 27, 1990

497 U.S. 836

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a six-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child's suffering serious emotional distress such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy v. Iowa*, 487 U. S. 1012, before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence, and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute*right to a face-to-face meeting with the witnesses agains them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio v. Roberts*, 448 U. S. 56, 448 U. S. 63. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. *See, e.g., Kirby v. United States*, 174 U. S. 47. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy, and only where the testimony's reliability is otherwise assured. *Coy*, *supra*, at 487 U. S. 1021. Pp. 497 U. S. 844-850.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 497 U. S. 851-857.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of

hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 497 U. S. 851-852.

(b) A State's interest in the physical and psychological wellbeing of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted similar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, *see, e.g., Globe Newspaper Co. v. Superior Court*, 457 U. S. 596,457 U. S. 607. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 497 U. S. 852-855.

(c) The requisite necessity finding must be case-specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis.* Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 497 U. S. 855-857.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P.497 U. S. 857.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 497 U. S. 857-860.

316 Md. 551, 560 A.2d 1120 (1989). Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, 497 U. S. 860.

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11.6: Waller v. Georgia 467 US 39 (1984)

U.S. Supreme Court

Waller v. Georgia, 467 U.S. 39 (1984)

Waller v. Georgia

No. 83-321

Argued March 27, 1984

Decided May 21, 1984*

467 U.S. 39

CERTIORARI TO THE SUPREME COURT OF GEORGIA

Syllabus

After court-authorized wiretaps of telephones by Georgia police revealed a large lottery operation, the police executed search warrants at numerous locations, including petitioners' homes. Petitioners and others were then indicted for violating the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act and other state gambling statutes. Prior to trial, petitioners moved to suppress the wiretaps and evidence seized during the searches. The State moved to close the suppression hearing to the public, alleging that unnecessary "publication" of information obtained under the wiretaps would render the information inadmissible as evidence, and that the wiretap evidence would "involve" the privacy interests of some persons who were indicted but were not then on trial, and some who were not then indicted. The trial court agreed, finding that, insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted, and could not be used in future prosecutions. Accordingly, over petitioners' objections, the court ordered the suppression hearing closed to all persons other than witnesses, court personnel, the parties, and the lawyers. The suppression hearing lasted seven days, but less than 2 1/2 hours were devoted to playing the tapes of the intercepted telephone conversations, and few of them mentioned or involved parties not then before the court. The case was then tried before a jury in open court, and petitioners were acquitted under the RICO Act but convicted under the other statutes. The Georgia Supreme Court affirmed.

Held:

1. Under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the following tests: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure. *Cf. Press-Enterprise Co. v. Superior Court of California*, 464 U. S. 501. Pp. 467 U. S. 44-47.

2. Under the above tests, the closure of the entire suppression hearing here plainly was unjustified. The State's proffer was not specific as

to whose privacy interests might be infringed if the hearing were open to the public, what portions of the wiretap tapes might infringe those interests, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. And the court did not consider alternatives to immediate closure of the hearing. Pp. 467 U. S. 48-49.

3. The case is remanded to the state courts to decide what portions, if any, of a new suppression hearing may be closed to the public in light of conditions at the time of that hearing. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial or in some other material change in the positions of the parties. Pp. 467 U. S. 49-50.

251 Ga. 124, 303 S.E.2d 437, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

JUSTICE POWELL delivered the opinion of the Court.

These cases require us to decide the extent to which a hearing on a motion to suppress evidence may be closed to the public over the objection of the defendant consistently

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with the Sixth and Fourteenth Amendment right to a public trial.

I

Acting under court authorization, Georgia police placed wiretaps on a number of phones during the last six months of 1981. The taps revealed a large lottery operation involved in gambling on the volume of stocks and bonds traded on the New York Stock Exchange. In early January, 1982, law enforcement officers simultaneously executed search warrants at numerous locations, including the homes of petitioners. Petitioners and 35 others were indicted and charged with violating the Georgia Racketeer Influenced and Corrupt Organizations (Georgia RICO) Act, Ga.Code Ann. §§ 16-14-1 to 16-14-15 (1982 and Supp.1983), and with commercial gambling and communicating gambling information in violation of Ga.Code Ann. §§ 16-12-22 and 16-12-28 (1982).

Prior to the separate trial of petitioners and 13 other defendants, petitioners moved to suppress the wiretaps and the evidence seized during the searches. They asserted, *inter alia*, that the warrants authorizing the wiretaps were unsupported by probable cause and based on overly general information, that the taps were conducted without adequate supervision, and that the resulting searches were indiscriminate, "exploratory and general." App. 11a. The State moved to close to the public any hearing on the motion to suppress. The closure motion stated that, in order to validate the seizure of evidence derived from the wiretaps, the State would have to introduce evidence "which [might] involve a reasonable expectation of privacy of persons other than" the defendants. *Id.* at 6a.

On June 21, 1982, a jury was empaneled and then excused while the court heard the closure and suppression motions. The prosecutor argued that the suppression hearing should be closed because, under the Georgia wiretap statute, "[a]ny publication" of information obtained under a wiretap warrant

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that was not "necessary and essential" would cause the information to be inadmissible as evidence. *See* Ga.Code Ann. § 16-11-64(b)(8) (1982). [Footnote 1] The prosecutor stated that the evidence derived in the wiretaps would "involve" some persons who were indicted but were not then on trial, and some persons who were not then indicted. He said that, if published in open court, the evidence "[might] very well be tainted." App. 13a. The trial court agreed. It found that, insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and could not be used in future prosecutions. *Id.* at 14a. Over objection, [Footnote 2] the court ordered the suppression hearing closed to all persons other than witnesses, court personnel, the parties, and the lawyers.

The suppression hearing lasted seven days. The parties do not dispute that less than 2 1/2 hours were devoted to playing tapes of intercepted telephone conversations. The intercepted conversations that were played included some persons who were not then on trial, but no one who had not been named in the indictment; one person who had not been

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indicted was mentioned in the recorded calls. The remainder of the hearing concerned such matters as the procedures used in obtaining and executing the search warrants and wiretap authorizations, the procedures followed in preserving the tape recordings, and certain allegations of police and prosecutorial misconduct.

Agreeing with the State's concession that 10 boxes of documents seized during the searches were "personal, no[n]crime-related," Tr. of Suppression Hearing 635, the trial court ordered them suppressed, *id.* at 642; App.19a. It refused to suppress a comparable amount of other material. The case was then tried to the jury in open court. Petitioners were acquitted of the charges under the Georgia RICO statute, but were convicted of commercial gambling and communicating gambling information. Prior to the trial of the remaining persons named in the indictment, the transcript of the suppression hearing was released to the public.

The Georgia Supreme Court affirmed the convictions. 2 51 Ga. 124, 303 S.E.2d 437 (1983). On the open-trial issue, the court ruled that the trial court had properly balanced petitioners' rights to a public hearing against the privacy rights of others under Georgia law and the Sixth Amendment. *Id.* at 126-127, 303 S.E.2d at 441. We granted certiorari to decide whether the defendant's Sixth

Amendment right to a public trial applies to a suppression hearing. 464 U.S. 959 (1983). We hold that it does, and that the trial court failed to give proper weight to Sixth Amendment concerns. Accordingly, we reverse.

II

These cases present three questions: first, does the accused's Sixth Amendment right to a public trial extend to a suppression hearing conducted prior to the presentation of evidence to the jury? Second, if so, was that right violated here? Third, if so, what is the appropriate remedy? [Footnote 3]

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A

This Court has not recently considered the extent of the accused's right under the Sixth Amendment to insist upon a public trial, and has never considered the extent to which that right extends beyond the actual proof at trial. We are not, however, without relevant precedents. In several recent cases, the Court found that the press and public have a qualified First Amendment right to attend a criminal trial.*Globe Newspaper Co. v. Superior Court for Norfolk County,*

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457 U. S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555 (1980). We also have extended that right not only to the trial as such, but also to the *voir dire*proceeding in which the jury is selected. *Press-Enterprise Co. v. Superior Court of California*, 464 U. S. 501 (1984). Moreover, in an earlier case in this line, *Gannett Co. v. DePasquale*, 443 U. S. 368 (1979), we considered whether this right extends to a pretrial suppression hearing. While the Court's opinion did not reach the question, *id.* at 443 U. S. 392, a majority of the Justices concluded that the public had a qualified constitutional right to attend such hearings, *id.* at 443 U. S. 397 (POWELL, J., concurring) (basing right on First Amendment); *id.* at 443 U. S. 406 (BLACKMUN, J., joined by BRENNAN, WHITE, and MARSHALL, JJ., dissenting in part) (basing right on Sixth Amendment).

In each of these cases, the Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care. We stated the applicable rules in *Press-Enterprise:*

"The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

464 U.S. at 464 U. S. 510. *Accord*, *Globe Newspaper Co.*, *supra*, at 457 U. S. 606-607; *Richmond Newspapers*, *supra*, at 448 U. S. 580-581 (opinion of BURGER, C.J.); *Gannett*, 443 U.S. at 443 U. S. 392-393 (*semble*); *id.* at 443 U. S. 400-401 (POWELL, J., concurring); *id.* at 443 U. S. 440-446 (BLACKMUN, J., dissenting in part).

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As noted, the analysis in these cases has proceeded largely under the First Amendment. Nevertheless, there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly, and "[o]ur cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant." *Gannett*, 443 U.S. at 443 U. S. 380.

""*The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . .*'""

Ibid. (quoting *In re Oliver*, 333 U. S. 257, 333 U. S. 270, n. 25 (1948), in turn quoting 1 T. Cooley, Constitutional Limitations 647 (8th ed.1927)). [Footnote 4] In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. *See In re Oliver*, *supra*, at 333 U. S. 270, n. 24; *Douglas v. Wainwright*, 714 F.2d 1532, 1541 (CA11 1983), *cert. pending*, Nos. 83-817, 83-995; *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (CA3 1969).

These aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence. As several of the individual opinions in *Gannett* recognized, suppression hearings often are as important as the trial itself. 443 U.S. at 443 U. S. 397, n. 1 (POWELL, J., concurring); *id.* at 443 U. S. 434-436 (BLACKMUN,

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J., dissenting in part); *see also id.* at 443 U. S. 397 (BURGER, C.J., concurring). In *Gannett*, as in many cases, the suppression hearing was the only trial, because the defendants thereafter pleaded guilty pursuant to a plea bargain.

In addition, a suppression hearing often resembles a bench trial: witnesses are sworn and testify, and of course counsel argue their positions. The outcome frequently depends on a resolution of factual matters. *See id.* at 443 U. S. 434(BLACKMUN, J., dissenting in part). The need for an open proceeding may be particularly strong with respect to suppression hearings. A challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor. As the Court of Appeals for the Third Circuit has noted, "[s]trong pressures are naturally at work on the prosecution's witnesses to justify the propriety of their conduct in obtaining" the evidence. *Rundle*, *supra*, at 605. The public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny. [Footnote 5] In sum, we hold that, under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors. [Footnote 6]

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B

Applying these tests to the cases at bar, we find the closure of the entire suppression hearing plainly was unjustified. Under *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. In this case, the only evidence about which the prosecutor expressed concern was the information derived from the wiretaps; he argued that unnecessary "publication" would render the taps inadmissible under the Georgia wiretap statute. App. 13a. The Georgia Supreme Court advanced the more general, but essentially identical, interest in protecting the privacy of persons not before the court. 251 Ga., at 126-127, 303 S.E.2d at 441. Under certain circumstances, these interests may well justify closing portions of a suppression hearing to the public. *See Press-Enterprise*, 464 U.S. at 464 U. S. 511-512.

Here, however, the State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. [Footnote 7] The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, *in camera* if necessary, and closing only those parts of the hearing that jeopardized

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the interests advanced. [Footnote 8] As it turned out, of course, the closure was far more extensive than necessary. The tapes lasted only 2 1/2 hours of the 7-day hearing, and few of them mentioned or involved parties not then before the court.

C

The question that remains is what relief should be ordered to remedy this constitutional violation. Petitioners argue that a new trial on the merits should be ordered. The Solicitor General, appearing on behalf of the United States as *amicus curiae*, suggests that, at most, only a new suppression hearing be directed. The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public trial guarantee. [Footnote 9] We agree

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with that view, but we do not think it requires a new trial in this case. Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest. *Cf. Goldberg v. United States*, 425 U. S. 94, 425 U. S. 111 (1976); *Jackson v. Deno*, 378 U. S. 368, 378 U. S. 394-396 (1964).

In these cases, it seems clear that, unless the State substantially alters the evidence it presents to support the searches and wiretaps here, significant portions of a new suppression hearing must be open to the public. We remand to the state courts to decide what portions, if any, may be closed. This decision should be made in light of conditions at the time of the new hearing, and only interests that still justify closure should be considered. A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties.

The judgments below are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

* Together with No. 83-322, *Cole et al. v. Georgia*, also on certiorari to the same court.

[Footnote 1]

The statute barring publication is part of a section authorizing wiretaps pursuant to warrant. At the time of trial, the statute read:

"Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution."

Ga.Code Ann. § 26-3004(k) (1977 and Supp.1981) (subsequently recodified as § 16-11-64(b)(8)).

[Footnote 2]

Counsel for petitioners Waller, Thompson, Eula Burke, and W. B. Burke lodged an objection to closing the hearing. Counsel for petitioner Cole concurred in the prosecution's motion to close the suppression hearing. App. 14a, 15a. Respondent argues that Cole is precluded from challenging the closure. The Georgia Supreme Court appears to have considered the objections of all the petitioners on their merits. 251 Ga. 124 126-127, 303 S.E.2d 437, 441 (1983). Cole's claims in this Court are identical to those of the others. Since the cases must be remanded, we remand Cole's case as well. The state courts may determine on remand whether Cole is procedurally barred from seeking relief as a matter of state law.

[Footnote 3]

Petitioners advance two Fourth Amendment arguments, both of which may be disposed of summarily. First, they assert that a forfeiture section of the Georgia RICO statute that authorizes certain warrantless seizures of all property used in or derived from a pattern of racketeering activity is facially invalid under the Fourth Amendment. *See* Ga.Code Ann. § 16-14-7(f) (1982 and Supp.1983). We find that petitioners have not established that they have standing to challenge the statute in the present proceeding. It appears that all the evidence that was admitted at trial was seized under the authority of the search warrants, not pursuant to the statute. The opinion below is not to the contrary. The fact that the Georgia Supreme Court found standing does not permit us to avoid the responsibility of ensuring that our order will be other than advisory.

Petitioners' second Fourth Amendment challenge is that police so "flagrant[ly] disregard[ed]" the scope of the warrants in conducting the seizures at issue here that they turned the warrants into impermissible general warrants. Petitioners rely on lower court cases such as *United States v. Heldt*, 215 U.S.App.D.C. 206, 227, 668 F.2d 1238, 1259 (1981) (per curiam), *cert. denied sub nom. Hubbard v. United States*,456 U.S. 926 (1982), and *United States v. Rettig*, 589 F.2d 418, 423 (CA9 1978), for the proposition that in such circumstances the entire fruits of the search, and not just those items as to which there was no probable cause to support seizure, must be suppressed. Petitioners do not assert that the officers exceeded the scope of the warrant in the places searched. Rather, they say only that the police unlawfully seized and took away items unconnected to the prosecution. The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well. *See, e.g., Andresen v. Maryland*, 427 U. S. 463, 427 U. S. 482, n. 11 (1976); *United States v. Offices Known As 50 State Distributing Co.*, 708 F.2d 1371, 1376 (CA9 1983), *cert. denied*, 465 U.S. 1021 (1984); *United States v. Tamura*, 694 F.2d 591, 597 (CA9 1982); *United States v. Holmes*, 452 F.2d 249, 259 (CA7 1971).

[Footnote 4]

Accord, Estes v. Texas, 381 U. S. 532, 381 U. S. 588 (1965) (Harlan, J., concurring) ("Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings"); *In re Oliver*, 333 U.S. at 333 U. S. 270 ("The knowledge

that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power").

[Footnote 5]

To the extent there is an independent public interest in the Sixth Amendment public trial guarantee, *see Gannett*, 443 U.S. at 443 U. S. 383; *cf. Globe Newspaper*,457 U.S. at 457 U. S. 604, it applies with full force to suppression hearings. This case is an example. The defendants alleged that police conducted general searches and wholesale seizures in over 150 homes, and eavesdropped on more than 800 hours of telephone conversations by means of effectively unsupervised wiretaps. *Cf. id.* at 457 U. S. 605 (First Amendment right of access to criminal trials "ensure[s] that [the] constitutionally protected *discussion of governmental affairs' is an informed one").*

[Footnote 6]

One of the reasons often advanced for closing a trial — avoiding tainting of the jury by pretrial publicity, *e.g.*, *Press-Enterprise*, 464 U.S. at 464 U. S. 510 — is largely absent when a defendant makes an informed decision to object to the closing of the proceeding. In addition, that rationale is further attenuated where, as here, the jurors have been empaneled and instructed not to discuss the case or read or view press accounts of the matter. Tr. 238-239, 240-241, 293-294.

Petitioners also make a claim to an open trial under the First Amendment. In view of our holding, there is no need to discuss that claim.

[Footnote 7]

The court's only relevant finding was as follows:

"If you plan to offer evidence, or if you are going to offer evidence that relates not only to those defendants not on trial but to other offenders, . . . in my judgment, insofar as they are concerned, it would amount to a publication and it would be tainted because of the publication."

App. 14a.

[Footnote 8]

The *post hoc* assertion by the Georgia Supreme Court that the trial court balanced petitioners' right to a public hearing against the privacy rights of others cannot satisfy the deficiencies in the trial court's record. The assertion finds little or no support in the record, and is itself too broad to meet the *Press-Enterprise* standard.

[Footnote 9]

See, e.g., Douglas v. Wainwright, 714 F.2d 1532, 1542 (CA11 1983) (citing cases), *cert. pending*, Nos. 83-817, 83-995. *See also Levine v. United States*, 362 U. S. 610, 362 U. S. 627, n. (1960) (BRENNAN, J., dissenting) ("[T]he settled rule of the federal courts [is] that a showing of prejudice is not necessary for reversal of a conviction not had in public proceedings"). The general view appears to be that of the Court of Appeals for the Third Circuit. It noted in an en banc opinion that a requirement that prejudice be shown "would in most cases deprive [the defendant] of the [public trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (1969). While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. *See also State v. Sheppard*, 182 Conn.412, 418, 438 A.2d 125, 128 (1980) ("Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied"); *People v. Jones*, 47 N.Y.2d 409, 416, 391 N.E.2d 1335, 1340 (1979) ("The harmless error rule is no way to gauge the great though intangible, societal loss that flows" from closing courthouse doors).

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11.7: Estes v. Texas 381 US 532 (1965)

U.S. Supreme Court

Estes v. Texas, 381 U.S. 532 (1965)

Estes v. Texas

No. 256

Argued April 1, 1965

Decided June 7, 1965

381 U.S. 532

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Syllabus

Petitioner had been indicted by a Texas county grand jury for swindling. Massive pretrial publicity had given the case national notoriety. On the trial date, following a change of venue, a hearing commenced on petitioner's motion to prevent telecasting, radio broadcasting, and news photography. The hearing, conducted in the presence of some trial witnesses and veniremen later released, was carried live on television and radio, and news photography was permitted. The original jury panel, petitioner, counsel, and the trial judge were highly publicized during the two days the pretrial hearing lasted, emphasizing throughout the community the notorious character that the trial would take. Four of the jurors selected later at the trial had seen or heard all or part of the broadcasts. The profusion of cameramen with their equipment in various parts of the crowded courtroom caused considerable disruption. The trial court denied petitioner's motion, but granted a continuance of almost a month. During the interim, a booth was erected in the rear of the courtroom to which television cameramen and equipment were restricted. Live telecasting was prohibited during most of the actual trial. The State's opening and closing arguments were carried live with sound (though, because of mechanical difficulty, there was no picture of the former), as were the return of the jury's verdict and its receipt by the judge. The court's order allowed videotapes without sound of the whole proceeding, and the cameras operated intermittently during the three-day trial, which ended with petitioner's conviction. Film clips of the trial were shown, largely on regularly scheduled news programs. Both the trial court and the appellate court rejected petitioner's claim of denial of due process in violation of the Fourteenth Amendment by the televising and broadcasting of the trial.

Held: The televising over petitioner's objections of the courtroom proceedings of petitioner's criminal trial, in which there was widespread public interest, was inherently invalid as infringing the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. Pp. 381 U. S. 536-552.

(a) The high degree of publicity given to the two-day hearing, which could only have impressed those present and the community

at large with the notorious character of the petitioner and the proceeding, made what occurred at the pretrial relevant to determining whether petitioner was accorded due process at his trial. Pp. 381 U. S. 536-537.

(b) The constitutional guarantee of a public trial is to ensure that the accused is fairly dealt with, and not unjustly condemned. Pp. 381 U. S. 538-539.

(c) The freedom granted to the press under the First Amendment must be subject to the maintenance of absolute fairness in the judicial process, and, in the present state of television techniques such freedom does not confer the right to use equipment in the courtroom which might jeopardize a fair trial, the atmosphere for which must be preserved at all costs. Pp. 381 U. S. 539-540.

(d) The public's right to be informed about court proceedings is satisfied if reporters are free to attend and to report on the proceedings through their respective media. Pp. 381 U. S. 541-542.

(e) Where, as here, the procedure employed by the State involves the probability that prejudice to the accused will result, that procedure, in line with the principle established in such cases as *Rideau v. Louisiana*, 373 U. S. 723, will be deemed lacking in due process whether or not isolatable prejudice can be demonstrated. Pp. 381 U. S. 542-544.

(f) There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors, and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect, particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship. Pp. 381 U. S. 544-550.

(g) The foregoing factors are not merely "hypothetical," as is evidenced by the bar on television in federal criminal trials imposed by the Federal Rules of Criminal Procedure and by such a bar in all but two States. P. 381 U. S. 550.

(h) Application of the rule of the *Rideau case, supra,* is clearly warranted by the facts of this case. Pp. 381 U. S. 550-552.

Reversed.

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

The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling, [Footnote 1] was

deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary, and reverse his conviction.

I

While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association, he does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but only that the time-honored principles of a fair trial were not followed in his case, and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts, but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex.B.J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is, of itself, not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment.

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken, and some 30 persons stood in the aisles. However at that time, a defense motion to prevent telecasting, broadcasting by radio, and news photography, and a defense motion for continuance were presented, and, after a two-day hearing, the former was denied and the latter granted.

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. *Cf. Wood v. Georgia*, 370 U. S. 375, 370 U. S. 383(1962); *Turner v. Louisiana*, 379 U. S. 466, 379 U. S. 472 (1965); *Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 562 (1965). Indeed at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench, and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned, and were present in the courtroom during the entire hearing, but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered, but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing

cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial, for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized, and could only have impressed those present, and also the community at large, with the notorious character of the petitioner, as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly

made aware of the peculiar public importance of the case by the press and television coverage being provided and by the fact that they themselves were televised live, and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22, the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening [Footnote 2] and closing arguments of the State, the return of the jury's verdict, and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

Because of the varying restrictions placed on sound and live telecasting, the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary

included excerpts from testimony and the usual reportorial remarks. On one occasion, the videotapes of the September hearings were rebroadcast in place of the "late movie."

II

In *Rideau v. Louisiana*, 373 U. S. 723 (1963), this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. *See id.* at 373 U. S. 729 (dissenting opinion of Clark, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point, the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take, and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something "not conventionally unconventional." When the new jury was empaneled at the trial, four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

III

We start with the proposition that it is a "public trial" that the Sixth Amendment guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with, and

not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother BLACK so well said in *In re Oliver*, 333 U. S. 257 (1948):

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."

At 333 U. S. 268-270. (Footnotes omitted.) It is said however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence § 1834 (3d ed. 1940), the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that "neither of these two amendments [First and Sixth] speaks of an unlimited

right of access to the courtroom on the part of the broadcasting media. . . ." At 7. Moreover, they recognize that the "primary concern of all must be the proper administration of justice"; that "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media"; and that

"the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial. . . ."

At 3-4.

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial, we will have another case.

IV

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries, Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result at this time, those safeguards do not permit the televising and photographing of a criminal trial save in two States, and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial — the most fundamental of all freedoms — must be maintained at all costs. Our approach has been through rules, contempt proceedings, and reversal of convictions obtained under unfair conditions. Here, the remedy is

clear and certain of application, and it is our duty to continue to enforce the principles that, from time immemorial, have proven efficacious and necessary to a fair trial.

V

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that, because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of "distractions" during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to "suppress, edit, or censor events, which transpire in proceedings before it," citing *Craig v. Harney*, 331 U. S. 367, 331 U. S. 374 (1947); and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset, the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury, or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness, but, as MR. JUSTICE DOUGLAS says, "the insidious influences which it puts to work in the administration of justice." Douglas, The Public Trial and the Free Press, 33 Rocky Mt.L.Rev. 1 (1960). These influences will be detailed below, but, before turning to them, the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be,

and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U. S. 252 (1941), and *Pennekamp v. Florida*, 328 U. S. 331 (1946), which we reaffirm. These reportorial privileges of the press were stated years ago:

"The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions which he would not have been likely to receive from hearing the trial itself."

2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927).

The State, however, says that the use of television in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice, and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that, in most cases involving claims of due process deprivations, we require a showing of identifiable prejudice to the accused. Nevertheless at times, a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due

process. Such a case was *In re Murchison*, 349 U. S. 133 (1955), where MR. JUSTICE BLACK for the Court pointed up with his usual clarity and force:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U. S. 11, 348 U. S. 14."

At 349 U. S. 136. (Emphasis supplied.) And, as Chief Justice Taft said in *Tumey v. Ohio*, 273 U. S. 510, almost 30 years before:

"the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible*temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."

At 273 U. S. 532. (Emphasis supplied.)

This rule was followed in *Rideau*, *supra*, and in *Turner v. Louisiana*, 379 U. S. 466(1965). In each of these cases, the Court departed from the approach it charted in *Stroble v. California*, 343 U. S. 181 (1952), and in *Irvin v. Dowd*, 366 U. S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner*, the Court did not stop to consider the actual effect of the practice, but struck down the conviction on the ground that prejudice was inherent in it. Likewise, in *Gideon v. Wainwright*,

372 U. S. 335 (1963), and *White v. Maryland*, 373 U. S. 59 (1963), we applied the same rule, although in different contexts.

In this case, it is even clearer that such a rule must be applied. In *Rideau*, *Irvin*, and *Stroble*, the pretrial publicity occurred outside the courtroom, and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In *Turner*, the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown, but the circumstances were held to be inherently suspect, and therefore such a showing was not held to be a requisite to reversal. Likewise, in this case, the application of this principle is especially appropriate. Television, in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in *Murchison*, *Tumey*, *Rideau*, and *Turner*. Such untoward circumstances as were found in those cases are inherently bad, and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would be inconsistent with our concepts of due process in this field.

VI

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather, its use amounts to the injection of an irrelevant factor into court proceedings. In addition, experience teaches that there are numerous situations

in which it might cause actual unfairness — some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the factfinding process. It is true that, in States like Texas, where they are required to be sequestered in trials of this nature, the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised, it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press, and the accused is highly publicized, along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts, and thus increases the change of prejudice that is present in every criminal case. And we must remember that, realistically, it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible, but highly probable, that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial, the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused, a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led "not to hold the balance nice, clear and true between the State and the accused. . . ."

Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury "distraction." The State argues this is *de minimis*, since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there. [Footnote 3] In other States following no such practice, jurors would return home and turn on the TV, if only to see how they appeared upon it. They would also be subjected to reenactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast, and would be subconsciously influenced the more by that testimony. Moreover, they would be subjected to the broadest commentary and criticism, and perhaps the well meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

Finally, new trials plainly would be jeopardized, in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later

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be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case, where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

In addition, the invocation of the rule against witnesses is frustrated. In most instances, witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand, or his apprehension of withering cross-examination, defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear, and thereby impede the trial, as well as the discovery of the truth.

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While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still, when television comes into the courtroom, he must also supervise it. In this trial, for example, the judge, on several different occasions — aside from the two days of pretrial — was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted, as it was here and as even the State concedes it must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also, and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand — the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. This is perhaps an even more crucial consideration. Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly

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and through the shaping of public opinion. Moreover, where one judge in a district, or even in a State, permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box.

4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental — if not physical — harassment resembling a police lineup or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him — sometimes the difference between life and death — dispassionately, freely, and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city, or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships, and the temptation offered by television to play to the public audience,

might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses.*See* Pye, The Lessons of Dallas — Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently, it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous

accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists, because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they "purely hypothetical." They are no more hypothetical than were the considerations deemed controlling in *Tumey*, *Murchison*, *Rideau*, and *Turner.* They are real enough to have convinced the Judicial Conference of the United States, this Court, and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition, they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

VII

The facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau*. The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom was a mass of wires, television cameras, microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses, and the lawyers were all exposed to this untoward situation. The judge decided that the trial

proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner, and, together with the subsequent televising of the trial, beginning 30 days late,r inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting, he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally, he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error — recurring each day of the trial — his day-to-day orders made the trial more confusing to the jury, the participants, and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in *Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462(1907):

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its

presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow, but must take the facts as they are presented today.

The judgment is therefore

Reversed.

* MR. JUSTICE HARLAN concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion, *post*, p. 381 U. S. 587.

[Footnote 1]

The evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment which in fact did not exist, and to sign and deliver to him chattel mortgages on the fictitious property.

[Footnote 2]

Due to mechanical difficulty, there was no picture during the opening argument.

[Footnote 3]

Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a noncapital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while, in at least one State, the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities, or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials, and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

I

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date, petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and cameramen, television cameramen, and spectators. At least 12 cameramen, with

their equipment, were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse, and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar, and four more marked cameras were aligned just outside the gates. . . . [C]ables and wires snaked over the floor. [Footnote 2/1]"

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial, since the cameras would distract the jury, witnesses, and lawyers. He also expressed the view that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that, if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling, petitioner arrived in the courtroom, [Footnote 2/2] and the defense introduced testimony

concerning the atmosphere in the court on that day. At the conclusion of the day's hearing, the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution witnesses at least some of whom had been in the courtroom during the proceedings.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA-TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the live television coverage, there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures, and television pictures. The judge once more ordered cameramen to stay on the other side of the railing, and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel, the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live, and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

On October 1, 1962, the trial judge is sued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the

benefit of television cameramen so that they could film him. The judge ruled that, although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV, could install one camera not equipped to pick up sound, and the film would be available to other television stations on a pooled basis. In addition, he ruled that, with respect to news photographers, only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom, and which were to be excluded.

For the proceedings beginning on October 22, station KLTV at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small, and the cameras were clearly visible to all in the courtroom. [Footnote 2/3] The cameras were equipped with "electronic sound-on camera" which permitted them to take both film and sound. Upon entering the courtroom, the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion

to ban all "sound equipment . . . still cameras, movie cameras and television, and all radio facilities" from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing, the trial judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to petitioner's argument that his rights under the Constitution of the United States were being violated, the judge remarked that the "case [was] not being tried under the Federal Constitution."

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23, the selection of the jury began. Overnight, an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible. [Footnote 2/4] A panel of 86 prospective jurors was ready for the *voir dire*. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial,

the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7, when the trial judge permitted live coverage of the prosecution's

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arguments to the jury, the return of the jury's verdict, and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and, while the defense was speaking, the cameras were directed at the judge, and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7, the judge, for the first time, directed news photographers desiring to take pictures to take them only from the back of the room. Up until this time, the trial judge's orders merely limited news photographers to the spectator section.

II

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time, the criminal trial has developed from a ritual practically devoid of rational justification [Footnote 2/5] to a factfinding process the acknowledged purpose of which is to provide a fair and reliable determination of guilt. [Footnote 2/6]

An element of rationality was introduced in the guilt-determining process in England over 600 years ago when a rudimentary trial by jury became "the principal institution for criminal cases." [Footnote 2/7] Initially members of the jury were expected to make their own examinations of the cases they were to try, and come to court already familiar

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with the facts, [Footnote 2/8] which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom. [Footnote 2/9] The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of *Edward Bushell*, 6 How.St.Tr. 999 (1670), which put an end to the practice of fining or otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath, [Footnote 2/10] to be informed of the charges against him before the trial, [Footnote 2/11] and to have counsel assist him with his defense. [Footnote 2/12] All these protections, and others which could be cited, were part of a development by which "the administration of criminal justice was set upon a firm and dignified basis." [Footnote 2/13]

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial, [Footnote 2/14] and the various States adopted constitutional provisions

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directed to the same end. [Footnote 2/15] Eventually, the Sixth Amendment incorporated into the Constitution certain provisions dealing with the conduct of trials:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Significantly, in the Sixth Amendment the words "speedy and public" qualify the term trial, and the rest of the Amendment defines specific protections the accused is to have at his trial. Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights, but also that he enjoy them at a trial — a word with a meaning of its own, *see Bridges v. California*, 314 U. S. 252,314 U. S. 271.

The Fourteenth Amendment, which places limitations on the States' administration of their criminal laws, also gives content to the term "trial." Whether the Sixth Amendment as a whole applies to the States through the Fourteenth, [Footnote 2/16] or the

Fourteenth Amendment embraces only those portions of the Sixth Amendment that are "fundamental," [Footnote 2/17] or the Fourteenth Amendment incorporates a standard of "ordered liberty" apart from the

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specific guarantees of the Bill of Rights, [Footnote 2/18] it has been recognized that state prosecutions must at the least, comport with "the fundamental conception" of a fair trial. [Footnote 2/19]

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment, such as the right to have the proceedings open to the public, *In re Oliver*, 333 U. S. 257, the right to notice of specific charges, *Cole v. Arkansas*, 333 U. S. 196; the right to confrontation, *Pointer v. Texas*, 380 U. S. 400; *Douglas v. Alabama*,380 U. S. 415, and the right to counsel, *Gideon v. Wainwright*, 372 U. S. 335. But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually applied. [Footnote 2/20]

In cases arising from state prosecutions, this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that tend to subvert its purpose. The Court recognized in *Pennekamp v. Florida*, 328 U.S.

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331, 328 U. S. 334, that the "orderly operation of courts" is "the primary and dominant requirement in the administration of justice." And, in *Moore v. Dempsey*,261 U. S. 86, 261 U. S. 90-91, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in *Irvin v. Dowd*, 366 U. S. 717, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance of the formal requisites of a legal trial. We commented in that case:

"No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

Id. at 366 U. S. 728.

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process. *Craig v. Harney*, 331 U. S. 367, 331 U. S. 377. As MR. JUSTICE BLACK said in another context:

"The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. [Footnote 2/21]"

In light of this fundamental conception of what the term trial

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means, this Court has recognized that often, despite widespread hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court's conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant external factors, rather than to aggravate them, as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to "the power of courts to protect themselves from disturbances and disorder *in the courtroom*," *Bridges v. California*, 314 U. S. 252, 314 U. S. 266 (emphasis added); "the necessity for fair adjudication, free from interruption of its processes," *Pennekamp v. Florida*, 328 U. S. 331, 328 U. S. 336, "the integrity of the trial," *Craig v. Harney*, 331 U. S. 367, 331 U. S. 377. And, in upholding a conviction against a claim of unfavorable publicity, this Court commented "that petitioner's trial was conducted in a calm judicial manner," *Darcy v. Handy*, 351 U. S. 454, 351 U. S. 463.

Similarly, when state procedures have been found to thwart the purpose of trial, this Court has declared those procedures to be unconstitutional. In *Tumey v. Ohio*,273 U. S. 510, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be, and so likely to produce prejudice, that it declared the practice unconstitutional even though no specific prejudice was shown.

In *Lyons v. Oklahoma*, 322 U. S. 596, this Court stated that if an involuntary confession is introduced into evidence

at a state trial the conviction must be reversed even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in *Payne v. Arkansas*, 356 U. S. 560, 356 U. S. 568:

"[W]here . . . a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."

Similar reasoning led to the decision last Term in *Jackson v. Denno*, 378 U. S. 368. We held there that, when the voluntariness of a confession is at issue, there must be a procedure adopted which provides "a reliable and clearcut determination of . . . voluntariness." *Id.* at 378 U. S. 391. We found insufficient a procedure whereby the jury heard the confession, but was instructed to disregard it if the jury found the confession involuntary:

"[T]he New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded, and have the coercion issue fairly and reliably determined. These hazards we cannot ignore."

Id. at 378 U. S. 389.

Earlier this Term, in *Turner v. Louisiana*, 379 U. S. 466, we considered a case in which deputy sheriffs, who were the prosecution's principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice, but said that, in the absence of a showing of prejudice, there was no ground for reversal. We reversed because the "extreme prejudice inherent" in the practice required its condemnation on constitutional grounds.

Finally, the Court has, on numerous other occasions, reversed convictions, where the formalities of trial were

observed, because of practices that negate the fundamental conception of trial. [Footnote 2/22]

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose — to provide a fair and reliable determination of guilt — and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

III

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in *Weems v. United States*, 217 U. S. 349, 217 U. S. 373, and reaffirmed in *Brown v. Board of Education*, 347 U. S. 483, 347 U. S. 492-493:

"Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent

into impotent and lifeless formulas. Rights declared in words might be lost in reality."

I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial

from its proper purpose, in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well defined purpose — to provide a fair and reliable determination of guilt. In *Tumey v. Ohio*, *supra*, at 273 U. S. 532, this Court condemned the procedure there employed for compensating judges because it offered a "possible temptation" to judges "not to hold the balance nice, clear, and true between the state and the accused." How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience, and, in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel renewed

his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

"This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution."

"* * * *"

"I took an oath to uphold this Constitution — not the Federal Constitution, but the State Constitution — and I am going to do my best to do that as long as I preside on this Court, and, if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful."

"One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:"

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors, or witnesses would be able to go

through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that,

"if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant."

Post, p. 381 U. S. 612. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, *e.g.*, *Watts v. Indiana*, 338 U. S. 49, 338 U. S. 51; *Norris v. Alabama*, 294 U. S. 587, 294 U. S. 590; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as *amici curiae*,recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White v. Maryland*, 373 U. S. 59, and *Hamilton v. Alabama*, 368 U. S. 52, clearly hold that an accused is entitled to procedural protections at pretrial hearings, as well as at actual trial, and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v. Texas*, 380 U. S. 400, we

held that a pretrial hearing can have a profound effect on the trial itself, and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to petitioner

did not end here. Most of the trial participants were present at the September hearing — the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself — and they saw for themselves the desecration of the courtroom. After undergoing this experience, it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in court for the actual trial. [Footnote 2/23] The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible, but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the "all-seeing eye." Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's attention

was distracted from the trial, since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

It is common knowledge that "television . . . can . . . work profound changes in the behavior of the people it focuses on." [Footnote 2/24] The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast but unseen audience is bound to increase nervousness and tension, [Footnote 2/25] cause an increased

concern about appearances, [Footnote 2/26] and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort, in itself, prevents them from giving their full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact, it undercuts the reliability of the trial process.

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

"The people thought holding court one of the greatest performances in the range of their experience. . . . The country folks would crowd in for ten miles to hear these 'great lawyers' plead, and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long. [Footnote 2/27]"

"In early frontier America, when no motion pictures, no television, and no radio provided entertainment,

trial day in the county was like fair day, and, from near and far, citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America. Applause and cat-calls were not infrequent. All too easily, lawyers and judges became part-time actors at the bar. . . . [Footnote 2/28]"

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the "Tonight Show" by one station, and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops, and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised, there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

"Tomorrow morning at 9:55, the WFAA T.V. cameras will be in Tyler to telecast live [the trial judge's] decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. [The trial judge]

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was appointed to the bench here in Tyler in 1942 by [the Governor]. The judge has served every two years since then. This very beautiful Smith County Courthouse was built and dedicated in 1954, but, before that, [the trial judge] had made a reputation for himself that reached not only throughout Texas, but throughout the United States, as well. It is said that [the trial judge], who is now 53 years old, has tried more cases than any other judge during his time in office."

The television industry might also decide that the bare-boned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings, and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that, if he wanted to see a ball game, he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case, construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom, and to move from their accustomed position two benches reserved for spectators. [Footnote 2/29] If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium. [Footnote 2/30] But, in the decision

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below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal "justice." This is not an abstract fear I am expressing, because this very situation confronted the Nebraska Supreme Court in *Roberts v. State*, 100 Neb. 199, 203, 158 N.W. 930, 931-932 (1916):

"The court removed the trial from the courtroom to the theater, and stated as a reason therefor:"

"By reason of the insufficiency of the courtroom to seat and accommodate the people applying for admission . . . , it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded."

"The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed, it was returned to the courtroom and concluded there. At the adjournment of court on one occasion, the bailiff announced from the stage:"

"The regular show will be tomorrow; matinee in the afternoon, and another performance at 8:30. Court is now adjourned until 7:30."

There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several "conferences [with] representatives of the news media." *Post*, p. 381 U. S. 606. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an

integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. *Cf. Rideau v. Louisiana*, 373 U. S. 723. To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people before a verdict of guilt or innocence has been rendered would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

It is argued that television not only entertains, but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial, but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure, and, by so doing, rendered the educational aspect self-defeating.

"Was it prejudicial to [Powers] that the trial took place in a special hall with over 2,000 spectators; that it was televised; that prominent representatives of many organizations in various countries were invited to attend; that simultaneous oral translations of the proceedings . . . were provided; and that detailed . . . reports of the case in various languages were distributed to the press before, during, and after the trial?"

". . . [T]he Soviet legal system . . . consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. . . ."

". . . A Soviet trial is supposed to be correct, impartial, just, reasonable, and, at the same time, it is supposed to serve as an object lesson to society, a means of teaching the participants, the spectators and the public generally, to be loyal, obedient, disciplined fighters for Communist ideals. . . ."

". . . [T]he tension between the demands of justice and the demands of politics can never be entirely

eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object lesson to the public."

". . . [T]he deliberate use of a trial as a means of political education threatens the integrity of the judicial process. [Footnote 2/31]"

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox approach; or because the district attorney has decided to run for another office, and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage. [Footnote 2/32] For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into

a vehicle for television. Yet these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection, and brings into the courtroom tangible evidence of the widespread interest in a case — an interest which has often been fanned by exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

"The Saturday Evening Post, The Readers Digest, Time, Life — all had feature stories upon [petitioner's] story, giving in detail his life history and the details of . . . alleged fraudulent transactions. . . ."

"The metropolitan papers throughout the country featured the story daily. Each day, for weeks, the broadcasts carried some features of the story. [Footnote 2/33]"

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse, he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face. [Footnote 2/34] When he finally made his way into the courthouse, it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner, and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial, he was

confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in *Gideon v. Wainwright*, 372 U. S. 335, 372 U. S. 344,

"From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."

This principle was not applied by the courts below.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if "actual prejudice" can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof, [Footnote 2/35] but it would gradually erode our fundamental conception of trial. [Footnote 2/36] A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, *Payne v. Arkansas*, *supra;* that the jury refrained from making a

clearcut determination on the voluntariness question, *Jackson v. Denno*, *supra;* that a particular judge was swayed by a direct financial interest in his conviction, *Tumey v. Ohio*, *supra;* or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner v. Louisiana*, *supra*. How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any

sense complete. In addition time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the

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judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing, and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but, like other institutions, it must respect the rights of others, and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television in the courtroom, and rule that its presence is inconsistent with the "fundamental conception" of what a trial should be. My conviction that this is the proper holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials. [Footnote 2/37] With only two or possibly three exceptions, [Footnote 2/38] the highest court of each

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State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of "trial." [Footnote 2/39] Similarly, Rule 53 of the Federal Rules of Criminal Procedure prohibits

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the "broadcasting" of trials, [Footnote 2/40] and the Judicial Conference of the United States has unanimously condemned televised trials. [Footnote 2/41] This condemnation rests on more than notions of policy; it arises from an understanding of the

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constitutional conception of the term "trial." Such a general consensus is certainly relevant to this Court's determination of the question. *See Mapp v. Ohio*, 367 U. S. 643, 367 U. S. 651.

IV

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in *In re Oliver*, 333 U. S. 257, 333 U. S. 266, 333 U. S. 270, that the public trial provision of the Sixth Amendment is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly, the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. [Footnote 2/42] But the guarantee of a public trial confers no special benefit on the press, the radio industry, or the television industry. A public trial is a necessary component of an accused's right to a fair trial, and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough

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for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial process, *see Moore v. Dempsey, supra.*When representatives of the communications media attend trials, they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthoure

because, by so doing, he would interfere with the conduct of the trial, representatives of the press and broadcasting industries are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

"A trial is a public event. What transpires in the courtroom is public property. If a transcript of the court proceedings had been published, we suppose

none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it. [Footnote 2/43]"

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

In summary, television is one of the great inventions of all time, and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights. [Footnote 2/44] The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that

hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

[Footnote 2/1]

N.Y. Times, Sept. 25, 1962, p. 46, col. 4. *See* Appendix Photographs 1, 2, 3.

[Footnote 2/2]

Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

[Footnote 2/3]

See Appendix, Photograph 6.

[Footnote 2/4]

See Appendix, Photograph 7.

[Footnote 2/5]

Jenks, A Short History of English Law 46-47 (6th ed. 1949); I Stephen, A History of the Criminal Law of England 51-74 (1883).

[Footnote 2/6]

See, e.g., Craig v. Harney, 331 U. S. 367, 331 U. S. 378; *Irvin v. Dowd*, 366 U. S. 717,366 U. S. 728; *Brady v. Maryland*, 373 U. S. 83, 373 U. S. 87; *Jackson v. Denno*, 378 U. S. 368, 378 U. S. 391.

[Footnote 2/7]

See Singer v. United States, 380 U. S. 24, 380 U. S. 27.

[Footnote 2/8]

II Pollock and Maitland, The History of English Law 621-622 (2d ed. 1906).

[Footnote 2/9]

I Stephen, *supra*, <l=|381 u.s.="" 532fn2="" 5|="">note 5 at 260.</l=|381>

[Footnote 2/10]

See 7 Will. 3, c. 3 (1695).

[Footnote 2/11]

Ibid.

[Footnote 2/12]

Ibid; 6 & 7 Will. 4, c. 114 (1836).

[Footnote 2/13]

I Stephen, *supra*, <l=|381 u.s.="" 532fn2="" 5|="">note 5 at 427.</l=|381>

[Footnote 2/14]

I Journals of the Continental Congress 1774-1789, 69 (Ford ed. 1904).

[Footnote 2/15]

Radin, The Right to a Public Trial, 6 Temple L.Q. 381, 383, n. 5a (1932).

[Footnote 2/16]

Adamson v. California, 332 U. S. 46, 332 U. S. 71-72 (dissenting opinion of MR. JUSTICE BLACK).

[Footnote 2/17]

Gideon v. Wainwright, 372 U. S. 335, 372 U. S. 342.

[Footnote 2/18]

Pointer v. Texas, 380 U. S. 400, 380 U. S. 408 (opinion of MR. JUSTICE HARLAN, concurring in the result).

[Footnote 2/19]

Cox v. Louisiana, 379 U. S. 559, 379 U. S. 562; *Frank v. Mangum*, 237 U. S. 309, 237 U. S. 347 (dissenting opinion of Justice Holmes). *See Adamson v. California*, 332 U. S. 46, 332 U. S. 53; *In re Murchison*, 349 U. S. 133, 349 U. S. 136; *Irvin v. Dowd*, 366 U. S. 717, 366 U. S. 722; *Jackson v. Denno*, 378 U. S. 368, 378 U. S. 377 (Court opinion),378 U. S. 424 (dissenting opinion of MR. JUSTICE CLARK), 378 U. S. 428 (dissenting opinion of MR. JUSTICE HARLAN).

[Footnote 2/20]

Frank v. Mangum, 237 U. S. 309, 237 U. S. 346 (dissenting opinion).

[Footnote 2/21]

Cox v. Louisiana, 379 U. S. 559, 379 U. S. 583 (dissenting opinion).

[Footnote 2/22]

See Mooney v. Holohan, 294 U. S. 103; *Alcorta v. Texas*, 355 U. S. 28; *Napue v. Illinois*,360 U. S. 264; and Brady v. Maryland, 373 U. S. 83.

[Footnote 2/23]

See Appendix, Photograph 7.

[Footnote 2/24]

Keating, "Not *Bonanza,' Not `Peyton Place,' But the U.S. Senate," N.Y. Times Magazine, April 25, 1965, 67, 72. See, e.g., N.Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, "Some stockholders seemed very much aware they were on camera"); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A.B.A.J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as "contorted, grimacing"); Gould, N.Y. Times, March 11, 1956, § 2, p. X11, col. 2 ("The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.").*

[Footnote 2/25]

See, e.g., Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840, 842 (1960). In *United States v. Kleinman,* 107 F.Supp. 407 (D.C.D.C.1952), the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

"The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end."

"In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again."

Id. at 408.

[Footnote 2/26]

See, e.g., Douglas, *supra*, note 25 at 842; Yesawich, Televising and Broadcasting Trials, 37 Cornell L.Q. 701, 717 (1952).

[Footnote 2/27]

Wigmore, A Kaleidoscope of Justice 487 (1941).

[Footnote 2/28]

Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U.Pa.L.Rev. 1, 6 (1961).

[Footnote 2/29]

Compare Appendix, Photograph 5, *with* Appendix, Photograph 6.

[Footnote 2/30]

N.Y. Times, Jan. 23, 1959, p. 1, col. 1.

[Footnote 2/31]

Berman, Introduction to the Trial of the U-2 xiii, xii-xiii, xxix (1960).

[Footnote 2/32]

A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

"Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?"

"A. I think that is pretty clear, sir. I don't think the jurors would be in the way there."

"Q. You don't think the jurors would get in the way of your operations?"

"A. I don't mean that exactly, sir."

[Footnote 2/33]

Petition for writ of certiorari, 35a.

[Footnote 2/34]

See Appendix, Photograph 4.

[Footnote 2/35]

See, e.g., Douglas, *supra*, <l=|381 u.s.="" 532fn2="" 25|="">note 25 at 844.</l=|381>

[Footnote 2/36]

Cf. Fay v. New York, 332 U. S. 261, 332 U. S. 300 (dissenting opinion of Mr. Justice Murphy).

[Footnote 2/37]

The Canon provides in pertinent part:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings, detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public, and should not be permitted."

[Footnote 2/38]

Colorado, *In re Hearings Concerning Canon 35 of Canons of Judicial Ethics*, 296 P.2d 465 (Colo.Sup.Ct.1956), and Texas permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In *Lyles v. State*, 330 P.2d 734 (1958), the Criminal Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okl.Stat.Ann., Tit. 5 at 65-66 (1963 Supp.). Nevertheless, in 1961, the court again stated that the televising of trials is a matter for the trial judge's discretion. *Cody v. State*, 361 P.2d 307, 84 A.L.R.2d 997 (Ct.Crim.App.Okl.1961).

[Footnote 2/39]

With the exceptions stated in <l=|381 u.s.="" 532fn2="" 38|="">note 38, *supra*, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J.Am.Jud.Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35 or its equivalent: Alaska, Alaska Rules Crim.Proc. 48; Arizona, Ariz.Sup.Ct.Rule 45, 17 Ariz.Rev.Stat.Ann. at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del.Sup.Ct.Rule 33, 13 Del.Code Ann. at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit "the taking of photographs" and "broadcasting of court proceedings"); Florida, Code of Ethics, Rule A35, 31 Fla.Stat.Ann. at 285 (1964 Supp.), *see Brumfield v. State*, 108 So.2d 33 (Fla.Sup.Ct.1958); Hawaii, Hawaii Sup.Ct.Rule 16, 43 Haw. 450; Illinois, 1964 Ann.Rep. of the Ill.Judicial Conference 168-169, *see People v. Ulrich*, 376 Ill. 461, 34 N.E.2d 393 (1941), *People v. Munday*, 280 Ill. 32, 117 N.E. 286 (1917); Iowa, Iowa Sup.Ct.Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup.Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky, Ky.Ct.App.Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422-423 (2d ed. 1962); New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N.M.Sup.Ct.Rule 27, 4 N.M.Stat.Ann. at 95 (1963 Supp.); New York, N.Y.Rules of the Administrative Board of the Judicial Conference, Rule 5, N.Y.Judiciary Law at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), *see State v. Clifford*, 162 Ohio St. 370, 123 N.E.2d 8 (1954), *cert. denied*, 349 U.S. 929; Tennessee, Tenn.Sup.Ct.Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash.2d xxviii (1963); West Virginia, 141 W.Va. viii (1955). </l=|381>

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form, and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely

prohibited “photographing” and “broadcasting” without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J.Am.Jud.Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was “improper” to televise criminal proceedings in *People v. Stroble*, 36 Cal.2d 615, 226 P.2d 330 (1951), *affirmed*, 343 U. S. 343 U.S. 181, *rehearing denied*, 343 U.S. 952; *see* the rule adopted by the Conference of California Judges, 24 Cal.State Bar J. 299 (1949); the Court of Appeals of Maryland, in *Ex parte Sturm*, 152 Md. 114, 122, 136 A. 312, 315, 51 A.L.R. 356 (1927), used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in *Mack Appeal*, 386 Pa. 251, 257, n. 5, 126 A.2d 679, 681-682, n. 4 (1956), *cert. denied*, 352 U.S. 1002; *see* 48 J.Am.Jud.Soc. 200 (1965).

[Footnote 2/40]

Rule 53 provides:

“The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.”

[Footnote 2/41]

“Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure, and that they ought not to be permitted in any federal court.”

Annual Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10.

[Footnote 2/42]

See, *e.g.*, 3 Blackstone, Commentaries on the Laws of England 372-373 (15th ed. 1809); 6 Wigmore, Evidence 332-335 (3d ed. 1940).

[Footnote 2/43]

Craig v. Harney, 331 U. S. 367, 331 U. S. 374. *See Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331.

[Footnote 2/44]

Compare Olmstead v. United States, 277 U. S. 438, 277 U. S. 471 (dissenting opinion of Mr. Justice Brandeis); *On Lee v. United States*, 343 U. S. 747, 343 U. S. 762(dissenting opinion of MR. JUSTICE DOUGLAS); *Silverman v. United States*, 365 U. S. 505; *Lopez v. United States*, 373 U. S. 427, 373 U. S. 445-446 (opinion concurring in the result), 373 U. S. 465 (dissenting opinion of MR. JUSTICE BRENNAN).

APPENDIX TO OPINION OF MR. CHIEF JUSTICE WARREN.

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MR. JUSTICE HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

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Some preliminary observations are in order: all would agree, I am sure, that, at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants — certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial — relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

I

No constitutional provision guarantees a right to televise trials. The "public trial" guarantee of the Sixth Amendment, which reflects a concept fundamental to the administration of justice in this country, *In re Oliver*, 333 U. S. 257, certainly does not require that television be admitted to the courtroom. *See United Press Assns. v. Valente*, 308 N.Y. 71, 123 N.E.2d 777. Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. *In re Oliver, supra*, 333 U.S. at 333 U. S. 266-273. A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.

Thus, the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those persons

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who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although, to be sure, the guarantee of public trial does not, of itself, prohibit such activity.

The free speech and press guarantees of the First and Fourteenth Amendments are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door, and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse, the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape, but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

II

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting wide popular interest may be one thing; the impact on a "run of the mill" case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented, it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions.*Compare Powell v. Alabama*, 287 U. S. 45; *Betts v. Brady*, 316 U. S. 455; *Gideon v. Wainwright*, 372 U. S. 335. The resolution of those further questions should await an appropriate case; the

Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding, in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case. [Footnote 3/1] Courtroom television introduces into the conduct of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance — even at its traditional best — is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance"?

Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the factfinding process carried on under such conditions. *See* Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840 (1960). To be sure,

such distortions may produce no telltale signs, but, in a highly publicized trial, the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something "special." Particularly treacherous situations are presented in cases where pretrial publicity has been massive, [Footnote 3/2] even when jurors positively state they will not be influenced by it; *see Rideau v. Louisiana*, 373 U. S. 723; *Irvin v. Dowd*, 366 U. S. 717. To increase the possibility of influence and the danger of a "popular verdict" by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner v. Louisiana*, 379 U. S. 466, 379 U. S. 472-473. As we recently observed in *Turner*,

"Mr. Justice Holmes stated no more than a truism when he observed that '[a]ny judge who has sat with juries knows that, in spite of forms they

are extremely likely to be impregnated by the environing atmosphere.' *Frank v. Mangum*, 237 U. S. 309, at 237 U. S. 349 (dissenting opinion)."

Id. at 379 U. S. 472. [Footnote 3/3] The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the Fourteenth Amendment is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In *Turner v. Louisiana*, *supra*, decided just this Term, we held that the "potentialities" for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the Due Process Clause of the Fourteenth Amendment. In *Jackson v. Denno*, 378 U. S. 368, the Court made the judgment that a trial judge's determination of a coerced confession issue is more likely to avoid prejudice than a jury determination, a judgment which indeed overrode a longstanding contrary state practice. And in *Irvin v. Dowd*, 366 U. S. 717, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. *See* 366 U.S. at 366 U. S. 729 (Frankfurter, J., concurring). Other examples of

instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. *See, e.g., Griffin v. California*, 380 U. S. 609; *Tancil v. Woolls*, 379 U. S. 19; *Mapp v. Ohio*, 367 U. S. 643 (*compare People v. Defore*, 242 N.Y. 13, 150 N.E. 585); *Avery v. Georgia*, 345 U. S. 559; *Brown v. Board of Education*, 347 U. S. 483,; *Tumey v. Ohio*, 273 U. S. 510.

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices, [Footnote 3/4] the views of the Judicial Conference of the United States (*infra*, p. 381 U. S. 601), Rule 53 of the Federal Rules of Criminal Procedure, and even the "personal views" (*post*,pp. 381 U. S. 601-602) of the Justices on the dissenting side of the present case.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might have in "run of the mill" cases, they carry little weight in cases of the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime

involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed, it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television

"billing," and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least, this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of "public trial." Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract, rather than add, to the reliability of the process. *See Cox v. Louisiana*, 379 U. S. 559,379 U. S. 562. A trial in Yankee Stadium, even if the crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence. [Footnote 3/5] There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives, the constitutional

judgment called for now would, of course, be subject to reexamination in accordance with the traditional workings of the Due Process Clause. At the present juncture, I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises, I concur in the opinion of the Court.

[Footnote 3/1]

The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

[Footnote 3/2]

Petitioner in this case amassed 11 volumes of pretrial press clippings.

[Footnote 3/3]

The Court had occasion to recognize in *Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 565, that even "judges are human," and not immune from outside environmental influences.

[Footnote 3/4]

The consistent position of the American Bar Association is set out in the Appendix.

[Footnote 3/5]

There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

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APPENDIX TO OPINION OF MR. JUSTICE HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the *amicus curiae* brief of the American Bar Association, pp. 3-8, as follows:

"It [Canon 35] was originally adopted on September 30, 1937, by the House of Delegates [Footnote 4/1] in the following form:"

"'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.'"

"62 A.B.A.Rep. 1134-35 (1937)."

"A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly

in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann. [Footnote 4/2] The Committee specifically referred to the evil of 'trial in the air'. [Footnote 4/3] 62 A.B.A.Rep. 860 (1937)."

"After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:"

" Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. . . . Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case unmindful of the effect which his comments or decision may

have upon the radio audience."

"AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957)."

"In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings (headed by the late John W. Davis). 77 A.B.A.Rep. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:"

" The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself, and ought not to be divided with the television or broadcast audience who, for the most part, have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude."

"*Id.* at 610. As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the 'televising' of court proceedings and inserting the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id.* at 110-11."

"In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored, and were presented in detail in the September, 1956, issue of the American Bar Association Journal. [Footnote 4/4] After extensive joint debate,

no solutions or agreements were reached. 83 A.B.A.Rep. 790-91 (1958). The Committee did report that it was convinced that"

"courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges,

lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . .”

“*Id.* at 645.”

“Following the presentation of the Bar-Media Conference Committee report, and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A.B.A.Rep. 643-45 (1958)), the House of Delegates conducted a hearing as a ‘Committee of the Whole’ during its February, 1958, session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A.B.A.Rep. 648-69 (1958). Thereafter at the August, 1958, meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and”

“conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts were either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.”

“83 A.B.A.Rep. 284 (1958).”

“The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August,

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1962 setting forth the ‘Area and Perspective’ of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee’s informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. . . . [Hereinafter cited *Int.Rep.*]”

“The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid, and ‘should be retained as essential safeguards of the individual’s inviolate and personal right of fair trial.’ . . . The Committee did recommend certain minor deletions . . . and changes . . . which were adopted by the House of Delegates, after full debate, on February 5, 1963:”

“The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] participants and witnesses in giving [his] testimony, [degrade the court,] and create misconceptions with respect thereto in the mind of the public, and should not be permitted. [Footnote 4/5] ”

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“A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:”

” Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.”

“*Int.Rep.* p. 97.”

(Footnotes numbered and partially omitted.)

[Footnote 4/1]

The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole.

[Footnote 4/2]

See State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (Ct.Err. & App.), *cert. denied*, 296 U. S. 649.

[Footnote 4/3]

Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34, which provides that a judge should not administer his office "for the purpose of advancing his personal ambitions or increasing his popularity." The Committee found that radio broadcasting of a trial changes

"what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge."

AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957).

[Footnote 4/4]

42 A.B.A.J. 834, 838, 843 (1956).

[Footnote 4/5]

The full text of Judicial Canon 35, as amended, is as follows:

"IMPROPER PUBLICIZING OF COURT PROCEEDINGS"

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights. I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional

rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion, the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, limited to a single question. The question, as phrased by the petitioner, is this:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of

Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set

out in the margin. [Footnote 5/1] But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change — the

techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and, for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

I

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial and a motion to continue the trial to a later date. Those proceedings were themselves telecast "live," and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings. [Footnote 5/2] At the conclusion

of the hearings the motion for a continuance was granted, and the case reset for trial on October 22. The motion to bar television and news photographers from the trial was denied. [Footnote 5/3]

On October 1, the trial judge issued an order delineating what coverage he would permit during the trial. [Footnote 5/4] As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the

courtroom was described by the judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record, and was agreed to and accepted by defense counsel:

"Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom, with a small opening across the top for the use of cameras. . . ."

"Live telecasting and radio broadcasting were not permitted, and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD (KLTV) Television in Tyler was allowed a camera in the courtroom. . . . The telecasting on film of this case was not a continuous camera operation, and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless, nor were flood lights and flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with

Associated Press, United Press International, and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar, and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse, where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound, and, because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer were not telecast or broadcast, as the Court granted their Motion that same not be permitted."

"There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and, during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys."

"During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given, and, throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated on *voir dire* or at any other time, make any request of the Court not to be televised."

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no "live" telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection. [Footnote 5/5]

Finally, the members of the jury saw no telecasts and no pictures of anything that went on during the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended. [Footnote 5/6] The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose, a portable television was brought into the jury's quarters by a court officer, and operated by him. Otherwise, the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

II

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury "had received through the news media damaging and prejudicial

evidence. . . ." [Footnote 5/7] We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were not prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial. [Footnote 5/8]

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. Louisiana*, 373 U. S. 723, therefore, has no bearing at all in this case. There, the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing

"Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff."

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at 373 U. S. 725. We found that "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at 373 U. S. 726. *See also Irvin v. Dowd*, 366 U. S. 717.

The *Rideau* case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as *Moore v. Dempsey*, 261 U. S. 86; *Brown v. Mississippi*, 297 U. S. 278; and *Chambers v. Florida*, 309 U. S. 227, 309 U. S. 235-241. "Under our Constitution's guarantee of due process," we said,

"a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge."

373 U.S. at 373 U. S. 726-727. We had occasion to apply the same basic concepts of procedural due process earlier this Term in *Turner v. Louisiana*, 379 U. S. 466.

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

379 U.S. at 379 U. S. 472-473.

But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pretrial events can do no more than obscure the important question which is actually before us.

III

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photographers

and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible . Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant. [Footnote 5/9] And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of constitutional dimensions that lurk in the very process of televising court proceedings at all.

Some of those risks are catalogued in the *amicus curiae* brief filed in this case by the American Bar Association:

"[P]otential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pretrial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. . . . Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value, and not for evidentiary purposes, can serve only to distort the jurors' perspective. . . . Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. . . . It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. . . . Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing

strangers, or perhaps harried by intruding telephone calls. . . ."

Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of

the public who did see such telecasts. This case, therefore, does not remotely resemble *Turner v. Louisiana*, 379 U. S. 466, where, during the trial, the jurors were subjected outside the courtroom to unmeasured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record, it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Not once, after the first witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion during the entire trial — until after the jury adjourned to reach its verdict — for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a

most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

IV

What ultimately emerges from this record, therefore, is one bald question — whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in

the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. *See Speiser v. Randall*, 357 U. S. 513, 357 U. S. 525. And the proposition that nonparticipants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range." *Pennekamp v. Florida*, 328 U. S. 331, 328 U. S. 347; *Bridges v. California*, 314 U. S. 252. *Cf. Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 563.

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.

[Footnote 5/1]

Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

“Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public, and should not be permitted.”

“Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.”

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

“Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge, who has the inherent power to exclude or control coverage in the proper case in the interest of justice.”

“In connection with the control of such coverage, the following declaration of principles is adopted:”

“(1) There should be no use of flashbulbs or other artificial lighting.”

“(2) No witness, over his expressed objection, should be photographed, his voice broadcast, or be televised.”

“(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.”

“(4) Any violation of the Court’s Rules shall be punished as a contempt.”

“(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge pending final disposition of the cause in trial shall be punished as a contempt.”

[Footnote 5/2]

A contemporary newspaper account described the scene as follows:

“A television motor van, big as an intercontinental bus, was parked outside the courthouse, and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar, and four more marked cameras were aligned just outside the gates.”

“A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. [C]ables and wires snaked over the floor.”

The New York Times, September 25, 1962, p. 46, col. 4.

[Footnote 5/3]

In ruling on the motion, the trial judge stated:

“In the past, it has been the policy of this Court to permit televising in the courtroom under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity, and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the courtroom. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas, and certainly it wasn’t any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the courtroom, if properly supervised.”

"Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that, and that is what you are going to get. If the Court permits a circus in this courtroom, it will be televised, that is true, but they will not be creating a circus."

"Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial."

"There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus — with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it."

"* * * *"

"There has been one consideration that the Court has given, and it is that this is a small courtroom, and there will be hundreds of people trying to get into this courtroom to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the courtroom and look in on the trial. With all of those people trying to crowd in and push into this courtroom, that is another consideration I have given to it."

[Footnote 5/4]

"In my statement of September 24, 1962, admitting television and other cameras in the courtroom during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas."

"In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows:"

" At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule."

". . . [E]ach television network and the local television station will be allowed one film camera without sound in the courtroom, and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool, and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press, and United Press."

"I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd."

"The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason."

[Footnote 5/5]

There were nine witnesses for the prosecution, and no witnesses for the defense.

[Footnote 5/6]

Arts. 668, 745 and 725, Tex.Code Crim.Proc.

[Footnote 5/7]

Petition for Writ of Certiorari, Question 3, p. 3.

[Footnote 5/8]

"A. (Mr. Hume Cofer, counsel for petitioner). . . . The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my

opinion that, on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case."

"Q. Not about the facts of the case?"

"A. No, sir; not about the facts, nor any of the evidence."

[Footnote 5/9]

See <l=|381 u.s.="" 532fn5="" 2|="">note 2.</l=|381>

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

I agree with MR. JUSTICE STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom, and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television

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coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, *cf. Rideau v. Louisiana*, 373 U. S. 723, and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, "we know too little of the actual impact . . . to reach a conclusion on the bare bones of the . . . evidence before us." *White Motor Co. v. United States*, 372 U. S. 253, 372 U. S. 261. It may well be, however, that, as further experience and informed judgment do become available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant. *Compare Wolf v. Colorado*, 338 U. S. 25, *with Mapp v. Ohio*, 367 U. S. 643; *Betts v. Brady*, 316 U. S. 455, *with Gideon v. Wainwright*, 372 U. S. 335; *Stein v. New York*, 346 U. S. 156, *with Jackson v. Denno*, 378 U. S. 368, 378 U. S. 389-390.

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. *Rideau v. Louisiana*, 373 U. S. 723, 373 U. S. 727; *Jackson v. Denno*,378 U. S. 368, 378 U. S. 389. But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

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MR. JUSTICE BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an "opinion of the Court," my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

"The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases. . . . The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. *The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.*"

Ante, pp. 381 U. S. 590-591. (Emphasis supplied.)

Thus, today's decision is not a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions "the Court's opinion" or "the opinion of the Court" refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

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CHAPTER OVERVIEW

12: Social Media and the Constitution- Exploring the limitations

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12.1: Elonis v. US 575 US____ (2015)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued.The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES

elonis *v*. united states

certiorari to the united states court of appeals for the third circuit

No. 13–983. Argued December 1, 2014—Decided June 1, 2015

After his wife left him, petitioner Anthony Douglas Elonis, under the pseudonym "Tone Dougie," used the social networking Web siteFacebook to post self-styled rap lyrics containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement. These posts were often interspersed with disclaimers that the lyrics were "fictitious" and not intended to depict real persons, and with statements that Elonis was exercising his First Amendment rights. Many who knew him saw his posts as threatening, however, including his boss, who fired him for threatening co-workers, and his wife, who sought and was granted a state court protection-from-abuse order against him.

When Elonis's former employer informed the Federal Bureau of Investigation of the posts, the agency began monitoring Elonis's Face-book activity and eventually arrested him. He was charged with five counts of violating 18 U. S. C. §875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." At trial, Elonis requested a jury instruction that the Government was required to prove that he intended to communicate a "true threat." Instead, the District Court told the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and renewed his jury instruction challenge on appeal. The Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

Held: The Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under Section 875(c). Pp. 7–17.

(a) Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, and the parties can show no indication of a particular mental state requirement in the statute's text. Elonis claims that the word "threat," by definition, conveys the intent to inflict harm. But common definitions of "threat" speak to what the statement conveys—not to the author's mental state. The Government argues that the express "intent to extort" requirements in neighboring Sections 875(b) and (d) should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c). The most that can be concluded from such a comparison, however, is that Congress did not mean to confine Section 875(c) to crimes of extortion, not that it meant to exclude a mental state requirement. Pp. 7–9.

(b) The Court does not regard "mere omission from a criminal enactment of any mention of criminal intent" as dispensing with such a requirement. *Morissette* v. *United States*, 342 U. S. 246 . This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal," and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.*, at 252. The "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." *United States* v. *Balint*, 258 U. S. 250 . Thus, criminal statutes are generally interpreted "to include broadly applicable scienter requirements, even where the statute . . . does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64 . This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples* v. *United States*, 511 U. S. 600 , n. 3. Federal criminal statutes that are silent on the required mental state should be read to include "only that *mens rea* which is necessary to separate" wrongful from innocent conduct. *Carter* v. *United States*, 530 U. S. 255 . In some cases, a general requirement that a defendant act knowingly is sufficient, but where such a requirement "would fail to protect the innocent actor," the statute "would need to be read to require . . . specific intent." *Ibid.* Pp. 9–13.

(c) The "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U. S., at 72. In the context of Section 875(c), that requires proof that a communication

was transmitted and that it contained a threat. And because "the crucial element separating legal innocence from wrongful conduct," *id.*, at 73, is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a threat. Elonis's conviction was premised solely on how his posts would be viewed by a reasonable person, a standard feature of civil liability in tort law inconsistent with the conventional criminal conduct requirement of "awareness of some wrongdoing," *Staples*, 511 U. S., at 606–607. This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers* v. *United States*, 422 U. S. 35 (Marshall, J., concurring). And the Government fails to show that the instructions in this case required more than a mental state of negligence. *Hamling* v. *United States*, 418 U. S. 87 , distinguished. Section 875(c)'s mental state requirement is satisfied if the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. The Court declines to address whether a mental state of recklessness would also suffice. Given the disposition here, it is unnecessary to consider any First Amendment issues. Pp. 13–17.

730 F. 3d. 321, reversed and remanded.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and dissenting in part. Thomas, J., filed a dissenting opinion.

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12.2: Riley v. California – 573 US____(2014)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued.The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.See United States v. Detroit Timber & Lumber Co., 200 U. S. 321 .

SUPREME COURT OF THE UNITED STATES

RILEY v. CALIFORNIA

certiorari to the court of appeal of california, fourth appellate district, division one

No. 13–132. Argued April 29, 2014—Decided June 25, 2014[1]

In No. 13–132, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

In No. 13–212, respondent Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit reversed the denial of the motion to suppress and vacated the relevant convictions.

Held: The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. Pp. 5–28.

(a) A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement. See Kentucky v. King, 563 U. S. ___, ___. The well-established exception at issue here applies when a warrantless search is conducted incident to a lawful arrest.

Three related precedents govern the extent to which officers may search property found on or near an arrestee. Chimel v. California, 395 U. S. 752 , requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In United States v. Robinson, 414 U. S. 218 , the Court applied the Chimel analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in Chimel are present in all custodial arrests, 414 U. S., at 235, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, id., at 236. The trilogy concludes with Arizona v. Gant, 556 U. S. 332 , which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle, id., at 343. Pp. 5–8.

(b) The Court declines to extend Robinson's categorical rule to searches of data stored on cell phones. Absent more precise guidance from the founding era, the Court generally determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U. S. 295 . That balance of interests supported the search incident to arrest exception in Robinson. But a search of digital information on a cell phone does not further the government interests identified in Chimel, and implicates substantially greater individual privacy interests than a brief physical search. Pp. 8–22.

(1) The digital data stored on cell phones does not present either Chimel risk. Pp. 10–15.

(i) Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, e.g., that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances. See, e.g., Warden, Md. Penitentiary v. Hayden, 387 U. S. 294 –299. Pp. 10–12.

(ii) The United States and California raise concerns about the destruction of evidence, arguing that, even if the cell phone is physically secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As an initial matter, those broad concerns are distinct from Chimel's focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. The briefing also gives little indication that either problem is prevalent or that the opportunity to perform a search incident to arrest would be an effective solution. And, at least as to remote wiping, law enforcement currently has some technologies of its own for combatting the loss of evidence. Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to urgent threats of remote wiping, see Missouri v. McNeely, 569 U. S. ___, ___, or by taking action to disable a phone's locking mechanism in order to secure the scene, see Illinois v. McArthur, 531 U. S. 326 –333. Pp. 12–15.

(2) A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved. Pp. 15–22.

(i) Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives. Pp. 17–21.

(ii) The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee, a concern that the United States recognizes but cannot definitively foreclose. Pp. 21–22.

(c) Fallback options offered by the United States and California are flawed and contravene this Court's general preference to provide clear guidance to law enforcement through categorical rules. See Michigan v. Summers, 452 U. S. 692 , n. 19. One possible rule is to import the Gant standard from the vehicle context and allow a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. That proposal is not appropriate in this context, and would prove no practical limit at all when it comes to cell phone searches. Another possible rule is to restrict the scope of a cell phone search to information relevant to the crime, the arrestee's identity, or officer safety. That proposal would again impose few meaningful constraints on officers. Finally, California suggests an analogue rule, under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart. That proposal would allow law enforcement to search a broad range of items contained on a phone even though people would be unlikely to carry such a variety of information in physical form, and would launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records. Pp. 22–25.

(d) It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases. Pp. 25–27.

No. 13–132, reversed and remanded; No. 13–212, 728 F. 3d 1, affirmed.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment.

Notes

1 Together with No. 13–212, v. on certiorari to the United States Court of Appeals for the First Circuit.

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